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## **“I Walk in, Sign. I Don’t Have to Go Through Congress.” President Trump’s Use of Executive Orders to Unravel the Patient Protection and Affordable Care Act**

Elizabeth Van Nostrand

*University of Pittsburgh Center for Public Health Practice, evannostrand@pitt.edu*

Tina Batra Hershey

*University of Pittsburgh School of Law, tbh16@pitt.edu*

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**“I WALK IN, SIGN. I DON’T HAVE TO GO THROUGH CONGRESS.”<sup>1</sup> PRESIDENT TRUMP’S USE OF EXECUTIVE ORDERS TO UNRAVEL THE PATIENT PROTECTION AND AFFORDABLE CARE ACT**

ELIZABETH VAN NOSTRAND\* AND TINA BATRA HERSHEY\*\*

ABSTRACT

*Executive orders, used by presidents to advance their administrations’ agendas, have changed history. These powerful written instruments were used to confine Japanese Americans during World War II, desegregate public schools, and create NASA. On the day of his inauguration, President Donald J. Trump issued his first Executive Order which directed secretaries of executive branch agencies to begin dismantling President Barack Obama’s flagship initiative—the Patient Protection and Affordable Care Act (ACA). This action, along with subsequent executive orders, precipitated a flurry of regulatory change and judicial challenges. Whether President Trump will ultimately be successful in crippling the ACA is still to be determined; however, his use of executive orders and the Supreme Court’s interpretation of the scope and limits of presidential authority will affect all future administrations.*

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1. Igor Bobic, *Donald Trump Repeats Vows to Revoke Obama’s Executive Orders*, HUFFINGTON POST (Dec. 16, 2015), [https://www.huffingtonpost.com/entry/donald-trump-executive-orders\\_us\\_5671c88ee4b0688701dbfb29](https://www.huffingtonpost.com/entry/donald-trump-executive-orders_us_5671c88ee4b0688701dbfb29).

\* Elizabeth Van Nostrand, JD is the Director of the MPH and JD/MPH programs at the University of Pittsburgh. She is also an Associate Professor for Health Policy and Management and an Adjunct Professor for the School of Law.

\*\* Tina Batra Hershey, JD, MPH is an Assistant Professor for Health Policy and Management at the University of Pittsburgh and the Assistant Director for Law and Policy at the Center for Public Health Practice.

## I. INTRODUCTION

*“We finally declared that in America, health care is not a privilege for a few, but a right for everybody.” President Barack Obama celebrating the seventh anniversary of the Patient Protection and Affordable Care Act<sup>2</sup>*

The initiative that singularly defines President Barack Obama’s domestic legacy is the passage of two companion laws—The Patient Protection and Affordable Care Act of 2010<sup>3</sup> and the Health Care and Education Reconciliation Act of 2010<sup>4</sup> (collectively referred to as the ACA). The ACA is the most comprehensive and radical federal health care reform enacted in the U.S. since the Medicaid Act of 1965.<sup>5</sup> This dramatic transformation of the U.S. health care system was necessitated by decades of escalating health care costs coupled with declining health outcomes.<sup>6</sup> In 2016, health care spending in the U.S. reached \$3.3 trillion, reflecting an increase of 4.3% over the previous year<sup>7</sup> and representing 17.9% of the nation’s total gross domestic product.<sup>8</sup> Despite disproportionate and unbridled spending, among thirty-six industrialized nations, the U.S. ranks twenty-ninth in infant mortality<sup>9</sup> and twenty-sixth for life expectancy.<sup>10</sup> Although the U.S. spends more on health care than any other nation, we lag behind comparable countries in key health outcomes.<sup>11</sup>

In response, the ACA was enacted to improve health outcomes while controlling health care costs through three main objectives: (1) reforming the private insurance market to make health care insurance more affordable; (2) expanding Medicaid coverage for all adults with incomes below 138% of the federal poverty level; and (3) lowering the cost of health care by influencing the

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2. Bob Bryan, *Obama Defends Obamacare: ‘America is Stronger Because of the Affordable Care Act’*, BUS. INSIDER (March 23, 2017), <https://www.businessinsider.coc/barack-obama-statement-on-obamacare-affordable-care-act-2017-3>.

3. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

4. Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

5. Social Security Amendments of 1965, Pub. L. 89-97, 79 Stat. 286 (1965).

6. AARON MCKETHAN ET AL., IMPROVING QUALITY AND VALUE IN THE U.S. HEALTH CARE SYSTEM 41 (2009).

7. *National Health Expenditure Data*, CTRS. MEDICARE & MEDICAID SERVS., <https://www.cms.gov/reserese-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpnationa/nationalhealthaccnationalhealtha.html> (last visited Apr. 3, 2019).

8. *Id.*

9. AMERICA’S HEALTH RANKINGS UNITED HEALTH FOUND., 2016 ANNUAL REPORT, <https://www.americashealthrankings.org/learn/reports/2016-annual-report/comparison-with-other-nations>.

10. *Id.*

11. Irene Papanicolas et al., *Health Care Spending in the United States and Other High-Income Countries*, 319 J. AM. MED. ASS’N 1024, 1025 (2018).

way health care decisions are made.<sup>12</sup> Since its enactment, more than twenty million adults have acquired health insurance coverage, with widespread gains across all racial and ethnic groups, including blacks (3 million), Latinos (4 million), and non-elderly whites (8.9 million).<sup>13</sup> Some of the most popular changes implemented by the ACA are eliminating lifetime and annual limits on the dollar value of benefits,<sup>14</sup> allowing children to remain on their parents' health insurance plans until age twenty-six,<sup>15</sup> and prohibiting discrimination based upon preexisting conditions or health status (guaranteed issue).<sup>16</sup> Approximately twenty-seven percent of adults ages eighteen to sixty-four (fifty-two million people)<sup>17</sup> have conditions that would have precluded them from obtaining insurance before the enactment of the ACA.

More than eight years after its passage, the ACA remains controversial. An August 2018 survey reveals that fifty percent of Americans favor the ACA;<sup>18</sup> however, there is a distinct partisan divide. Seventy-seven percent of Democrats support the law with an equal percentage of Republicans (seventy-eight percent) holding unfavorable views.<sup>19</sup> Seventy-five percent of Americans, however, favor continuing the preexisting condition protection provisions of the ACA, including a majority of both parties (eighty-six percent of Democrats, fifty-eight percent of Republicans).<sup>20</sup>

Nevertheless, in *Texas v. United States*, twenty Republican state attorneys general and two individuals filed suit challenging the ACA in its entirety or, in the alternative, specific portions of the law, including the preexisting condition

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12. *Affordable Care Act (ACA)*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/affordable-care-act/>.

13. Namrata Uberoi et al., *Health Insurance Coverage and the Affordable Care Act, 2010-2016*, DEPT. OF HEALTH AND HUMAN SERVS. (2016), <https://aspe.hhs.gov/system/files/pdf/187551/ACA2010-2016.pdf>.

14. 42 U.S.C. § 300gg-11(a)(1)(A)-(B) (2012).

15. *Id.* § 300gg-14(a).

16. *Id.* § 300gg-1; *Id.* § 300gg-2; *Id.* §§ 300gg-4.

17. Gary Claxton et al., *Preexisting Conditions and Medical Underwriting in the Individual Insurance Market Prior to the ACA*, KAISER FAM. FOUND. 1, 2 (2016), <https://www.kff.org/health-reform/issue-brief/pre-existing-conditions-and-medical-underwriting-in-the-individual-insurance-market-prior-to-the-aca/>.

