



# DPCC

DEMOCRATIC POLICY & COMMUNICATIONS COMMITTEE  
CHAIRWOMAN DEBBIE STABENOW

CAPTURED COURTS  
SEPTEMBER 2020

# WHAT'S AT STAKE: HEALTH CARE AND REPRODUCTIVE RIGHTS

How the Right-wing Capture of Our  
Courts Threatens Health Care and  
Reproductive Rights for Millions of  
Americans

**PREPARED BY:**

Senator Tammy Baldwin  
Senator Debbie Stabenow, DPCC Chairwoman  
Senator Chuck Schumer, Senate Democratic Leader  
Senator Sheldon Whitehouse  
Senator Dianne Feinstein, Ranking Member, Senate Judiciary Committee  
Senator Kirsten Gillibrand  
Senator Richard Blumenthal  
Senator Mazie Hirono  
Senator Tammy Duckworth

## Justice Ruth Bader Ginsburg



Throughout her career, Justice Ruth Bader Ginsburg worked tirelessly to bend the arc of the moral universe towards justice. As a litigator and co-founder of the Women's Rights Project of the American Civil Liberties Union, she pushed the Supreme Court to recognize that the 14th Amendment forbade sex discrimination. When she joined first the D.C. Circuit and then the Supreme Court, she was known for building consensus among judges across the political spectrum. As the Court shifted rightward under the influence of corporate and special interests, her dissents pulled back the curtain on how the Court privileged the powerful at the expense of the powerless. She defended women's reproductive rights (*Gonzalez v. Carhart*), the rights of workers (*Ledbetter v. Goodyear Tire and*

[Supreme Court of the United States](#)

*Rubber Company*), voting rights (*Shelby County v. Holder*), and countless other freedoms. Her absence on the Court will echo for years to come.

Justice Ginsburg's death places the legitimacy of the Court and our democratic process in jeopardy. Little more than an hour after Ginsburg's passing, Mitch McConnell announced that the Senate would vote on Trump's nominee for her replacement. For Senate Republicans, it hardly matters whom Trump selects. The wealthy special interests that fund the Republican Party have made sure that whomever President Trump nominates will be a reliable vote to roll back the access to health care Justice Ginsburg defended and the reproductive freedoms she fought for. Her legacy is at risk and with it the health and rights of millions of Americans for generations to come.

## WHAT'S AT STAKE: HEALTH CARE & REPRODUCTIVE RIGHTS



- **Courts are the linchpin of the Republican anti-health care and anti-reproductive-rights agenda.** The vacancy created by Justice Ginsburg's death further jeopardizes health care and reproductive rights for millions of Americans.
- **If the Supreme Court overturns the Affordable Care Act (ACA), 135 million Americans with pre-existing conditions could lose protections.** The ACA's Medicaid expansion – which covers 17 million people – would end. Insurance companies could once again charge women more than men. And insurance companies could stop covering basic services like maternity care, cancer screenings, and contraception.
- **Corporate special interests and ultra-wealthy donors, like the Koch Brothers, have spent millions of dollars to destroy the ACA and undermine reproductive rights.** From 2010-2012, as the National Federation of Independent Businesses (NFIB) led a major lawsuit opposing the ACA, it took in \$10 million in new donations from just 10 wealthy donors. This was a huge jump: In 2009, before their lawsuit began, their largest donation was just \$21,000.
- **The Trump Administration has used opposition to the ACA and *Roe v. Wade* as a litmus test for its judicial nominees.** These judges, with life tenure, will carry out the Republicans' anti-health care and anti-reproductive-rights agenda long beyond Trump's time in office.
- **Emboldened by this slate of activist judges, opponents of the ACA and reproductive rights have put in place scores of laws and policies that restrict Americans' access to health care.**
- **These restrictions disproportionately impact people who are poor, people who live in rural areas, and people of color.**





## How We Got Here

For years, Republicans have made rolling back protections on health care access, particularly access to reproductive care, a core issue. And since *Griswold v. Connecticut* (1965) and *Roe v. Wade* (1973), courts have been a key battleground in these fights. A network of wealthy donors has funded a flotilla of organizations to make their case in the courts and has spent millions to support nominations of judges friendly to their agenda (See Appendix 1 for an overview of the Captured Courts Project).

Under Chief Justice Roberts, the Supreme Court has been complicit in this agenda, using partisan 5-4 majorities to achieve victories for conservative interests. At the heart of these battles have been the “swing” justices—first Justices Sandra Day O’Connor and Anthony Kennedy and now Chief Justice John Roberts. While preventing extreme outcomes like striking down the ACA or overturning *Roe*, they have gradually undermined these protections and planted the seeds for legislation and future decisions. They are taking small steps and playing a long game.

From the beginning, appointing judges who would secure conservative victories was part of the Republican strategy. According to Pat Buchanan, who was at the time communications director for then-President Reagan, “[Our conservative appointment strategy] could do more to advance the social agenda – school prayer, anti-pornography, anti-busing, right-to-life, and quotas in employment – than anything Congress can accomplish in 20 years.”

***“[Our conservative appointment strategy] could do more to advance the social agenda – school prayer, anti-pornography, anti-busing, right-to-life, and quotas in employment – than anything Congress can accomplish in 20 years.” - Pat Buchanan***

## Future of the Affordable Care Act

Just one week after the 2020 election, the Supreme Court will consider the future of the ACA. Despite the COVID-19 pandemic, which has caused over 200,000 deaths in the United States, the Trump Administration still wants the Court to strike down the entire law as unconstitutional.<sup>1</sup> If the Court agrees—or even if the Court deadlocks 4-4 before a new Justice is appointed—as many as 129 million Americans with pre-existing conditions could face higher premiums, denial of coverage, or limitations on benefits.<sup>2</sup> With Justice Ginsburg, a staunch defender of the ACA, now gone, the chance that the Roberts Court achieves what Congressional Republicans could not is greater than ever.

In February 2018, eighteen Republican state attorneys general sued to strike down

the ACA after repeated efforts to repeal it in Congress failed. These attorneys general, joined by the Trump Justice Department, have made legal arguments that are far-fetched and extreme. Even conservative legal scholars<sup>3</sup> and the National Review editorial board criticized these arguments.<sup>4</sup> Senator Lamar Alexander (R-TN) called the Justice Department's argument that the entire ACA must be struck down "as far-fetched as any I've ever heard."<sup>5</sup>



This far-fetched lawsuit is just the latest chapter of repeated attempts to use the courts to kill the ACA.

From the start, Republicans opposed the ACA. It eventually became "the driving force behind Republican politics."<sup>6</sup> When it became clear that they would not be able to prevent its passage through the legislative process, Republicans began preparing a litigation strategy, hoping to achieve in the courts what they could not do politically.<sup>7</sup>

As soon as the law passed in 2010, the dark-money-funded National Federation of Independent Business<sup>8</sup> (NFIB) and twenty-six Republican attorneys general all sued, arguing a key aspect of the law was unconstitutional.<sup>9</sup> When the litigation started, "the idea that the Act's mandate to purchase health insurance might be unconstitutional was, in the view of most legal professionals and academics,

***"The idea that the [Affordable Care] Act's mandate to purchase health insurance might be unconstitutional was, in the view of most legal professionals and academics, simply crazy."***

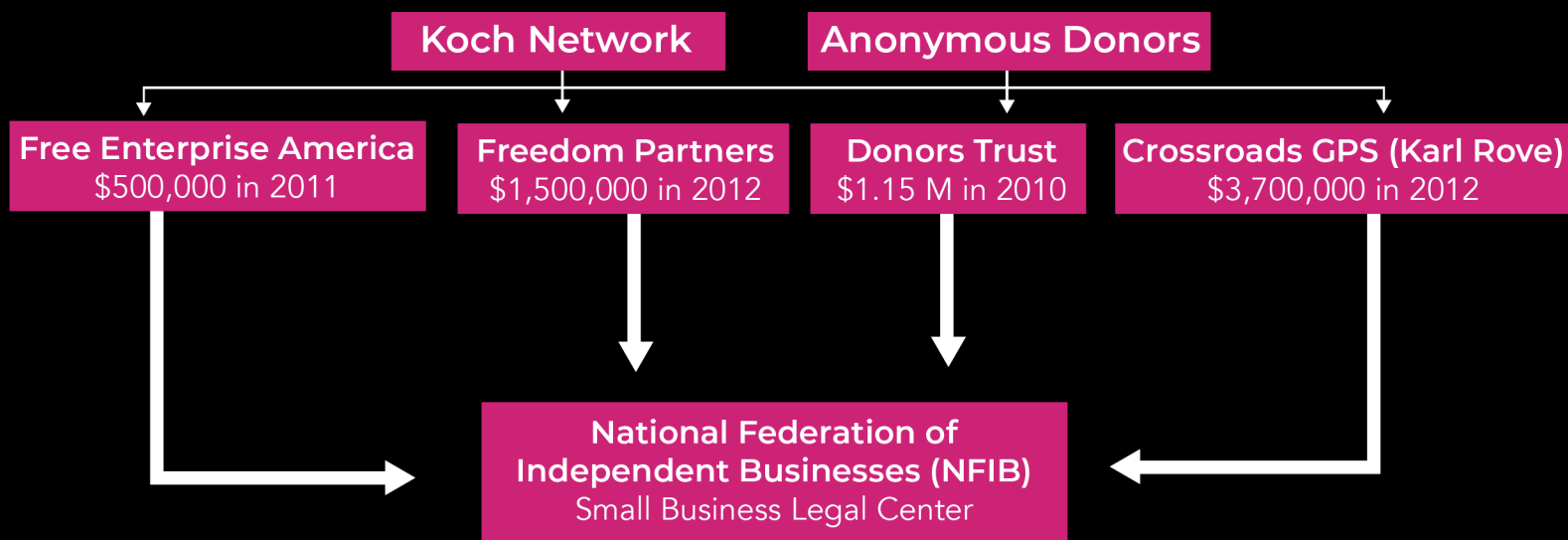
simply crazy.”<sup>10</sup> However, a coordinated effort by the Heritage Foundation and other dark-money-funded organizations moved this radical argument into the right-wing mainstream.<sup>11</sup> The organizations collaborated with the Republican attorneys general who filed suit and conscripted law professor Randy Barnett to draft an influential report on the constitutionality of the ACA.<sup>12</sup> According to its legal director Todd Gaziano, Heritage hoped the report would “convince [professors] to write” articles, op-eds, and blog posts to lay the foundation for future constitutional challenges.<sup>13</sup> Heritage also courted Congressional staffers in order to get the paper in the legislative record.<sup>14</sup> Other dark-money organizations directly funded NFIB’s litigation.<sup>15</sup>

## WHO PAID FOR THE LAWSUIT AGAINST THE ACA?


In *NFIB vs. Sebelius* (2012), the National Federation of Independent Business (NFIB) Small Business Legal Center sued to destroy the ACA.

