



*For Immediate Release*

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## **Judge Kavanaugh's Nomination Threatens Pre-Existing Condition Protections For Millions Of Americans**

***Sen. Orrin Hatch (R-UT) on the Affordable Care Act: "Anybody who thinks it's not going to be litigated sometime in the future is nuts."***

**PRESIDENT TRUMP PROMISED TO APPOINT JUDGES TO OVERTURN AND ELIMINATE HEALTH CARE PROTECTIONS UNDER THE AFFORDABLE CARE ACT**

"If I win the presidency, my judicial appointments will do the right thing unlike Bush's appointee John Roberts on Obamacare." – Then-candidate Donald Trump [[6/26/15](#)]

"Remember, Cruz And Bush gave us Roberts who upheld #ObamaCare twice! I am the only one who will #MAKEAMERICAGREATAGAIN!" – Then-candidate Donald Trump [[2/19/16](#)]

"Justice Roberts, everybody liked Justice Roberts, turned out to be a disaster because of Obamacare. He could have killed it twice, and he turned out to be a total disaster, so." – Then-candidate Donald Trump [[2/4/16](#)]

**THE TRUMP ADMINISTRATION'S ATTACK ON PRE-EXISTING CONDITION PROTECTIONS IS CURRENTLY MOVING THROUGH THE COURTS, COULD REACH THE SUPREME COURT—THREATENS AFFORDABLE COVERAGE FOR CANCER PATIENTS, PREGNANT WOMEN, AND PEOPLE WITH DIABETES**

In June 2018, President Trump's Department of Justice broke with longstanding Department precedent and decided it would no longer defend the Affordable Care Act (ACA). In a brief filed by the Trump administration in *Texas v. United States*, the administration joined with 20 Republican-led states to argue that the ACA's protections for people with pre-existing conditions should be invalidated.

- A 2016 [analysis](#) by the nonpartisan Kaiser Family Foundation suggests that this attack could take health care away from 52 million Americans with pre-existing conditions, including cancer patients, people with diabetes, and pregnant women.
- According to [physician groups](#), the Trump administration’s brief “would have a devastating impact on doctors, patients, and the American health care system as a whole.”
- Currently, *Texas v. U.S.* is pending before a federal trial court in Texas. Once the trial court rules on the case, the losing party will appeal this decision to the United States Court of Appeals for the Fifth Circuit. Any appeal from that court would be to the United States Supreme Court.
- *Texas v. United States* could make its way to the Supreme Court in an upcoming term, giving President Trump’s nominee to replace Justice Kennedy a critical role in determining whether Americans with pre-existing conditions will continue to have access to affordable, quality health care.

**JUDGE KAVANAUGH LAID OUT THE “ROADMAP” FOR SUPREME COURT JUSTICES WHO RULED AGAINST THE ACA WHEN HE CHOSE NOT TO AFFIRMATIVELY UPHOLD THE HEALTH LAW**

***“No other contender on President Trump’s list is on record so vigorously criticizing the law.” –[former Kavanaugh law clerk](#)***

Judge Kavanaugh considered the constitutionality of the Affordable Care Act in 2011, and his dissent against upholding the health law has been described as a “roadmap” for the Supreme Court justices who ultimately sided against the law in 2012. When the D.C. Circuit Court considered the constitutionality of the Affordable Care Act in 2011, the court upheld the health law, with Kavanaugh dissenting, arguing that it was premature to hear the case before the individual mandate had taken effect. In his dissent, Kavanaugh wrote two things:

1. the president could choose not to enforce the individual mandate “if [he] concludes that enforcing it would be unconstitutional”; and
2. the taxing clause argument “may have a potential problem.” The taxing clause argument was, in 2012, the basis for Justice Roberts’ majority opinion upholding the Affordable Care Act.

A former clerk for Judge Kavanaugh [wrote](#) this summer, “Kavanaugh’s dismissal of the Taxing Clause argument is a roadmap to the conclusion reached *by the dissenters*—that the individual mandate is unconstitutional under the Taxing Clause,” and “the only justices following a roadmap from Brett Kavanaugh were the ones who said Obamacare was unconstitutional.”

Another former clerk for Judge Kavanaugh [summarized](#) Kavanaugh's decision, "...any suggestion that his decision paved the way for the Supreme Court's disastrous ruling is, as Justice Scalia would later put it in an Obamacare dissent, 'pure applesauce.' The Supreme Court Justices who followed Judge Kavanaugh in the Obamacare case were *the dissenters*, Justices Scalia, Thomas, Alito, and Kennedy."

## **WITH THE POTENTIAL FOR JUDGE KAVANAUGH, HOSTILE TO THE ACA, TO JOIN THE SUPREME COURT AND THE GOVERNMENT FIGHTING AGAINST THE LAW, THE LEGAL THREAT TO PRE-EXISTING CONDITION PROTECTIONS IS REAL AND SIGNIFICANT**

In Judge Kavanaugh, President Trump has fulfilled his [promise](#) to nominate a justice who would overturn the ACA. With a new, more conservative Supreme Court, the *Texas v. United States* lawsuit (or another case) could succeed in taking away protections for people with pre-existing conditions, disabilities, and older Americans.

- The previous challenges to the ACA that reached the Supreme Court (*King v. Burwell* and *NFIB v. Sebelius*) were narrowly decided and do not predict how the Court will rule after a successor to Justice Kennedy joins the Court.
- Given the deference Chief Justice Roberts has shown to the administration, the addition of another justice hostile to the health care law and its protections for pre-existing conditions would be a huge risk to American families who depend on the protections.

The issue in the *Texas* case is whether by repealing the penalties associated with the ACA's individual mandate, the Republican Congress effectively eliminated the ACA's critical protections for Americans with pre-existing conditions, disabilities, and older Americans.

- Rather than defend laws that protect Americans' health care as it did during the Obama administration, the Department of Justice under President Trump has chosen to fight against those laws.
- Under President Trump, the Department of Justice is arguing that the individual mandate and the protections for pre-existing conditions are inextricably linked and therefore the protections have to be repealed along with the mandate. This is an argument legal scholars have [called](#) "so radical, and so self-evidently without merit, that career lawyers in that agency would not sign their names to it."

Given that this question about "severability" has not been previously decided, it is an open question how Chief Justice Roberts would rule. If the president nominates someone hostile to the ACA as he has promised, critical protections under the ACA, like protections for people with pre-existing conditions, disabilities, and older Americans, will be facing a huge risk.

## **JUDGE KAVANAUGH WOULD BE A CRITICAL VOTE ON HEALTH CARE RIGHTS**

In addition to *Texas v. United States*, there are dozens of health care cases pending in the lower courts which are likely to be appealed to the Supreme Court in upcoming terms. The outcomes of these cases in the Supreme Court will directly impact access to health care for millions of American families, including the most vulnerable in our society. These cases deal with critical issues, such as:

- The scope of health care coverage for nursing mothers, the transgender community, and individuals with disabilities. (*Briscoe v. Health Care Service Corp*, *Condry v. United Health Group, Inc.*, *Prescott v. Rady Children's Hospital*).
- False advertising by health insurance companies. (*Harvey v. Centene Corp*)
- Whether employers are required to provide health care coverage to their employees. (*Marin v. Dave & Buster's, Inc.*)
- In each of these cases, there is a question about whether the ACA creates rights that individuals can enforce in courts. The Supreme Court is likely to weigh in, which could impact every pending case about access to health care under the ACA.

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