18. Ashley Kirzinger et al., *Kaiser Health Tracking Poll – Late Summer 2018: The Election, Pre-Existing Conditions, and Surprises on Medical Bills*, KAISER FAM. FOUND. (Sept. 5, 2018), [https://www.kff.org/health-reform/poll-finding/kaiser-health-tracking-poll-late-summer-2018-the-election-pre-existing-conditions-and-surprises-on-medical-bills/?utm\\_campaign=KFF-2018-September-Poll-ACA-Pre-Existing-Condition-Protections&utm\\_source=hs\\_email&utm\\_medium=email&utm\\_content=2&\\_hsenc=p2ANqtz—ppRA6xaN1uYbJb0PPFoU2tAGfYtQ73xEbt2OrKtCp gXTgWmr2enqu1PRhmXoLRquBeTe\\_i85WQTBXML4fP43o-1FwA&\\_hsmi=2](https://www.kff.org/health-reform/poll-finding/kaiser-health-tracking-poll-late-summer-2018-the-election-pre-existing-conditions-and-surprises-on-medical-bills/?utm_campaign=KFF-2018-September-Poll-ACA-Pre-Existing-Condition-Protections&utm_source=hs_email&utm_medium=email&utm_content=2&_hsenc=p2ANqtz—ppRA6xaN1uYbJb0PPFoU2tAGfYtQ73xEbt2OrKtCp gXTgWmr2enqu1PRhmXoLRquBeTe_i85WQTBXML4fP43o-1FwA&_hsmi=2).

19. *Id.*

20. *Id.*

protection.<sup>21</sup> On June 7, 2018, the Department of Justice, on behalf of the Trump administration, filed a brief declining to defend the constitutionality of the ACA.<sup>22</sup> Recognizing the popularity among Americans for continuing preexisting coverage protections, Senate Majority Leader Mitch McConnell (R-KY) boldly claimed that “[t]here’s nobody in the Senate that I’m familiar with who is not in favor of coverage of pre-existing conditions.”<sup>23</sup> And, although his administration is instrumental in the *Texas v. United States* case, President Trump now pledges to support preexisting condition coverage.<sup>24</sup>

The Republican party has long desired to repeal President Obama’s signature health care achievement.<sup>25</sup> In fact, repealing the ACA “very, very quickly”<sup>26</sup> is a mantra for the Trump administration and many Republican legislators. Since his inauguration and through the end of 2018, President Trump has issued eighty-five executive orders, three of which directly target the ACA.<sup>27</sup> This Article first provides an overview of the power and effect of presidential executive orders, then focuses on President Trump’s use of these instruments to dismantle President Obama’s flagship program.

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21. *Id.*; Complaint at 1–5, *Texas v. United States*, Civil Action No. 4:18-cv-00167-O (N.D. Tex. Feb. 26, 2018).

22. Letter from Jeff Sessions, III, Attorney General, on *Texas v. United States*, No. 4:14-cv-00167-O (N.D. Tex.) to Paul Ryan, Speaker of the House (June 7, 2018); see also Katie Keith, *Trump Administration Declines to Defend the ACA*, HEALTH AFF. BLOG (June 8, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180608.355585/full/>.

23. Steven T. Dennis & Sahil Kapur, *McConnell Defends Lawsuit to Undo Pre-Existing Condition Protection*, BLOOMBERG (Oct. 18, 2018), <https://www.bloomberg.com/news/articles/2018-10-18/mcconnell-defends-trump-backed-suit-on-health-care-protections>.

24. Jacob Pramuk, *Trump Pledges to Support Pre-Existing Conditions Coverage Even as His Administration Backs Lawsuit to Scrap It*, CNBC (Oct. 22, 2018), <https://www.cnbc.com/2018/10/19/trump-says-he-backs-pre-existing-conditions-coverage-his-actions-say-no.html>.

25. Jessie Hellmann, *Ryan: Obamacare Repeal is First Priority Under Trump*, HILL (Dec. 4, 2016), <https://thehill.com/homenews/house/308691-repealing-obamacare-first-priority-for-republicans-under-trump>.