NFIB claims to be a “nonprofit, nonpartisan” organization “advocating on behalf of America’s small and independent business owners.” Yet ultra-wealthy megadonors and right-wing partisans poured millions into it to fund its litigation against the ACA, hoping to buy an outcome favorable to them. Those donors’ exact identities remain unknown almost a decade later.

Prior to the lawsuit, NFIB didn’t receive any contributions larger than \$21,000.



Many credited Chief Justice Roberts with saving the ACA in *NFIB v. Sebelius*, the first challenge of the Act to reach the Supreme Court.<sup>16</sup> But even as he “saved” the ACA’s individual mandate, Roberts laid the groundwork for future attacks on the law by corporate special interests. First, he agreed with the four dissenting justices that



Congress did not have power under the Constitution's Commerce Clause to require people to purchase health insurance.<sup>17</sup> The Commerce Clause has long been one of Congress's greatest sources of power, serving as the constitutional basis for more than 700 statutory provisions.<sup>18</sup> This dramatic narrowing of the Commerce Clause will impact how Congress structures government programs in the future.<sup>19</sup>

Second, Roberts convinced both liberal and conservative justices to strike down the other central pillar of the health care legislation, the Medicaid expansion, as an overly coercive form of congressional spending.<sup>20</sup> This was the first time the Supreme Court had ever found an exercise of Congress' spending power unconstitutionally coercive.<sup>21</sup> In short, Roberts "made a calculated choice to take a short-term hit in order to craft a larger long-term gain."<sup>22</sup>

So it comes as no surprise that the ACA is back before the Supreme Court in *Texas v. California*. Like prior ACA suits, this latest legal challenge is supported by the same dark money special interests that are behind attacks on the right to vote, labor unions and workers' rights, public health and safety regulations, and so many other priorities of the Republican Party.

The Republican Attorneys General Association (RAGA) is a political group that aims to get and keep these powerful offices under conservative control and "is often pivotal in who has funding to make a successful run."<sup>23</sup> In 2018, RAGA gave money to 13 of the 18 Republican attorneys general suing to overturn the ACA.<sup>24</sup>

So where does RAGA get its money? In addition to big health care companies like Anthem, and big business associations like the U.S. Chamber of Commerce and the Pharmaceutical Research and Manufacturers of America (PhRMA), RAGA received at least \$9.9 million in recent years, including at least \$1.7 million in 2018, from the Judicial Crisis Network (JCN).<sup>25</sup>

As Senate Democrats documented in [Captured Courts](#),<sup>26</sup> JCN spent millions of dollars on campaigns to support the confirmations of Justices Neil Gorsuch and Brett Kavanaugh. JCN President Carrie Severino ran the process to develop President Trump's latest short list of Supreme Court nominees.<sup>27</sup> Severino has pledged that JCN will spend at least \$10 million to support Trump's pick for Justice Ginsburg's seat on the court.<sup>28</sup> "We are going to have a state-of-the-art campaign using whatever we need to win this fight," she said.<sup>29</sup> Her work, and the multi-million-dollar advertising campaigns JCN runs, are supported by multi-million-dollar contributions from anonymous sources.

**That's right: The same groups and people who are vetting and promoting President Trump's replacement for Justice Ginsburg have been funding the litigation to kill the ACA.**

Justice Roberts previously used his role as the median swing justice to “save” the ACA in *NFIB v. Sebelius*. If Trump’s nominee takes Justice Ginsburg’s place on the Court, even Roberts may not be able to “save” health care for millions of Americans.

## Reproductive Rights


Republicans decided decades ago that it is smarter politically to chip away at reproductive rights than to win a full repeal of *Roe*. This strategy to undermine women’s reproductive freedom was at work in *Planned Parenthood v. Casey*.<sup>30</sup> In *Casey*, Justices O’Connor and Kennedy, joined by Justice Souter, nominally upheld *Roe* but made it far easier to pass laws that restrict access to abortion so long as they did not place an “undue burden” on women.<sup>31</sup> Their opinion opened the door for states to pass restrictions on care, from parental consent requirements to so-called TRAP (targeted regulation of abortion providers) laws that proponents claim protect women’s health but in fact only make it harder to access reproductive care.<sup>32</sup>

The Roberts Court faced its first abortion case in *Gonzales v. Carhart*,<sup>33</sup> which challenged the federal Partial-Birth Abortion Ban Act (PBABA).<sup>34</sup> Seven years earlier, the Court had struck down a Nebraska statute banning all second trimester abortion procedures as an undue burden on women, in part because it did not include an exception allowing the procedure when a woman’s health was in danger.<sup>35</sup> The PBABA was in all important respects the same as the Nebraska law. **What changed? Not the law, but the Court: Justice Alito replaced Justice O’Connor, and gave the conservative bloc a 5-4 majority, the Roberts Five. And as part of this new majority, Justice Kennedy claimed that the government has an interest in “respect for the dignity of human life”<sup>36</sup> which could justify restrictions on abortion.**

The pattern is clear: over and over, by 5-4 partisan decisions, the Roberts court has chipped away at many of the rights Justice Ginsburg defended her entire career.







In September 2012, Hobby Lobby, a private, for-profit corporation, challenged the ACA's contraceptive coverage policy. Borrowing an argument from the plaintiffs in *Citizens United*, Hobby Lobby argued it was a "person" with religious rights that were unlawfully burdened by the ACA's contraception benefit in violation of the Religious Freedom Restoration Act (RFRA). The Roberts Five agreed: The government's requirement that closely held corporations with religious objections provide contraceptive coverage through their employee health plans violated RFRA.<sup>37</sup> The decision's effect was significant: "Closely-held companies" like Hobby Lobby make up over 90% of all American businesses and employ about 52% of the American workforce.<sup>38</sup>


Later, in *Little Sisters of the Poor v. Pennsylvania*, the Supreme Court sided again with the employer in a challenge to Trump Administration rules that made it even easier for employers, including publicly traded companies, to deny their employees birth control coverage on the basis of "moral" or religious grounds.<sup>39</sup>

In *National Institute of Family and Life Advocates (NIFLA) v. Becerra*,<sup>40</sup> the Roberts Five used the First Amendment to invalidate a California law requiring centers claiming to offer reproductive health care to provide information about free or low-cost contraception and abortions. They held that the free speech rights of anti-choice "crisis pregnancy centers" were more important than the right of patients to obtain full and accurate information about available health services.<sup>41</sup> As Justice Breyer pointed out in his dissent, the decision meant a state could "lawfully require a doctor to tell a woman seeking an abortion about adoption services," but could not "require a medical counselor to tell a woman seeking prenatal care or other reproductive health care about childbirth and abortion services."<sup>42</sup>

Even victories for reproductive rights are fleeting with the Roberts Court. In 2016, the Supreme Court in *Whole Woman's Health v. Hellerstedt* struck down a Texas law that required doctors performing abortions to have admitting privileges at a local hospital, finding that it imposed an undue burden on abortion access because the burdens it created outweighed the purported benefits.<sup>43</sup> Four years later, an identical Louisiana law was back before the Court in *June Medical Services LLC v. Russo*.<sup>44</sup>

**What changed? Not the law, but the Court. Justice Kavanaugh replaced Justice Kennedy, who had been in the majority in the previous decision. And the Fifth Circuit Court of Appeals refused to apply *Whole Woman's Health* as precedent, finding the Louisiana law was valid.<sup>45</sup>**

The Court was faced with a conundrum. A majority of the current Justices—including Justice Roberts—believed that *Whole Woman's Health* was wrongly decided. But under the principle of *stare decisis*, the Court should not reverse itself on a question of constitutional law just because a new majority disagrees with the prior decision. And the Supreme Court should not allow a lower court to brazenly defy a controlling decision. That is not the way our judicial system is supposed to work.



Once again, Chief Justice Roberts proved ready to take a short-term hit in order to craft a larger long-term gain. The Chief Justice agreed to strike the Louisiana law, but only because *Whole Woman's Health* obliged him to.<sup>46</sup> The decision earned him opprobrium from many on the right, who believed that after Justice Kennedy's retirement almost any abortion restriction would survive Supreme Court review.<sup>47</sup> But even as he joined the liberal justices, Roberts made it easier for states to enact future abortion restrictions, holding that courts need only strike down laws that place a "substantial obstacle" in the path of a woman seeking an abortion, even if the benefits of those restrictions do not outweigh the burdens. In short, Justice Roberts' opinion in *June Medical* "preserve[d] the outer shell of the earlier decision while gutting its substance," "invit[ing] states to push the envelope on abortion legislation, secure that, regardless of the benefits to patients, courts will bless the laws so long as they do not pose a substantial obstacle."<sup>48</sup> Within weeks, the Eighth Circuit Court of Appeals, relying on Roberts's concurrence, asked the district court to reconsider its decision that Arkansas' slew of new abortion restrictions, including a requirement that patients pregnant because of rape notify their rapists before terminating their pregnancy, were unconstitutional.<sup>49</sup>

## Who Is Behind It

Health care access—even access to reproductive care—was not always an issue that broke along party lines.<sup>50</sup> When *Roe v. Wade* was decided, many prominent Republicans—including First Lady Betty Ford, Vice President Nelson Rockefeller, and then-Governor Ronald Reagan—supported expanded access to abortions.<sup>51</sup> The conservative Heritage Foundation originally proposed an individual mandate to purchase health care, and many Republicans championed the idea.<sup>52</sup>

But Republicans used *Roe v. Wade* to create a motivated bloc of voters who would support candidates who promised to roll back access to abortion.<sup>53</sup> In the late 1970s, Republican strategists like Paul Weyrich, the co-founder of the Moral Majority,<sup>54</sup> recognized that the Republican Party could use abortion and other social issues to broaden its base beyond the business class<sup>55</sup> and mobilize socially conservative voters. The Republican Party and the dark-money donors who fund it now use the promise to reverse *Roe v. Wade*—or the threat that this may not happen—to motivate this group of voters every election cycle. Given the gains in birth control coverage following the implementation of the Affordable Care Act, Republicans quickly mobilized this key constituency in opposition to that law too.<sup>56</sup>

Political campaigns for anti-choice candidates are funded by dark-money donors willing to ally themselves with social conservatives in order to elect legislators who are friendly to their corporate interests.<sup>57</sup> Republican donors used the ACA in a similar