26. Jenna Johnson, *Trump’s Grand Promises to ‘Very, Very Quickly’ Repeal Obamacare Run Into Reality*, WASH. POST (July 18, 2017), [https://www.washingtonpost.com/politics/trumps-grand-promises-to-very-very-quickly-repeal-obamacare-run-into-reality/2017/07/18/91b5f220-6bd3-11e7-9c15-177740635e83\\_story.html?noredirect=on&utm\\_term=.ab04f1671282](https://www.washingtonpost.com/politics/trumps-grand-promises-to-very-very-quickly-repeal-obamacare-run-into-reality/2017/07/18/91b5f220-6bd3-11e7-9c15-177740635e83_story.html?noredirect=on&utm_term=.ab04f1671282).

27. *Executive Orders*, FEDERAL REGISTER, <https://www.federalregister.gov/presidential-documents/executive-orders> (last updated Apr. 2, 2018).

## II. THE EFFECT AND SCOPE OF EXECUTIVE ORDERS

### A. *The Effect: "Stroke of the Pen. Law of the Land. Kind of Cool."*<sup>28</sup> Paul Begala, *Aid to President William J. Clinton, Upon Discovering the Effect of Executive Orders*

The Founding Fathers recognized the importance of a tripartite system of government. "The accumulation of all powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny."<sup>29</sup> Each federal government branch has clearly defined authorities and control. With the exception of the veto power, the president has no authority to engage in lawmaking; rather, executive power is given to the Office of the President<sup>30</sup> to faithfully enforce the law. The president's power is given great deference. Under common law, there is a rebuttable presumption that a president's duties are properly discharged unless clear and convincing evidence is presented to the contrary.<sup>31</sup>

Executive orders are instruments used by presidents and governors to direct executive branch agencies, establish policy, and issue declarations.<sup>32</sup> Throughout the history of the U.S., they have made a great impact. President Lincoln's Emancipation Proclamation changed the legal status of subjugated Americans living in the Confederate South.<sup>33</sup> Through Executive Order 9,066, President Franklin Delano Roosevelt instructed the Secretary of War to incarcerate Japanese Americans, German Americans, and Italian Americans in internment camps.<sup>34</sup> On July 26, 1948, President Truman used an executive order to desegregate the military.<sup>35</sup> Through an executive order, President Eisenhower placed the Arkansas National Guard under federal control and ordered them to mitigate violence associated with school integration in Little Rock.<sup>36</sup> The National Aeronautics and Space Administration (NASA)<sup>37</sup> and the Warren Commission to investigate President Kennedy's assassination<sup>38</sup> were established through executive orders by Presidents Eisenhower and Johnson,

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28. James Bennet, *True to Form, Clinton Shifts Energies Back to U.S. Focus*, N.Y. TIMES (July 5, 1998), <https://www.nytimes.com/1998/07/05/us/true-to-form-clinton-shifts-energies-back-to-us-focus.html>.

29. THE FEDERALIST NO. 47 (James Madison).

30. U.S. CONST. art. I, § 8; U.S. CONST. art. II, §§ 2–3; U.S. CONST. art. III § 2; U.S. CONST. art. II, § 3.

31. *United States v. Chem. Found. Inc.*, 272 U.S. 1, 6 (1926).

32. VIVIAN S. CHU & TODD GARVEY, CONG. RESEARCH SERV., EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION 1 (2014).

33. Proclamation No. 95 (Jan. 1, 1863).

34. Exec. Order No. 9066, 7 Fed. Reg. 1407, 1474 (Feb. 25, 1942).

35. Exec. Order No. 9981, 13 Fed. Reg. 4311, 4313 (July 28, 1948).

36. Exec. Order No. 10,730, 22 Fed. Reg. 7573, 7628 (Sept. 25, 1957).

37. Exec. Order No. 10,783, 23 Fed. Reg. 7643, 7643 (Oct. 3, 1958).

38. Exec. Order No. 11,130, 28 Fed. Reg. 12,783, 12,789 (Dec. 3, 1963).

respectively. President Reagan used an executive order to convene the first Presidential Commission on the HIV Epidemic.<sup>39</sup>

Executive orders are neither constitutionally nor statutorily defined.<sup>40</sup> In practice, they are numbered, titled, signed, and published in the Federal Register and codified under Title 3 of the Code of Federal Regulations.<sup>41</sup> Other instruments a president can use include memoranda, proclamations, presidential signing statements, and national security presidential directives.<sup>42</sup> “In general . . . the difference [between these instruments] is typically one of form, not substance.”<sup>43</sup>

*B. The Scope: “The travel ban into the United States should be far larger, tougher and more specific-but stupidly, that would not be politically correct!” September 15, 2017 Tweet from President Trump in response to criticism of his executive orders issued to ban immigration from certain Muslim nations*<sup>44</sup>

The power of the president to issue executive orders is broad but not limitless.<sup>45</sup> Executive orders are given the full force and effect of the law only when issued pursuant to constitutional or statutory authority.<sup>46</sup> In the quintessential 1952 case of *Youngstown Sheet & Tube Co. v. Sawyer*, members of the United Steelworkers of America threatened to strike over a wage dispute.<sup>47</sup> President Truman, fearing that the work stoppage would jeopardize the Korean War effort, issued Executive Order 10,340, which directed the Secretary of Commerce to seize steel mills and keep them operating.<sup>48</sup> The impacted companies sought to enjoin enforcement of the executive order.<sup>49</sup> The

39. Exec. Order 12,601, 52 Fed. Reg. 24,127, 24,129–30 (June 29, 1987).

40. COMM. ON GOV'T OPERATIONS, 85TH CONG., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS I (Comm. Print 1957).

41. *Id.* at 37.

42. Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. OF LEGIS., 1, 7 (2002); see also *Presidential Directives and Where to Find Them*, LIBR. OF CONGRESS, <https://www.loc.gov/rr/news/directives.html> (showing how different presidents have referred to these with different names. For example, President Ronald Reagan called them “National Security Decision Directives,” President William Clinton used the title “Presidential Decision Directives,” and President Barack Obama issued “Presidential Policy Directives.”) (last visited Feb. 20, 2019).

43. Branum, *supra* note 42, at 7.

44. Tucker Higgins, *Supreme Court Rules that Trump's Travel Ban is Constitutional*, CNBC (June 26, 2018), <https://www.cnbc.com/2018/06/26/supreme-court-rules-in-trump-muslim-travel-ban-case.html>.

45. COMM. ON GOV'T OPERATIONS, *supra* note 40, at 14.

46. *Id.* at 32.

47. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952).

48. Exec. Order No. 10,340, 17 Fed. Reg. 3139, 3141 (Apr. 10, 1952).

49. *Youngstown*, 343 U.S. at 583.

Supreme Court ruled in favor of the steel companies, because President Truman, as the Commander in Chief, did not have power to take property in the way asserted and there was not explicit or implicit statutory authority allowing him to seize the mills to prevent work stoppages.<sup>50</sup> Conversely, as demonstrated in *Dames & Moore v. Reagan*,<sup>51</sup> where there is constitutional or congressional authorization as a basis for the executive order, the "strongest of presumptions" is given that the president is acting within his authority.<sup>52</sup>

The boundaries of presidential authority to issue executive orders was recently challenged in the context of President Trump's travel bans on foreign nationals from certain countries. The first travel ban, Executive Order 13,769, "Protecting the Nation from Foreign Terrorist Entry into the United States" (TB-1), was issued on January 27, 2017, three days after President Trump assumed office.<sup>53</sup> Authority to issue TB-1 was asserted under the U.S. Constitution and the Immigration and Nationality Act (INA).<sup>54</sup> TB-1 instructed the Secretary of Homeland Security to assess the adequacy of foreign governments' adjudication procedures for their nationals seeking U.S. entry.<sup>55</sup> Pending the assessment, TB-1 immediately suspended for ninety days the immigration of individuals from six predominantly Muslim countries: Iran, Iraq, Libya, Somalia, Sudan, and Yemen.<sup>56</sup> The entry of refugees from Syria, a seventh Muslim country, was halted indefinitely.<sup>57</sup> The United States Refugee Admissions Program (USRAP), which requires that executive branch officials annually review the refugee situation, was suspended for 120 days.<sup>58</sup> The directive that the Secretaries of Homeland Security and State prioritize the admission of individuals belonging to minority religions in the affected countries was met with great opposition.<sup>59</sup> Since the dominant religion in each of the banned

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50. *Id.* at 585.