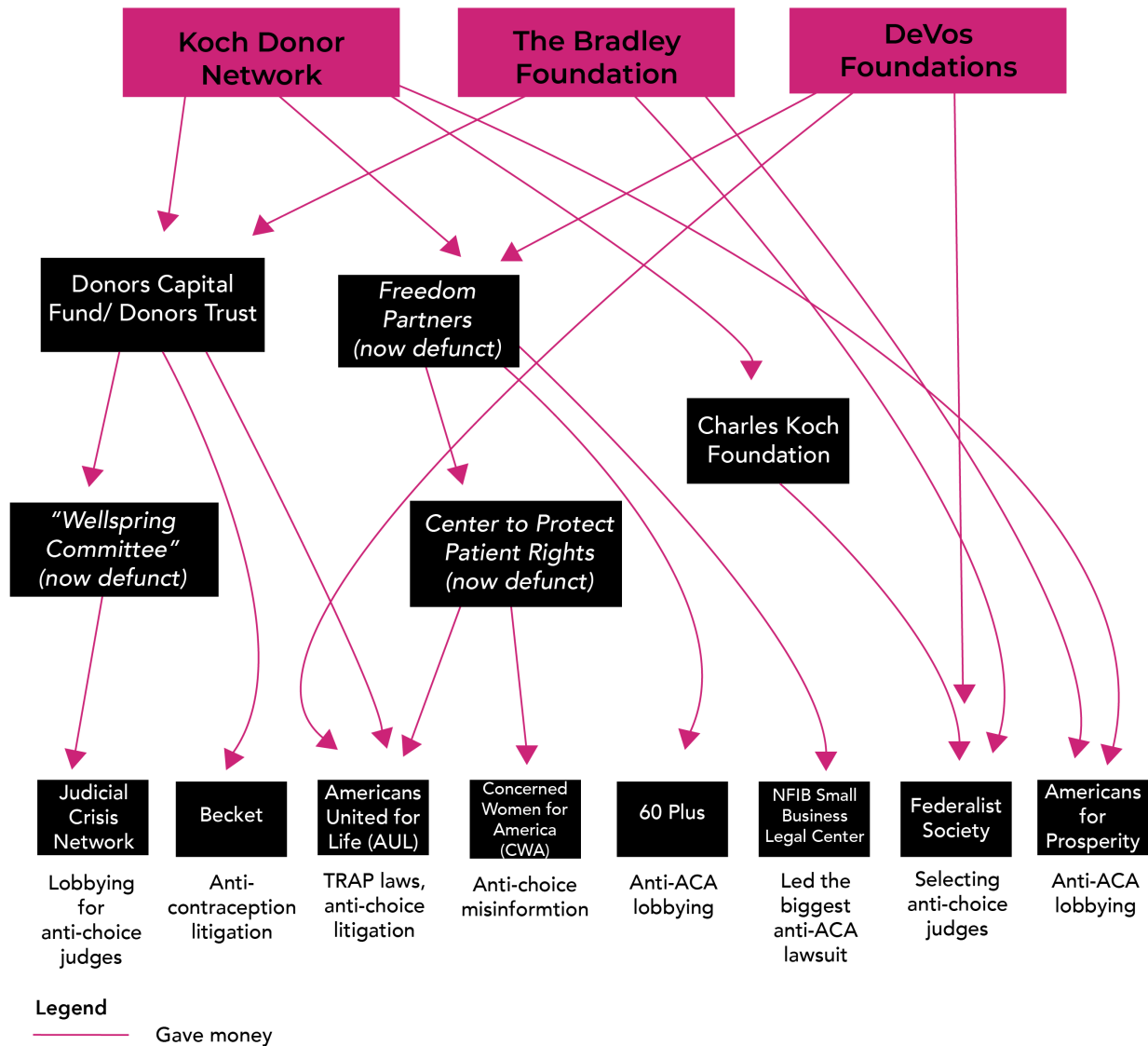
way, organizing Tea Party groups in 2009 by ginning up opposition to the Act.<sup>58</sup>

***“The playbook hasn’t changed for decades. Fake a Supreme Court on the brink of being lost forever, gin up the dark-money ads, and the evangelical vote is a lock. It’s a win-win tactic because you can stir up heaps of money and voters when you face the loss of a potential seat, and you can stir up money and voters when you fill a contested seat. You can even stir up money and voters after you’ve prevented a seat from being filled.”<sup>59</sup> – Dahlia Lithwick and Steve Vladeck***

The strategy is often successful. In 2010, the anti-choice, anti-ACA Koch-funded **Americans for Prosperity**<sup>60</sup> spent \$40 million on an estimated 100 races across the country.<sup>61</sup> As a result, the Republican Party took control of the U.S. House of Representatives as well as an additional eleven state legislatures and six governors’ mansions.<sup>62</sup> Similarly, the formerly “very pro-choice”<sup>63</sup> Donald Trump courted anti-choice leaders in 2016<sup>64</sup> and announced during a presidential debate that he would “[put] pro-life justices on the court” so that overturning *Roe* would “happen automatically.”<sup>65</sup> Anti-choice groups then spent millions of dollars to get Trump elected.<sup>66</sup> Their support was pivotal to Trump’s victory: According to the *Washington Post*, 26% of all Trump voters polled said that the Supreme Court was the most important factor in their decision to vote for him.<sup>67</sup>



## MEGADONORS AGAINST YOUR HEALTH CARE



The same special-interest donors also funnel millions of dollars of dark money to anti-choice, anti-ACA groups that bring lawsuits, file amicus briefs in support of those lawsuits, and promote judicial nominees who are carefully vetted to be favorably inclined toward the arguments made in those lawsuits. The Kochs, for example, have described themselves as libertarian,<sup>68</sup> and David Koch has described himself as supporting women's right to choose.<sup>69</sup> Yet the Kochs have supported organizations pledged to strike down the ACA and repeal *Roe v. Wade*:

- The Koch Brothers funded **NFIB's** efforts to take down the ACA. In 2011, the Koch-linked **Free Enterprise America** donated \$500,000 to NFIB.<sup>70</sup> In 2012, the Koch-backed **Freedom Partners** gave \$1.5 million to NFIB—more than the organization received from any other single source.<sup>71</sup> They gave an additional \$1 million to other groups affiliated with NFIB.<sup>72</sup>



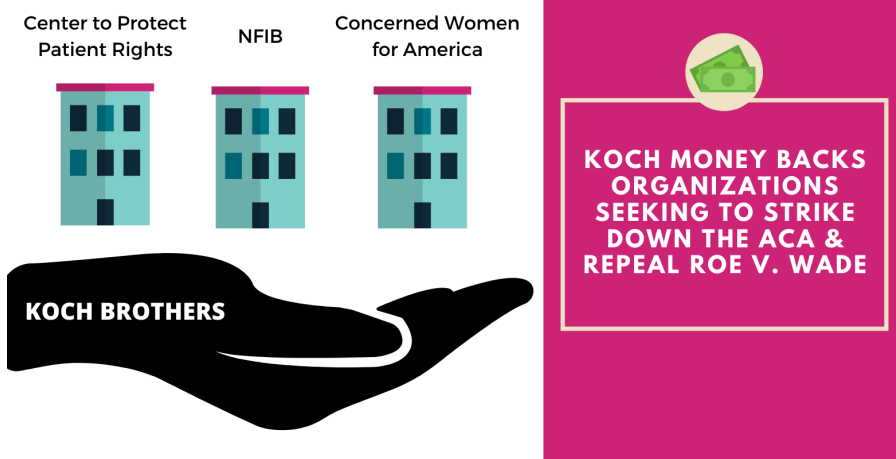
- Since it was founded in late 2011, the Koch Brothers' Freedom Partners has given millions to anti-ACA, anti-choice organizations, including \$32 million to **Americans for Prosperity** and \$15.7 million to **60 Plus**.<sup>73</sup> Freedom Partners also donated \$115 million to the now-defunct **Center to Protect Patient Rights**, which funded both anti-ACA and anti-choice campaigns.<sup>74</sup>

- More than \$11.5 million of Koch-connected money has gone to **Concerned Women for America**

(CWA), an organization whose mission is to "protect and promote Biblical values" and to "restore the family to its traditional purpose."<sup>75</sup>

CWA has opposed exceptions for rape and incest in laws restricting abortions, opposed

making abortion accessible to military servicewomen who were the victims of rape, and urged support for Hobby Lobby's suit over the ACA's contraception requirement.<sup>76</sup>



- Hundreds of thousands of dollars of dark-money has gone to **Americans United for Life** (AUL) through the Center to Protect Patient Rights<sup>77</sup> (later renamed American Encore), which was created and controlled by a Koch loyalist.
- **Judicial Crisis Network** (JCN) receives millions of dollars each year from the Wellspring Committee, a dark-money group founded in 2008 "with the help of conservative donors in the network led by billionaire brothers Charles and David Koch."<sup>78</sup> JCN has called TRAP laws "sensible abortion regulations" and warned against "liberal justices" who would protect abortion rights.<sup>79</sup> JCN funds political ad campaigns to support confirming right-wing justices.<sup>80</sup>
- The Koch-aligned **Donors Capital Fund** and **DonorsTrust** have been key funders in the fight against the ACA's contraception provision. As described in the Senate Democrats' *Captured Courts* report, Donors Capital Fund and DonorsTrust have also heavily funded the conservative legal movement and efforts to vet and confirm right-wing ideologues to the bench.<sup>81</sup> **The Becket Fund** (now Becket), a nonprofit boutique litigation firm that frequently attacks reproductive rights as a litigant and/or amicus, received almost a quarter-million dollars in funding from DonorsTrust.<sup>82</sup> Donors Capital Fund also gave at least \$531,000 to AUL in 2008 and 2009. None of

these funds can be traced back to the original donors.

- The Koch brothers fund a number of other organizations that have argued against reproductive rights in amicus briefs at the Supreme Court, including the **Independent Women's Law Center, the Cato Institute, the Pacific Legal Foundation,** and the **Judicial Education Project.**

These dark-money groups played a critical role during the confirmation hearings of Neil Gorsuch and Brett Kavanaugh. Under President Obama, JCN was "the biggest player" in the effort to block Supreme Court nominee Merrick Garland and, under Trump, JCN later spent at least \$10 million to support Neil Gorsuch's nomination and over \$3 million to support Brett Kavanaugh's nomination.<sup>83</sup> CWA encouraged members to call their Senators about supporting Gorsuch's nomination and to attend Senators' town halls to express their support, and gathered outside of the Capitol and around D.C. to show their support for Gorsuch.<sup>84</sup> AUL and the Charlotte Lozier Institute promoted information about Gorsuch's position on abortion.<sup>85</sup>

At the center of this network of dark-money-funded organizations is the Federalist Society's Leonard Leo. Senate Democrats documented Leo's key role in the Trump Administration's judicial-selection process in their *Captured Courts* report.<sup>86</sup> He has many personal ties to anti-choice movement groups that all appear to receive funding from the same sources.

### **Americans United for Life (AUL)**

drafts anti-choice legislation for state legislatures, which often pass those model bills verbatim. These model bills include many of the most common TRAP laws. For example, AUL claims that the law at issue in *Whole Women's Health* was "enacted . . . with the help of AUL experts."<sup>169</sup>

AUL recognized early on that "[if the [Supreme] Court was reluctant to overrule *Roe* directly, . . . it might be possible to erode abortion rights by convincing the Court to recognize more and more reasons that the government could regulate abortion."<sup>170</sup> Their strategy centered on identifying ways to get the Court to undercut the protections created by *Roe*.<sup>171</sup> In doing so, "the pro-life movement hoped to energize its members, convince donors to back the movement, persuade politicians that pro-life voters could swing some elections, and, they hoped, set the stage for overruling *Roe*."<sup>172</sup> To advance these theories, AUL drafted amicus briefs in every major reproductive rights case.<sup>173</sup> In *June Medical*, AUL wrote two briefs: one filed in its own name, and one on which it served as counsel for members of Congress.<sup>174</sup>

- Leo sits on the board of **Becket**.<sup>87</sup> He received Becket's highest honor, the Canterbury Prize, at a 2017 gala.<sup>88</sup>
- Leo is co-Chairman of the board of **Students for Life of America** (SFLA), an anti-choice group with undergraduate student chapters on hundreds of college campuses.<sup>89</sup> It is largely unknown who funds SFLA, though in the early 2010s it received at least two mid-level anonymized donations from DonorsTrust and one from mega-donor Sean Fieler's Chiaroscuro Foundation.<sup>90</sup>
- Leo is on the board of **International Center on Law, Life, Faith, and Family** (ICOLF), a group of jurists that describes itself as promoting "the right to life, from the moment of conception until natural death."<sup>91</sup> ICOLF has released "A Model Declaration on the Rights of the Family," a document asserting that a "pre-born person" has full legal personhood "from the moment of conception."<sup>92</sup> (Only three of the 50 states have laws recognizing this extreme view, and voters in such deep red states as North Dakota and Mississippi have overwhelmingly rejected ballot initiatives codifying "fetal personhood" within the past decade.<sup>93</sup>)
- Leo is on the board of **Ethics and Public Policy Center** (EPPC), a right-wing legal group that filed amicus briefs in litigation against the Affordable Care Act's expansion of contraceptive health care coverage.<sup>94</sup>



Leonard Leo  
[The Federalist Society](#)

The Federalist Society also gives AUL a platform for boosting its radical anti-choice legal agenda. William Saunders, who was Senior Counsel at AUL for over a decade, chairs the Federalist Society's "Religious Liberties Practice Group" and has done so since at least 2011.<sup>95</sup> Another Senior Counsel at AUL, Clarke Forsythe, has been a regular contributor and guest of honor at Federalist Society chapters nationwide since at least 2015.<sup>96</sup>

## How Trump's Judges Will Continue the Assault on Health Care and Reproductive Rights

As a candidate in 2016, Donald Trump released a list, compiled in consultation with the Federalist Society and Heritage Foundation, of possible Supreme Court nominees. That list included notably anti-choice nominees<sup>97</sup> and omitted several prominent GOP-appointed judges who had failed to strike down the ACA.<sup>98</sup> In 2020, President

Trump released a new list created by the same groups,<sup>99</sup> filled with similar picks for the Court.<sup>100</sup> As Senate Democrats explained in *Captured Courts*,<sup>101</sup> Mitch McConnell has turned the Senate into a conveyor belt to confirm dozens of these extremist nominees to all levels of the federal bench.

- While on the D.C. Circuit, then-Judge **Brett Kavanaugh** argued that the government could block an undocumented minor from traveling to receive an abortion using private funds in *Garza v. Hargan*.<sup>102</sup> He refused to state affirmatively that the Constitution protects a woman's right to choose,<sup>103</sup> signaling that precedents *Roe v. Wade* and *Planned Parenthood v. Casey* would be at risk if he were appointed to the Supreme Court.



Justin Walker  
[New York Times](#)

- Kavanaugh also wrote a dissenting opinion in *Seven-Sky v. Holder* in which he argued that the D.C. Circuit lacked the jurisdiction to hear a challenge to the ACA. Kavanaugh's view on the court's jurisdiction would have prevented an important ruling that the ACA was in fact constitutional.<sup>104</sup> A former clerk for Kavanaugh — **Justin Walker**, who now is a judge on the D.C. Circuit — praised Kavanaugh's dissent in *Seven-Sky* as a "roadmap to the conclusion reached by the dissenters [in *NFIB v. Sebelius*] – that the individual mandate is unconstitutional under the Taxing Clause."<sup>105</sup>
- As a judge on the Tenth Circuit, **Neil Gorsuch** concurred with that Circuit's ruling in favor of the employer in *Hobby Lobby Stores, Inc. v. Sebelius*, writing that the ACA's contraceptive-coverage policy required Hobby Lobby "to violate their religious faith" by forcing them "to underwrite payments for drugs or devices that can have the effect of destroying a fertilized human egg."<sup>106</sup> Later, when the Tenth Circuit decided against rehearing *en banc* a challenge to the Obama administration's contraceptive mandate policy in *Little Sisters of the Poor v. Burwell*, Gorsuch joined a dissenting opinion arguing that the contraceptive mandate was a clear burden on the plaintiffs' free exercise of religion and predicted that the doctrine would "not long survive."<sup>107</sup>



- A former Kavanaugh clerk, **Sarah Pitlyk** (E.D. Mo.) served as special counsel to the Thomas More Society, a conservative anti-choice law firm that frequently authors amicus briefs opposing abortion and contraception.<sup>108</sup> In that role, she took extreme positions on reproductive health issues, opposing surrogacy and fertility treatment.<sup>109</sup> In a July 2018 op-ed, Pitlyk wrote that the Supreme Court's decision in *NFIB v. Sebelius* upholding the Affordable Care Act was "a disastrous ruling" and "unprincipled."<sup>110</sup>
- Before his nomination to the bench, **Cory Wilson** (5th Cir. Miss.) referred to the ACA as "perverse" and "illegitimate"<sup>111</sup> and supported the Mississippi Governor's decision to oppose Medicaid expansion under the ACA.<sup>112</sup> Wilson also called upon the Supreme Court to overturn the ACA, writing that, "For the sake of the Constitution, I hope the Court strikes down the law and reinvigorates some semblance of the limited government the Founders intended."<sup>113</sup> He has stated that there should be a "complete and immediate reversal" of *Roe v. Wade* and that abortion should be illegal in all cases, even when necessary to save a patient's life.<sup>114</sup>
- As Georgia's Solicitor General, **Britt Grant** (11th Cir. Ga.) worked on an amicus brief in *Oklahoma v. Burwell* challenging the creation of federal health care exchanges under the ACA.<sup>115</sup> Grant also defended a Georgia law criminalizing abortions after 20 weeks.<sup>116</sup>
- As acting Assistant Attorney General of the Justice Department's Civil Division, **Chad Readler** (6th Cir. Oh.), filed a brief in *Texas v. United States* arguing that the ACA's individual mandate is unconstitutional.<sup>117</sup> Several career lawyers within the Civil Division refused to sign their names to this brief, and one senior career Justice Department official resigned in protest of the Department's efforts. Senator Lamar Alexander (R-TN) called the arguments in Readler's brief "as far-fetched as any I've ever heard."<sup>118</sup> Later, Readler defended the Trump Administration in *Garza v. Hargan*.<sup>119</sup>



Chad Readler  
[Roll Call](#)

- **Andrew Oldham** (5th Cir. Tex.) helped lead a lawsuit by 20 conservative states to have the ACA struck down as unconstitutional.<sup>120</sup> As Texas's Deputy Solicitor General, Oldham also defended the Texas law at issue in *Whole Woman's Health*.<sup>121</sup>
- **Amy Coney Barrett** (7th Cir. Ind.) wrote that the ACA's coverage requirement was unconstitutional and criticized Chief Justice Roberts for "push[ing] the Affordable Care Act beyond its plausible meaning to save the statute."<sup>122</sup> Barrett also questioned the precedent of *Roe v. Wade*<sup>123</sup> and signed on to a letter written by The Becket Fund that condemned the birth control benefit under the Affordable Care Act as "a grave infringement on religious liberty."<sup>124</sup> Anti-choice groups have pushed President Trump to appoint her to the Supreme Court because she is reliably anti-choice.<sup>125</sup>
- As an attorney in the George W. Bush administration, **Greg Katsas** (D.C. Cir.) also sought to limit abortion rights for women in *Planned Parenthood v. Gonzales* and *Carhart v. Gonzales*.<sup>126</sup> He dismissed "the right to abortion, which isn't in the Constitution, which has all these made-up protections [sic]."<sup>127</sup> Later, while in private practice, Mr. Katsas represented NFIB in several challenges to the ACA's individual mandate, arguing that the mandate was unconstitutional.<sup>128</sup>
- In 2016, as Ohio's State Solicitor General, **Eric Murphy** (6th Cir. Oh.) helped lead the state's challenge to an ACA provision known as the Transitional Reinsurance Program.<sup>129</sup> He also represented Ohio in a brief supporting an Arizona law that banned abortion after 20 weeks.<sup>130</sup>
- As an attorney in private practice, **Daniel Collins** (9th Cir. Cal.) authored amicus briefs on behalf of conservative organizations challenging the ACA's contraceptive coverage requirement and a Baltimore ordinance that required anti-choice crisis pregnancy centers to disclose to patients that they did not provide abortions.<sup>131</sup>
- **Kyle Duncan** (5th Cir. La.) served as the lead counsel for Hobby Lobby in the company's challenge to the ACA's contraceptive mandate.<sup>132</sup> He also filed an amicus brief arguing in favor of the Texas TRAP law struck down by the Supreme Court in *Whole Woman's Health*.<sup>133</sup>



Amy Coney Barrett  
[The Federalist Society](#)

For Trump judges, auditioning for appointment by signaling hostility to health care access and reproductive rights has been a successful strategy for advancement.

## What to Expect

### With Courts Stacked in Their Favor, Republicans Will Continue to Erode Americans' Ability to Access Health Care and Restrict Reproductive Freedom

During the Trump Administration, dozens of judicial nominees have acknowledged that they must follow the precedents of *Roe v. Wade* and *NFIB v. Sebelius*. These pledges mean little when the Supreme Court has shown there are plenty of ways to erode reproductive and health care rights without abruptly overturning these precedents.

Republican-controlled state legislatures have heard the message. Since 2010, state lawmakers have passed more than 400 abortion restrictions: narrowing when a person can access abortion, limiting what procedures can be used, and imposing regulations that make it impossible for most abortion providers to operate.<sup>134</sup>

Nine states passed laws that prohibit ending a pregnancy before most people even know they are pregnant.<sup>135</sup> Alabama banned virtually all abortions,<sup>136</sup> even in cases of rape or incest, and established criminal penalties of up to 99 years in prison for doctors who perform them.<sup>137</sup> This year, Republicans in several states even took advantage of the COVID-19 crisis to impose further restrictions on abortion.<sup>138</sup>

#### With Courts on their Side, Republicans Will Continue to Erode Americans' Ability to Access Health Care.



Since 2010, state lawmakers have passed more than 400 abortion restrictions.



Nine states passed laws that prohibit ending a pregnancy before most people know they are pregnant.



Alabama banned virtually all abortions, even in cases of rape or incest.

With decisions like *June Medical*, we expect these efforts to continue, if not intensify, even if *Roe v. Wade* is never overruled.<sup>139</sup> And even if Republicans lose elections, individuals, organizations, and corporations can turn to the courts, using their personal beliefs to deny another person's right to access the health care that they need. The Trump Administration has been so singularly focused on stocking the courts with judges willing to undermine a woman's right to health care that these rights are in jeopardy for a generation.