51. *Dames & Moore v. Reagan*, 453 U.S. 654, 654 (1981).

52. *Id.* at 670.

53. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017); *see also* Andrew Katz, *Trump's First Day*, TIME (Jan. 20, 2017), <http://time.com/president-donald-trump-inauguration-day-photos/> (detailing President Trump's first day in office).

54. Exec. Order No. 13,769, 82 Fed. Reg. at 8977; Immigration and Nationality Act, 8 U.S.C. §§ 1101–1107 (2012); 3 U.S.C. § 301 (2012).

55. Exec. Order No. 13,769, 82 Fed. Reg. at 8977.

56. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (March 9, 2017). *See generally* *Islamic Countries of the World*, WORLD ATLAS, <https://www.worldatlas.com/articles/islamic-countries-in-the-world.html> (discussing countries that practice Islam and have large Muslim populations).

57. Exec. Order No. 13,769, 82 Fed. Reg. at 8979.

58. *Id.*; *The United States Refugee Admissions Program (USRAP) Consultation & Worldwide Processing Priorities*, U.S. CITIZENSHIP & IMMIGR. SERVS, <https://www.uscis.gov/humanitarian/refugees-asylum/refugees/united-states-refugee-admissions-program-usrap-consultation-world-wide-processing-priorities> (last visited Feb. 20, 2019).

59. *See generally* Maher Chmaytelli & Lin Noueihed, *Global Backlash Grows Against Trump's Immigration Order*, REUTERS (Jan. 29, 2017), <https://www.reuters.com/article/us-usa->



countries is Islam, under TB-1, immigration preference was given to Christians and other non-Muslims.

Three days later, Washington and Minnesota, on behalf of their affected citizens, challenged the constitutionality of TB-1.<sup>60</sup> In *Washington v. Trump*,<sup>61</sup> the states claimed that TB-1 was unconstitutional because (1) it violated due process and equal protection under the Fifth Amendment<sup>62</sup> by discriminating against their residents on the basis of religion and nationality, and (2) it contravened the Establishment Clause of the First Amendment<sup>63</sup> by giving preference to Christianity over Islam. The Trump administration asserted that courts have no authority to assess the validity of TB-1 since the Constitution gives the president “unreviewable authority” over certain matters of immigration.<sup>64</sup> James Robart, Senior Judge for the United States District Court for the Western District of Washington, ruled in favor of the states and granted a nationwide temporary restraining order blocking the enforcement of TB-1.<sup>65</sup> The following day, the federal government filed an emergency motion seeking a stay of the district court’s temporary restraining order.<sup>66</sup> In a per curiam opinion, the Ninth Circuit denied the government’s motion and affirmed that, although the executive branch is owed substantial deference in matters of immigration and national security policy, such decisions are *always* subject to judicial review.<sup>67</sup>

Rather than continuing to litigate, on March 6, 2017, President Trump used Executive Order 13,780,<sup>68</sup> also entitled “Protecting the Nation From Foreign Terrorist Entry Into the United States,” (TB-2) to revoke TB-1. Authority for TB-2 was asserted under Article II of the Constitution and § 212(f) of the INA.<sup>69</sup> The Department of State completed its review of the conditions in six of the countries designated under TB-1. Until further assessment of the screening and vetting procedures was completed, a “temporary pause” was placed on entry of

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trump-immigration-reaction-idUSKBN15D0QM (discussing global views on President Trump’s executive order related to immigration).