### Corporations Assert New Religious Freedom and Free Speech Rights to Limit Access to Reproductive Care and Avoid Civil Rights Protections

Emboldened by their success in the courts, corporations and religious groups will continue to push back against government mandates and restrictions, arguing

they should be exempt from generally applicable laws that they claim infringe on their freedom of religion or speech. Businesses have already used *Hobby Lobby* to claim that they do not need to comply with state and local antidiscrimination laws, particularly those that protect against discrimination on the basis of sexual orientation, because they conflict with their religion.<sup>140</sup> The Supreme Court will weigh in again next term, deciding whether the City of Philadelphia must contract with a religious foster care agency even though that agency refuses to follow the city's anti-discrimination laws and policies.<sup>141</sup>

## Americans' Health, Particularly Reproductive Health, Will Suffer

Republicans' sustained attacks on health care have led to worse health outcomes for many Americans—particularly for people who are poor, people who live in rural areas, and people of color. Future decisions striking down the ACA or further limiting access to reproductive care will only exacerbate these effects.

WHAT'S AT STAKE

### Health Care and Reproductive Rights



If the Supreme Court overturns the Affordable Care Act (ACA):

135 million Americans with pre-existing conditions could lose protections.

The Medicaid expansion – which covers 17 million people – would end.

Insurance companies could once again charge women more than men.

- **Americans still cannot access affordable health care.** In one decision, the Supreme Court took away health care under the ACA for 2.6 million Americans,<sup>142</sup> more than half in just three states (Texas, Georgia, and Florida).<sup>143</sup> If the ACA is struck down, the number of uninsured people in the U.S. would increase by 19.9 million, or 65%.<sup>144</sup> Demand for uncompensated care would increase by \$50.2 billion, or 82%, devastating rural and safety-net hospitals and leading to more hospital closures.<sup>145</sup> 135 million Americans with pre-existing conditions would lose protections.<sup>146</sup> The ACA's Medicaid expansion—which covers almost 17 million people—would end.<sup>147</sup> Notably, these estimates of the damage that will occur if the ACA is struck down pre-date the current pandemic. Because millions of people



who lost their jobs during the crisis now rely on the ACA's Medicaid expansion, marketplace premium assistance, or other coverage provisions for their health insurance, these outcomes are likely to be much worse.<sup>148</sup>

- **Attacks on the ACA disproportionately hurt communities of color:** Historic economic, social, and racial disadvantages have created persistent differences in health care access and health outcomes based on where people live and their race, sexual orientation, and income.<sup>149</sup> If the ACA is struck down, nearly one out of every three Latinos and one out of five Black people will not have health coverage.<sup>150</sup> Nearly one million (913,000) Latino young adults between the ages of 19 and 26 who are covered under their parents' plan would lose their health coverage.<sup>151</sup>
- **Americans pay more for reproductive care.** Before *Hobby Lobby*, the ACA required most health insurance plans to cover birth control without copays. Now an increasing number of employers can avoid covering this care. Oral contraceptive pills can cost about \$25 a month; an IUD can cost up to \$900, about a month's pay for minimum-wage workers.<sup>152</sup>
- **Americans have worse health outcomes.** The Institute of Medicine found that access to contraceptives is essential preventive care.<sup>153</sup> Many people use birth control exclusively for non-contraceptive health reasons.<sup>154</sup> Others suffer from certain heart conditions, diabetes, lupus, or other health complications that become life threatening health hazards during pregnancy. Without access to reproductive health care, Americans cannot get these health benefits or time their pregnancies to reduce risks to maternal and fetal health.<sup>155</sup> Restrictions on abortion access similarly lead to worse health outcomes.<sup>156</sup>
- **A person's right to safe, legal abortions and other reproductive care will continue to depend on where she lives.** Restrictions targeted at abortion providers have caused many clinics to close. As a result, nearly half of women of reproductive age have to travel between 10 to 79 miles to access an abortion, with some women in rural Midwest areas forced to travel 180 miles or more.<sup>157</sup> Restrictions in many states make travel even more complicated: A mandatory waiting period means those seeking care have to make the trip twice; fewer clinics overall may mean longer waits for appointments; and the closest clinic may not provide abortions later in pregnancy.<sup>158</sup> Clinics like Planned Parenthood also often provide other kinds of reproductive health care, including contraception, sexually transmitted disease testing, and cancer screenings. When these clinics close, Americans lose access to all these vital services.
- **Restrictions on reproductive care disproportionately impact poor people, people in rural areas, and people of color.** Clinic closures disproportionately affect people in rural communities, forcing them to travel farther to access

reproductive care.<sup>159</sup> In 2016, more than half of rural women did not have access to reproductive health services anywhere in their county.<sup>160</sup> Restrictions on medication abortions and on the use of telemedicine to deliver such abortion services have similar unequal effects.<sup>161</sup> At the same time, unintended pregnancies are increasingly concentrated among low-income individuals.<sup>162</sup> Yet abortion coverage bans, like the Hyde Amendment, can make the cost of an abortion out of reach for poor people.<sup>163</sup> People of color in particular “live at the intersection of multiple disparities and structural barriers that lead to a higher likelihood of being Medicaid eligible and therefore, subject to Hyde.”<sup>164</sup> Making it harder to access affordable contraception and forcing clinics to close will only exacerbate these disparities.

### **Health Care Will Continue to Drive Dark Money into Our Elections and the Courts**

Republicans and their dark-money donors will continue to weaponize the ACA and *Roe* in order to turn out their base. After *June Medical*, Vice President Mike Pence denounced Justice Roberts as a “disappointment to conservatives,” arguing, “It’s been a wake-up call for pro-life voters around the country who understand, in a very real sense, the destiny of the Supreme Court is on the ballot in 2020.”<sup>165</sup> Senator Josh Hawley called *June Medical* a “disaster” and a “big-time wakeup call to religious conservatives,” urging “[w]e need to make our voices heard.”<sup>166</sup>

The tragic death of Justice Ruth Bader Ginsburg has brought these issues to the forefront again as we approach the 2020 election—and, with it, a flood of dark money. Within hours of her passing, outside groups like the Koch Network and JCN began mobilizing for the battle to fill her seat on the court.<sup>167</sup> Hoping to energize the Republican base, President Trump has pledged to nominate someone “without delay,” and Senator Mitch McConnell promised that Trump’s nominee would get a vote.<sup>168</sup> The fight ahead will likely shape all three branches of government for years to come.

# CAPTURED COURTS OVERVIEW

The GOP's Big-Money Assault on the Constitution, Our Independent Judiciary, and the Rule of Law

In May 2020, DPCC released a report with Senators Schumer and Whitehouse to shed a light on the right-wing takeover of our judicial system. The Trump Administration and Mitch McConnell's Senate Republicans have few significant legislative accomplishments. Instead, they're packing the judiciary with far-right extremist judges. The Senate has confirmed more than 200 new life-tenured federal judges, most of whom were chosen not for their qualifications or experience—which are often lacking—but for their allegiance to Republican political goals.

This court capture has been perpetrated through a complex network of anonymously-funded groups like the Federalist Society and spearheaded by right-wing activists like Leonard Leo. Their web consists of:

1. deep-pocketed, special-interest donors, who provide the money;
2. shell entities, which funnel the money and exploit tax laws to keep donors' identities secret;
3. public relations firms and political operatives who run multi-million-dollar ad campaigns to support and oppose judges and generate press to craft favorable public narratives; and
4. a brain trust of ideological think tanks, academic institutions, and "public interest" law firms, filled with lawyers and professors who generate "intellectual capital"—law review articles, *amicus* briefs, and so on—to advance the donors' interests through the courts.

## Senate Democrats' report exposes that web:

- ☒ How the "conservative legal movement" has rewritten federal law to favor the rich and powerful with 80 partisan Supreme Court decisions
- ☒ How the Federalist Society, Leonard Leo, and special-interest money dominate our courts
- ☒ How Mitch McConnell's broken Senate confirmation process helps Republicans and the big-money donors behind them

## WHAT DOES GOP COURT-PACKING MEAN FOR AMERICA:

- Voters across the country wait in line for hours to vote
- Special interests flood our airways with political ads
- Workers have discrimination cases thrown out of court
- Communities can't regulate gun violence
- Polluters can pollute our air and water without consequence
- Access to healthcare, including protections for pre-existing conditions, remains under attack

## BY THE NUMBERS:



**AT LEAST \$250 MILLION** in dark money is funding Republicans' court capture machine



**86%** of Donald Trump's nominees to the Supreme Court and influential appellate courts are Federalist Society members



**FOR 50 YEARS** right-wing donors and paid-for activists built a "conservative legal movement" to deliver for their agenda



**80+ PARTISAN 5-4 DECISIONS** at the Roberts Supreme Court have delivered wins to the Republican Party and the big corporate interests behind it



**NEARLY 90%** of the House-passed bills that Mitch McConnell sidelined to confirm partisan judges received bipartisan support