60. *Washington v. Trump*, 847 F.3d 1151, 1157 (9th Cir. 2017).

61. *Id.* at 1151.

62. *Id.* at 1165, 1167; U.S. CONST. amend. V.

63. *Washington*, 847 F.3d at 1167; U.S. CONST. amend. I.

64. *Washington*, 847 F.3d at 1161.

65. See Marilia Brocchetto, *James Robart: 5 Things to Know About Judge Who Blocked Travel Ban*, CNN (Feb. 4, 2017), <https://www.cnn.com/2017/02/04/politics/judge-james-robart-travel-ban-profile/index.html> (explaining Judge James Robart’s experience with the judicial system and his background); *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012, at \*7–8, \*10 (W.D. Wash. Feb. 3, 2017).

66. *Washington v. Trump*, 691 Fed. Appx. 834, 835 (9th Cir. 2017).

67. *Washington*, 847 F.3d at 1156, 1164, 1169.

68. Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,218 (Mar. 9, 2017).

69. *Id.* at 13,209; Immigration and Nationality Act, 8 U.S.C. § 1182(f) (2012).

nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen.<sup>70</sup> Because of its close cooperative relationship with the U.S., citizens from Iraq, previously impacted by TB-1, were no longer affected by the ban.<sup>71</sup> The indefinite exclusion of Syrian refugees and preference for those members of minority religions that were religiously persecuted were deleted from TB-2.<sup>72</sup>

Numerous judicial challenges to TB-2 ensued, including cases in the Second (*Alharbi v. Miller*),<sup>73</sup> Fourth (*International Refugee Assistance Project (IRAP) v. Trump*<sup>74</sup>), Sixth (*Arab American Civil Rights League v. Trump*<sup>75</sup>), and Ninth (*State of Hawaii v. Trump*<sup>76</sup> and *Toloubeydokhti v. Nielson*<sup>77</sup>) Circuits. District Courts in the *IRAP v. Trump* and *Hawaii v. Trump* cases entered nationwide preliminary injunctions barring the enforcement of TB-2 and their respective Courts of Appeals affirmed.<sup>78</sup> The Supreme Court granted certiorari, stayed the injunctions, and allowed TB-2 to go into effect;<sup>79</sup> however, the temporary provisions in TB-2 expired before the Supreme Court could consider the merits of the cases, and the lower courts' decisions were rendered moot.<sup>80</sup>

A third iteration of the travel ban was issued through Presidential Proclamation No. 9645, entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats" (TB-3).<sup>81</sup> The stated purpose of TB-3 was to assess the vetting procedures of certain countries to determine whether they adequately protect the U.S. from terroristic threats.<sup>82</sup> Entry restrictions were placed upon immigration from Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and

70. Exec. Order No. 13,780, *supra* note 68, at 13,211.

71. *Id.* at 13,212.

72. *See generally id.*

73. *Alharbi v. Miller*, No. CV 18-2435 at 1, 40, 41 (E.D.N.Y. April 25, 2018) (ex-parte petition for emergency writ of mandamus and complaint for declaratory and injunction relief).

74. *Int'l. Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 539, 543–44 (D. Md. 2017) (this case was consolidated with two others: *Iranian Alliances Across Borders v. Trump* and *Zakzok v. Trump*).

75. *Arab Am. Civil Rights League v. Trump*, No. 2:17-CV-10310-VAR-SSD at 1, 11, 14, 15, 17 (E.D. Mich. Oct. 25, 2018) (complaint for declaratory and injunctive relief).

76. *Hawaii v. Trump*, 859 F.3d 741, 741, 755 (9th Cir. 2017).

77. *Toloubeydokhti v. Nielson*, No. 3:18-CV-01587, at 1–5 (S.D. Cal. Oct. 26, 2018) (class action complaint for injunctive and declaratory relief and for writ of mandamus).

78. *Int'l. Refugee Asst. Project v. Trump*, 241 F.Supp. 3d 539, 566 (D.Md. 2017); *Hawaii*, 859 F.3d at 788.