## Endnotes

- 1 Brief for the Federal Respondents, *California v. Texas*, Nos. 19-840 & 19-1019 (June 25, 2020).
- 2 Centers for Medicare & Medicaid Services, At Risk: Pre-Existing Conditions Could Affect 1 in 2 Americans: 129 Million People Could Be Denied Affordable Coverage without Health Reform, <https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/preexisting> (last visited Sept. 20, 2020).
- 3 Jonathan Adler, *Justice Department Revises Its Position in Texas ACA Case*, REASON (Mar. 25, 2019), <https://reason.com/2019/03/25/justice-department-revises-its-position/>; Jonathan Adler, *Does Anyone Support DOJ's Position in the Texas ACA Case?*, REASON (Mar. 29, 2019), <https://reason.com/2019/03/29/does-anyone-support-doj-s-position-in-the/>.
- 4 Editorial Board, *Obamacare Needs an Out-of-Court Settlement*, NAT'L REV., Dec. 17, 2018, <https://www.nationalreview.com/2018/12/obamacare-republicans-cant-rely-on-courts-on-health-care/>.
- 5 Senator Lamar Alexander, Press Release (Jun. 12, 2018), available at <https://www.alexander.senate.gov/public/index.cfm/2018/6/alexander-statement-on-texas-obamacare-court-case>.
- 6 Brian Highsmith, *Partisan Constitutionalism: Reconsidering the Role of Political Parties in Popular Constitutional Change*, 2019 WIS. L. REV. 911, 920 (2019).
- 7 *Id.* at 927-28.
- 8 Josh Harkinson, *Meet the Front Group Leading the Fight Against Taxing the Rich*, MOTHER JONES (July 23, 2012), available at <https://www.motherjones.com/politics/2012/07/national-federation-independent-businesses/>.
- 9 Donovan Slack, *Crossroads GPS gave \$3.7 million to plaintiff in health care suit*, POLITICO (Apr. 13, 2012), available at <https://www.politico.com/blogs/politico44/2012/04/crossroads-gps-gave-37-million-to-plaintiff-in-health-care-suit-120501>.
- 10 Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012), available at <https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/>.
- 11 Highsmith, *supra* note 6, at 928-29, 933.
- 12 Todd Gaziano, Randy Barnett, & Nathaniel Stewart, *the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional*, THE HERITAGE FOUNDATION (Dec. 9, 2009), available at <https://www.heritage.org/health-care-reform/report/why-the-personal-mandate-buy-health-insurance-unprecedented-and>; Josh Blackman, *How Randy Barnett joined the constitutional challenge to Obamacare*, THE VOLOKH CONSPIRACY (Sept. 10, 2013), <http://volokh.com/2013/09/10/randy-barnett-joined-constitutional-challenge-obamacare/>.
- 13 Josh Blackman, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 44 (2013).
- 14 *Id.*
- 15 Heidi Przybyla & Jonathan D. Salant, *One Donor Gave One-Third of Pro-Republican Group's Funds*, BLOOMBERG (Apr. 17, 2012), available at <https://www.bloomberg.com/news/articles/2012-04-17/one-donor-gave-one-third-of-republican-super-pac-s-funds>.
- 16 *National Federation of Independent Business (NFIB) v. Sebelius*, 567 U.S. 519 (2012).
- 17 *Id.* at 575, 647.
- 18 Kenneth R. Thomas, *The Power to Regulate Commerce: Limits on Congressional Power*, CONGRESSIONAL RESEARCH SERVICE (May 16, 2014), available at <https://fas.org/sgp/crs/misc/RL32844.pdf>.
- 19 Abbe Gluck, Mark Regan, & Erica Turret, *The Affordable Care Act's Litigation Decade*, 108 GEO. L.J. 1471, 1482 (2020).
- 20 *NFIB*, 567 U.S. at 585.
- 21 *Id.* at 625 (Ginsburg, J., dissenting) (“The Chief Justice therefore—for the first time ever—finds an exercise of Congress’ spending power unconstitutionally coercive.”).
- 22 Tonja Jacobi, *Obamacare as a Window on Judicial Strategy*, 80 TENN. L. REV. 763, 766 (2013).
- 23 Ciara Torres-Spellicy, *Tracing the Money Behind the Supreme Court Case Against Obamacare*, BRENNAN



CENTER, Aug. 31, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/tracing-money-behind-supreme-court-case-against-obamacare>

24 *Id.*

25 Judicial Crisis Network IRS Form 990 (2013, 2014, 2015, 2016, 2017, 2018). *See also* David Halperin, *Republican Attorneys General Use Corporate Cash to Lobby for Kavanaugh*, REPUBLIC REPORT (Sept. 19, 2018), <https://www.republicreport.org/2018/republican-attorneys-general-use-corporate-cash-to-lobby-for-kavanaugh/>; Torres-Spellicy, *supra* note 23.

26 *See* DPCC Senate Democrats, CAPTURED COURTS (May 2020), *available at* <https://www.hsdl.org/?view&did=839500>.

27 Tyler Olson, *An inside look at how Trump's Supreme Court list is made: 'A tremendous investment of time'*, FOX NEWS (June 10, 2020), *available at* <https://www.foxnews.com/politics/behind-the-scenes-of-how-trumps-supreme-court-list-is-made>

28 Brian Schwartz, *Outside groups gear up for expensive battle over Ruth Bader Ginsburg Supreme Court seat*, CNBC (Sept. 19, 2020), <https://www.cnbc.com/2020/09/19/outside-groups-gear-up-for-expensive-battle-over-ginsburg-supreme-court-seat.html>

29 *Id.*

30 *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

31 Robert J. Pushaw Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL'Y 519, 544 (2008).

32 Dahlia Lithwick & Mark Joseph Stern, *John Roberts' Stealth Attack on Abortion Rights Just Paid Off*, SLATE (Aug. 7, 2020), *available at* <https://slate.com/news-and-politics/2020/08/john-roberts-8th-circuit-abortion-rights-arkansas.html>.

33 *Gonzalez v. Carhart*, 550 U.S. 124 (2007).

34 18 U.S.C. § 1531.

35 *Stenberg v. Carhart*, 530 U.S. 914 (2000).

36 *Gonzales*, 550 U.S. at 163.

37 *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 708-09 (2014).

38 Brett LoGuirato, *More Than 90% Of Corporations In The US Are Just Like The One At The Center Of Today's Obamacare Decision*, BUSINESS INSIDER (June 30, 2014), *available at* <https://www.businessinsider.com/closely-held-companies-hobby-lobby-decision-obamacare-2014-6>.

39 *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S.Ct. 2367 (2020).

40 *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018).

41 *Id.* at 2371.

42 *Id.* at 2385.

43 *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016).

44 *June Medical Services L.L.C. v. Russo*, 140 S.Ct. 2103 (2020).

45 *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015).

46 *June Medical*, 140 S.Ct. at 2133.

47 *See, e.g.*, Alexandra Desanctis, *June Medical Is Another Disappointment for Pro-Lifers*, NAT'L REV. (June 29, 2020), *available at* <https://www.nationalreview.com/corner/june-medical-is-another-disappointment-for-pro-lifers/>; *Abortion foes vent disappointment after Supreme Court ruling*, THE COLUMBIAN (June 29, 2020), *available at* <https://www.columbian.com/news/2020/jun/29/abortion-foes-vent-disappointment-after-supreme-court-ruling/>.

48 Melissa Murray, *The Supreme Court's abortion decision deems pulled from the "Casey" playbook*, WASH. POST (June 29, 2020), *available at* <https://www.washingtonpost.com/opinions/2020/06/29/problem-with-relying-precedent-protect-abortion-rights/>.

49 *Hopkins v. Jegley*, 968 F.3d 912 (8th Cir. 2020).

50 Anna North, *How abortion became a partisan issue in America*, VOX (Apr. 10, 2019), *available at* <https://www.vox.com/2019/4/10/18295513/abortion-2020-roe-joe-biden-democrats-republicans>.

51 *Id.*

- 52 See e.g. Ezra Klein, *Obama revealed: A moderate Republican*, WASH. POST (Apr. 25, 2011), available at [https://www.washingtonpost.com/business/economy/obama-revealed-a-moderate-republican/2011/04/25/AFPrgfkE\\_story.html](https://www.washingtonpost.com/business/economy/obama-revealed-a-moderate-republican/2011/04/25/AFPrgfkE_story.html); Testimony of Stuart Butler, Vice President of Domestic & Economic Policy Studies, Heritage Foundation, before the U.S. Senate's Special Committee on Aging, Mar. 10, 2003, available at <https://www.heritage.org/testimony/laying-the-groundwork-universal-health-care-coverage>.
- 53 North, *supra* note 50.
- 54 See Jonathan Merritt, *The Religious Right Turns 33: What Have We Learned?*, THE ATLANTIC (June 8, 2012), available at <https://www.theatlantic.com/politics/archive/2012/06/the-religious-right-turns-33-what-have-we-learned/258204/>.
- 55 Eyal Press, *Why Republicans Could Regret Overturning Roe v. Wade*, THE NEW YORKER (Jan. 20, 2017), available at <https://www.newyorker.com/news/daily-comment/why-republicans-could-regret-overturning-roe-v-wade>.
- 56 E.g. Denise Grady, *Ruling on Contraception Draws Battle Lines at Catholic Colleges*, N.Y. TIMES (Jan. 29, 2012), available at <https://www.nytimes.com/2012/01/30/health/policy/law-fuels-contraception-controversy-on-catholic-campuses.html#:~:text=Ruling%20on%20Contraception%20Draws%20Battle%20Lines%20at%20Catholic%20Colleges,-By%20Denise%20Grady&text=Bridgette%20Dunlap%2C%20a%20Fordham%20University,with%20New%20York%20state%20law.&text=Many%20Catholic%20colleges%20decline%20to,birth%20control%2C%20citing%20religious%20reasons>.
- 57 Adele M. Stan, *Anatomy of the War on Women: How the Koch Brothers Are Funding the Anti-Choice Agenda*, REWIRE NEWS (Nov. 5, 2013), available at <https://rewire.news/article/2013/11/05/anatomy-of-the-war-on-women-how-the-koch-brothers-are-funding-the-anti-choice-agenda/>.
- 58 *Id.*
- 59 Dahlia Lithwick & Steve Vladeck, *Running on Roberts*, SLATE (Aug. 5, 2020), available at <https://slate.com/news-and-politics/2020/08/john-roberts-campaign-boogeyman.html>.
- 60 Alexander Hertel-Fernandez, Caroline Tervo, & Theda Skocpol, *How the Koch brothers built the most powerful rightwing group you've never heard of*, THE GUARDIAN (Sep. 26, 2018), available at <https://www.theguardian.com/us-news/2018/sep/26/koch-brothers-americans-for-prosperity-rightwing-political-group>.
- 61 Eric Lipton, *Billionaire Brothers' Money Plays Role in Wisconsin Dispute*, N.Y. TIMES (Feb. 21, 2011), available at <https://www.nytimes.com/2011/02/22/us/22koch.html>.
- 62 Stan, *supra* note 57.
- 63 Noar Caplan-Bricker, *What the Anti-Abortion Movement Has Won*, THE NEW YORKER (Jan. 28, 2017), available at <https://www.newyorker.com/news/news-desk/what-the-anti-abortion-movement-has-won>.
- 64 NARAL, *The Insidious Power of the Anti-Choice Movement*, 92-104 (2018).
- 65 Aaron Blake, *The final Trump-Clinton debate transcript, annotated*, WASH. POST (Oct. 19, 2016), available at <https://www.washingtonpost.com/news/the-fix/wp/2016/10/19/the-final-trump-clinton-debate-transcript-annotated/>.
- 66 NARAL, *supra* note 64, at 104-111.
- 67 Philip Bump, *A quarter of Republicans voted for Trump to get Supreme Court picks—and it paid off*, WASH POST (June 26, 2018), available at <https://www.washingtonpost.com/news/politics/wp/2018/06/26/a-quarter-of-republicans-voted-for-trump-to-get-supreme-court-picks-and-it-paid-off/>.
- 68 The Bridge Project & NARAL Pro-Choice America, *Koch-Cerned Women for America* (2015).
- 69 Sarah Fischer, *David Koch is pro-choice, supports gay rights; just not Democrats*, CNN (Aug. 23, 2019), available at <https://www.cnn.com/2014/12/14/politics/david-koch-gay-rights-abortion-democrats/index.html>.
- 70 Paul Blumenthal, *NFIB Received Huge Koch Brothers-Linked Contribution In 2011*, HUFFINGTON POST (Sept. 17, 2013), available at [https://www.huffpost.com/entry/nfib-koch-brothers\\_n\\_3943225](https://www.huffpost.com/entry/nfib-koch-brothers_n_3943225).
- 71 *Id.*
- 72 Chris Frates, *Koch Bros.-backed group gave millions to small business lobby*, CNN (Nov. 21, 2013), available at <https://www.cnn.com/2013/11/21/politics/small-business-big-donor/index.html>.
- 73 Stan, *supra* note 57.
- 74 *Id.*

- 75 Bridge Project & NARAL, *supra* note 68.
- 76 *Id.*
- 77 Amanda Marcotte, *Why Are “Free Market” Organizations Pouring Money Into Anti-Abortion Activism? The Koch Brothers.*, SLATE (Nov. 6, 2013), available at <https://slate.com/human-interest/2013/11/koch-brothers-pouring-money-into-anti-abortion-agenda-through-the-center-to-protect-patient-rights-and-freedom-partners.html>.
- 78 Viveca Novak & Peter Stone, *The JCN Story: Building a Secretive GOP Judicial Machine*, CENTER FOR RESPONSIVE POLITICS (March 3, 2015), available at <https://www.opensecrets.org/news/2015/03/the-jcn-story-building-a-secretive-gop-judicial-machine/>.
- 79 NARAL, *supra* note 64, at 6.
- 80 Laila Robbins, *Conservative Group Behind Kavanaugh Confirmation Has Spent Years Reshaping State and Federal Benches*, BRENNAN CENTER (Sep. 12, 2018), available at <https://www.brennancenter.org/our-work/analysis-opinion/conservative-group-behind-kavanaugh-confirmation-has-spent-years>.
- 81 DPCC Senate Democrats, *supra* note 26; David Armiak, *Donors Trust Bankrolled Right-Wing Judicial Appointments, Trump’s Acting AG, and Lobbying Front Groups in 2017*, PR WATCH (Feb. 19, 2019), available at <https://www.prwatch.org/news/2019/02/13449/donorstrust-bankrolled-right-wing-judicial-appointments-trumps-acting-ag-and>.
- 82 Amelia Thomson-Deveaux, *God’s Rottweilers*, POLITICO (Oct. 5, 2014), available at <https://www.politico.com/magazine/story/2014/10/becket-fund-religious-conservatives-111468>.
- 83 Laila Robbins, *Conservative Group Behind Kavanaugh Confirmation Has Spent Years Reshaping State and Federal Benches*, BRENNAN CENTER (Sept. 12, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/conservative-group-behind-kavanaugh-confirmation-has-spent-years>.
- 84 NARAL, *supra* note 64, at 6.
- 85 *Id.* The Charlotte Lozier Foundation is the research and education arm of the Susan B. Anthony List, an organization that seeks to reduce and ultimately end abortion in the U.S. by supporting anti-abortion politicians.
- 86 See DPCC Senate Democrats, *supra* note 26.
- 87 Becket, Board of Directors, <https://www.becketlaw.org/about-us/board/> (last visited Sept. 21, 2020).
- 88 Becket, 2017 Canterbury Medalist, <https://www.becketlaw.org/2017-canterbury-medalist/> (last visited Sept. 21, 2020).
- 89 Students for Life of America, Our Board, <https://studentsforlife.org/about/boardofdirectors/> (last visited Sept. 21, 2020).
- 90 See Students for Life, Conservative Transparency, <http://conservativetransparency.org/recipient/students-for-life-of-america/> (last visited Sept. 21, 2020).
- 91 International Center on Law, Life, Faith, & Family, Mission Statement, <http://icolf.org/about/mission-statement/> (last visited Sept. 21, 2020).
- 92 International Center on Law, Life, Faith, & Family, A Model Declaration on the Rights of the Family, at <http://icolf.org/model-declaration-on-the-rights-of-the-family/> (last visited Sept. 21, 2020).
- 93 As of September 2020, fetal personhood laws exist only in Alabama, Kansas, and Missouri. The 2011 Mississippi initiative failed 42% to 58%, and the 2014 North Dakota initiative failed 63% to 37%. See Rewire News Legislative Tracker (updated Nov. 7, 2018), <https://rewire.news/legislative-tracker/law-topic/personhood/>.
- 94 See EPPC files amicus brief in HHS mandate cases, ETHICS & PUBLIC POLICY CENTER, press release (Jan. 28, 2014), available at <https://eppc.org/news/eppc-files-amicus-brief-in-hhs-mandate-cases/>.
- 95 The Federalist Society, Contributors, William L. Saunders <https://fedsoc.org/contributors/william-saunders> (last visited Sept. 21, 2020).
- 96 The Federalist Society, Contributors, Clarke Forsythe, <https://fedsoc.org/contributors/clarke-forsythe-1> (last visited Sept. 21, 2020).
- 97 Alan Rappeport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES (May 18, 2016), available at <https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html>.
- 98 Highsmith, *supra* note 6, at 940.



- 99 Tyler Olson, *An inside look at how Trump's Supreme Court list is made: 'A tremendous investment of time'*, FOX NEWS (June 10, 2020), available at <https://www.foxnews.com/politics/behind-the-scenes-of-how-trumps-supreme-court-list-is-made>.
- 100 Ariane de Vogue & Devan Cole, *Notable names on Trump's list of potential Supreme Court nominees*, CNN (Sept. 20, 2020), <https://www.cnn.com/2020/09/18/politics/trump-supreme-court-list-potential-nominees/index.html>; Elliot Minberg, *Health care in the crosshairs with new Trump Supreme Court list*, Sept. 14, 2020, THE HILL, <https://thehill.com/opinion/judiciary/516243-health-care-in-the-crosshairs-with-new-trump-supreme-court-list>.
- 101 DPCC Senate Democrats, *supra* note 26.
- 102 *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (en banc).
- 103 *Id.* at 753.
- 104 *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011).
- 105 Justin Walker, *Brett Kavanaugh Said Obamacare Was Unprecedented and Unlawful*, THE FEDERALIST (July 3, 2018), available at <https://thefederalist.com/2018/07/03/brett-kavanaugh-said-obamacare-unprecedented-unlawful/>.
- 106 *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1152 (10th Cir. 2013).
- 107 *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 799 F.3d 1315, 1318 (10<sup>th</sup> Cir. 2015).
- 108 Mark Joseph Stern, *Senate Confirms Trump Judicial Nominee Who Fought Against Abortion, Surrogacy, and Fertility Treatment*, SLATE (Dec. 4, 2019), <https://slate.com/news-and-politics/2019/12/sarah-pitlyk-trump-judge-ivf-abortion.html>; see also, e.g., Brief of 67 Catholic Theologians & Ethicists as Amici Curiae in Support of Hobby Lobby Stores, Inc., & Conestoga Wood Specialties Corp., *Sebelius v. Hobby Lobby Stores, Inc.* (2014) (Nos. 13-354, 13-356), 2014 WL 316716.
- 109 *Id.*
- 110 Sarah Pitlyk, Judge Brett Kavanaugh's Impeccable Record of Constitutional Conservatism, NAT'L REV. (July 3, 2018), available at <https://www.nationalreview.com/2018/07/judge-brett-kavanaughs-impeccable-record-of-constitutional-conservatism/>.
- 111 Cory Wilson, *ACA: Big Intrusive Government*, MADISON COUNTY J. (Feb. 20, 2014), available at <https://www.afj.org/wp-content/uploads/2020/01/Wilson-Attachments-p76-77.pdf>.
- 112 Cory Wilson, *Obamacare train getting derailed in Mississippi*, MOBILE (AL) PRESS-REGISTER (Feb. 22, 2013), available at <https://www.afj.org/wp-content/uploads/2020/01/Wilson-Attachments-p143-145.pdf>.
- 113 Cory Wilson, *Obama's Day of Reckoning*, MADISON COUNTY J. (June 28, 2012), available at <https://www.afj.org/wp-content/uploads/2020/01/Wilson-Attachments-p193.pdf>.
- 114 Kate Smith, *Trump's 200th judge called for the "complete and immediate reversal" of Roe v. Wade*, CBS NEWS (June 25, 2020), <https://www.cbsnews.com/news/cory-wilson-trump-200th-federal-judge-reversal-roe-v-wade/>.
- 115 *Oklahoma v. Burwell*, Brief of Amicus Curiae in Support of Petitioner, No. 14-586 (2014), available at <https://sblog.s3.amazonaws.com/wp-content/uploads/2014/12/Okla-v.-Burwell-WV-amicus-brief-M0051450xCECC6.pdf>.
- 116 Bill Rankin, *Judge rejects challenge to state's 'fetal pain' abortion law*, THE ATLANTA J.-CONSTITUTION (Aug. 13, 2016), available at <https://www.ajc.com/news/local/judge-rejects-challenge-state-fetal-pain-abortion-law/rOWQw1E7Wb50EGPIrMNWMJ/>.
- 117 Federal Defendants' Memorandum in Response to Plaintiffs' Application for Preliminary Injunction, *Texas v. United States* (N.D. Tex. June 7, 2018), available at [https://www.justsecurity.org/wp-content/uploads/2018/06/ACA.Azar\\_.filing.pdf](https://www.justsecurity.org/wp-content/uploads/2018/06/ACA.Azar_.filing.pdf).
- 118 Senator Lamar Alexander, Press Release (Jun. 12, 2018), available at <https://www.alexander.senate.gov/public/index.cfm/2018/6/alexander-statement-on-texas-obamacare-court-case>.
- 119 Petition for Writ of Certiorari, *Hargan v. Garza*, No. 17-654 (Nov. 3, 2017), available at 2017 WL 5127296.
- 120 Appellate Brief of Texas, et al. at 5, *Hotze v. Sebelius*, No. 14-20039 (May 15, 2014), available at 2014 WL 2158681.



- 121 State Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673 (W.D. Tex. 2014), available at 2014 WL 115114622.
- 122 Amy C. Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. 61, 80 (2017) (book review), available at [https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=2330&context=law\\_faculty\\_scholarship](https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=2330&context=law_faculty_scholarship).
- 123 Lecture: *Roe at 40: The Supreme Court, Abortion and the Culture Wars that Followed*, University of Notre Dame (Jan. 18, 2013), posting of event archived at <https://al.nd.edu/news/events/2013/01/18/lecture-roe-at-40-the-supreme-court-abortion-and-the-culture-war-that-followed/>.
- 124 Amy K. Matsui, *Five Things You Should Know About 7th Circuit Nominee Amy Coney Barrett*, NATIONAL WOMEN'S LAW CENTER (Sept. 7, 2017), available at <https://nwlc.org/blog/five-things-you-should-know-about-7th-circuit-nominee-amy-coney-barrett/>.
- 125 E.g. Americans United for Life, *Americans United for Life Urges the President to Nominate Judge Barrett to the Supreme Court* (Sept. 19, 2020), <https://aui.org/2020/09/19/americans-united-for-life-urges-the-president-to-nominate-judge-barrett-to-the-supreme-court/>.
- 126 Questions for the Record for Greg Katsas, Senate Judiciary Committee (Oct. 24, 2017), <https://www.judiciary.senate.gov/imo/media/doc/Katsas%20Responses%20to%20QFRs.pdf>.
- 127 Stacey Leasca, *20 People That Could Fill RGB's Supreme Court Seat*, GLAMOUR (Sept. 19, 2020), <https://www.glamour.com/story/20-people-could-fill-ruth-bader-ginsburg-supreme-court-seat>.
- 128 Brief for Private Respondents on the Individual Mandate, *NFIB v. Sebelius*, 567 U.S. 519 (2012), available at 2012 WL 379586.
- 129 Brief of Appellants, *Ohio v. United States*, 849 F.3d 313 (6th Cir. 2017), available at 2016 WL 1380982.
- 130 Brief of Amicus Curiae, *Horne v. Isaacson*, No. 13-402 (2014), available at 2013 WL 5837683.
- 131 Brief of Amici Curiae Ethics & Religious Liberty Commission et al. in Support of Appellee and Affirmance, *Greater Baltimore Center for Pregnancy Concerns v. Mayor and City Council of Baltimore*, 879 F.3d 101 (4th Cir. 2018); see also Brief of Amicus Curiae Ethics & Public Policy Center in Support of Petitioners, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), available at 2016 WL 155625.
- 132 See Brief for Respondents, *Sebelius v. Hobby Lobby Stores, Inc.*, sub nom, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), available at 2014 WL 546899.
- 133 Brief of Amicus Curiae Association of American Physicians & Surgeons in Support of Respondents, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), available at 2016 WL 491883.
- 134 Elizabeth Nash, Rachel Benson Gold, Lizamarie Mohammed, Zohra Ansari-Thomas, & Olivia Cappello, *Policy Trends in the States*, GUTTMACHER INST. (Jan. 2, 2018), available at <https://www.guttmacher.org/article/2018/01/policy-trends-states-2017>.
- 135 Mary Ziegler, *Social Conservatives Are Learning All the Wrong Lessons From Trump*, THE ATLANTIC (June 30, 2020), available at <https://www.theatlantic.com/ideas/archive/2020/06/social-conservatives-roberts-trump/613660/>.
- 136 Jeffrey Toobin, *The Abortion Fight and the Pretense of Precedent*, THE NEW YORKER (May 19, 2019), available at <https://www.newyorker.com/magazine/2019/05/27/the-abortion-fight-and-the-pretense-of-precedent>.
- 137 Rick Rojas & Alan Blinder, *Alabama Abortion Ban Is Temporarily Blocked by a Federal Judge*, N.Y. TIMES (Oct. 29, 2019), available at <https://www.nytimes.com/2019/10/29/us/alabama-abortion-ban.html>.
- 138 Texas initially included abortions in a list of medical procedures that must be delayed during the pandemic, forcing those seeking care to travel long distances to clinics in neighboring states. Five other states—Indiana, Iowa, Mississippi, Ohio, and Oklahoma—issued similar restrictions. See Jennifer Haberkorn, *Amid coronavirus outbreak some red states move to restrict abortion, spurring legal fight*, L.A. TIMES (Apr. 2, 2020), available at <https://www.latimes.com/politics/story/2020-04-02/red-states-block-abortion-coronavirus-outbreak#:~:text=While%20several%20states%20and%20the,to%20protect%20the%20life%20or>.
- 139 Rojas & Blinder, *supra* note 143.
- 140 Gluck, Regan, & Turret, *supra* note 19, at 1502.
- 141 *Fulton v. City of Philadelphia*, 140 S.Ct. 1104 (2020).

- 142 Lynn Adelman, *The Roberts' Court Assault on Democracy*, 14 HARV. L. & POL'Y REV. 131, 156 (2019), available at <https://harvardlpr.com/wp-content/uploads/sites/20/2020/03/Adelman.pdf>.
- 143 *Id.*
- 144 Linda J. Blumberg, Matthew Buettgens, John Holahan, & Clare Pan, *State-by-State Estimates of the Coverage and Funding Consequences of Full Repeal of the ACA*, URBAN INST. (Mar. 2019), available at [https://www.urban.org/sites/default/files/publication/100000/repeal\\_of\\_the\\_aca\\_by\\_state\\_0.pdf](https://www.urban.org/sites/default/files/publication/100000/repeal_of_the_aca_by_state_0.pdf).
- 145 See Dhruv Khullar, Zirui Song, & Dave A. Chokshi, *Safety-Net Health Systems At Risk: Who Bears The Burden Of Uncompensated Care?*, HEALTH AFFAIRS (May 10, 2018), available at <https://www.healthaffairs.org/doi/10.1377/hblog20180503.138516/full/>.
- 146 Emily Gee, *Number of Americans with Preexisting Conditions by District for the 116<sup>th</sup> Congress*, CENTER FOR AMERICAN PROGRESS (Oct. 2, 2019), <https://www.americanprogress.org/issues/healthcare/news/2019/10/02/475030/number-americans-preexisting-conditions-district-116th-congress/>.
- 147 Planned Parenthood, *Medicaid Expansion*, <https://www.plannedparenthoodaction.org/issues/health-care-equity/medicaid-and-reproductive-health/medicaid-expansion> (last visited Sept. 21, 2020).
- 148 Tara Straw & Aviva Aron-Dine, *Commentary: ACA Repeal Even More Dangerous During Pandemic and Economic Crisis*, Center on Budget & Policy Priorities (June 24, 2020), <https://www.cbpp.org/health/commentary-aca-repeal-even-more-dangerous-during-pandemic-and-economic-crisis>.
- 149 Samantha Artiga, Petry Ubri, & Julia Foutz, *What is at Stake for Health and Health Care Disparities under ACA Repeal?*, KAISER FAMILY FOUNDATION (Mar. 20, 2017), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/what-is-at-stake-for-health-and-health-care-disparities-under-aca-repeal/>.
- 150 Straw & Dine, *supra* note 154.
- 151 Unidos U.S., *Affordable Care Act Threatened: What's At Stake for Latinos*, June 2020, available at <http://publications.nclr.org/handle/123456789/2061>
- 152 Eliana Dockterman, *Five Things Women Need to Know About the Hobby Lobby Ruling*, TIME (July 1, 2014), available at [https://time.com/2941323/supreme-court-contraception-ruling-hobby-lobby/#:~:text=The%20Affordable%20Care%20Act%20\(a.k.a.,lasts%20up%20to%2012%20years\)](https://time.com/2941323/supreme-court-contraception-ruling-hobby-lobby/#:~:text=The%20Affordable%20Care%20Act%20(a.k.a.,lasts%20up%20to%2012%20years)).
- 153 Inst. of Medicine, *CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS* (2011), available at <https://www.nap.edu/catalog/13181/clinical-preventive-services-for-women-closing-the-gaps>.
- 154 Press Release, *Many American Women Use Birth Control Pills for Noncontraceptive Reasons*, GUTTMACHER INST. (Nov. 15, 2011), available at <https://www.guttmacher.org/news-release/2011/many-american-women-use-birth-control-pills-noncontraceptive-reasons>.
- 155 See *Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 238, 262 (D.C. Cir. 2014), *cert. granted sub nom. Roman Catholic Archbishop of Washington v. Burwell*, 136 S. Ct. 444, *cert. granted sub nom. Priests for Life v. Dep't of Health & Human Servs.*, 136 S. Ct. 446, and *vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016).
- 156 Nat'l Partnership for Women & Families, *MATERNAL HEALTH AND ABORTION RESTRICTIONS: HOW LACK OF ACCESS TO QUALITY CARE IS HARMING BLACK WOMEN* (Oct. 2019), <https://www.nationalpartnership.org/our-work/resources/repro/maternal-health-and-abortion.pdf>.
- 157 Jonathan M. Bearak, Kristen Lagasse Burke, & Rachel K. Jones, *Disparities and change over time in distance women would need to travel to have an abortion in the USA: a spatial analysis*, THE LANCET (Oct. 3, 2017), available at [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(17\)30158-5/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(17)30158-5/fulltext).
- 158 *Id.*; see also Stanley K. Henshaw, *Factors Hindering Access to Abortion Services*, PERSPECTIVES ON SEXUAL & REPRODUCTIVE HEALTH, MAR./APR. 1995, VOL. 27, NO. 2, available at <https://www.guttmacher.org/journals/psrh/1995/03/factors-hindering-access-abortion-services>.
- 159 Bearak, Burke, & Jones, *supra* note 163.
- 160 Y. Tony Yang & Katy B. Kozhimannil, *Medication Abortion Through Telemedicine: Implications of a Ruling by the Iowa Supreme Court*, *Obstetrics & Gynecology*, OBSTET. GYNECOL. Feb. 2016, vol. 127, no. 2, p. 313-16, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4780360/>.
- 161 *Id.*
- 162 Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage*

Matters, GUTTMACHER INST.(July 14, 2016), *available at* <https://www.guttmacher.org/gpr/2016/07/abortion-lives-women-struggling-financially-why-insurance-coverage-matters>.

163 Nat'l Partnership for Women & Families, *supra* note 162. Beginning in 1976, Congress limited the use of federal funds to reimburse the cost of abortions under Medicaid. These restrictions became known as the Hyde Amendment. In 1980, the Supreme Court held 5-4 that states participating in Medicaid did not have to fund medically necessary abortions for which federal reimbursement was unavailable because of the Hyde Amendment. *Harris v. McRae*, 448 U.S. 297 (1980). As a result, millions of low-income Americans were left without insurance coverage for abortions.

164 Nat'l Partnership for Women & Families, *supra* note 162.

165 Robert Barnes, *Abortion, transgender rights likely to land back before Supreme Court*, WASH. POST (Aug. 13, 2020), *available at* [https://www.washingtonpost.com/politics/courts\\_law/arkansas-abortion-florida-transgender-supreme-court/2020/08/12/588f1162-dc09-11ea-809e-b8be57ba616e\\_story.html](https://www.washingtonpost.com/politics/courts_law/arkansas-abortion-florida-transgender-supreme-court/2020/08/12/588f1162-dc09-11ea-809e-b8be57ba616e_story.html).

166 Josh Hawley Twitter post, *available at* <https://twitter.com/HawleyMO/status/1277647041968123907>

167 Brian Schwartz, *Outside groups gear up for expensive battle over Ruth Bader Ginsburg Supreme Court seat*, CNBC (Sept. 19, 2020), <https://www.cnbc.com/2020/09/19/outside-groups-gear-up-for-expensive-battle-over-ginsburg-supreme-court-seat.html>

168 *Id.*

169 Americans United for Life, 5th Circuit Protects Women's Health with Ruling Holding Texas Abortionists to Real Medical Standards (June 9, 2015), <https://aul.org/2015/06/09/5th-circuit-protects-womens-health-with-ruling-holding-texas-abortionists-to-real-medical-standards/>.

170 Mary Ziegler, *After Life: Governmental Interests and the New Antiabortion Incrementalism*, 73 U. MIAMI L. REV. 78, 95 (2018).

171 *Id.* at 87.

172 *Id.*

173 Americans United for Life, Court Cases, <https://aul.org/what-we-do/court-cases/> (last accessed Aug. 27, 2020).

174 *Id.*