79. *Trump v. Hawaii*, 138 S. Ct. 2392, 2404 (2018).

80. *Id.*

81. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017).

82. *Id.* at 45,162.

Yemen.<sup>83</sup> Again, President Trump pointed to the Constitution and certain provisions of the INA as giving him authority to issue TB-3.<sup>84</sup>

Hawaii (as the operator of the University of Hawaii), three individuals with relatives from the affected states, and the Muslim Association of Hawaii (collectively, Hawaii) challenged TB-3<sup>85</sup> alleging that it violates provisions of the INA and the Establishment Clause of the First Amendment. In sum, Hawaii asserted that TB-3 is an anti-Muslim directive rather than an initiative to further national security protections.<sup>86</sup> Judge Derrick Watson from the United States District Court for the District Court of Hawaii granted a nationwide preliminary injunction barring the enforcement of TB-3, because the ban violated two provisions of the INA concerning the classes of aliens ineligible to receive visas<sup>87</sup> and travel control of citizens and aliens.<sup>88</sup> The Ninth Circuit granted a partial stay,<sup>89</sup> but the Supreme Court stayed the injunction in full pending the disposition of the merits of the case.<sup>90</sup> The Court of Appeals ruled in favor of Hawaii and determined that President Trump exceeded his authority under the INA when issuing TB-3.<sup>91</sup> President Trump appealed.<sup>92</sup>

The Supreme Court granted certiorari in *Trump v. Hawaii*.<sup>93</sup> Hawaii again averred that TB-3 was unconstitutional, because the breadth of the proclamation exceeded statutory authority given to the President under the INA.<sup>94</sup> The government argued that its actions were not reviewable; therefore, the courts had no authority to determine the validity of the proclamation.<sup>95</sup> In a five to four decision, the conservative members of the Court reversed and remanded the Ninth Circuit's determination.<sup>96</sup> The authority for a president to act under certain provisions of the INA is "sweeping,"<sup>97</sup> and the INA "exudes deference to the President in every clause."<sup>98</sup> The president has "ample power" to impose entry

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83. *Id.* at 45,164. On April 10, 2018, Chad was later removed from the listing through Presidential Proclamation Maintaining Enhanced vetting capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats. Proclamation No. 9723, 83 Fed. Reg. 15,937, 15,939 (Apr. 13, 2018).

84. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017).

85. *Trump*, 138 S. Ct. at 2406 (the plaintiffs did not challenge TB-3 as it applies to North Korea and Venezuela).

86. *Id.* at 2406, 2421.

87. *Id.* at 2406, 2413.

88. *Id.* at 2406, 2407.

89. *Id.* at 2406.

90. *Trump*, 138 S. Ct. at 2406.

91. *Id.* at 2406–07.

92. *Id.* at 2406.

93. *Id.* at 2407.

94. *Id.* at 2408.

95. *Trump*, 138 S. Ct. at 2407.

96. *Id.* at 2423.

97. *Abourezk v. Reagan*, 785 F.2d 1043, 1049 (D.C. Cir. 1986).

98. *Trump*, 128 S. Ct. at 2408.

restrictions on groups of foreign nationals, and the asserted statutory basis for issuing TB-3 was "squarely within the scope of Presidential authority under the INA. Indeed, neither dissent even attempts any serious argument to the contrary, despite the fact that plaintiffs; primary contention below and in their briefing before [the Supreme] Court was that the Proclamation violated the statute."<sup>99</sup>

In addition to judicial challenges, executive orders can be modified by the president or the law affected by the executive order can be amended or rescinded by Congress, thereby rendering it moot.<sup>100</sup> The president can review, revoke, amend, or supersede his own executive orders (which rarely occurs) or those of his predecessors (which President Trump has done with considerable frequency).<sup>101</sup> For example, Trump Executive Order 13,780 TB-2<sup>102</sup> revoked Trump Executive Order 13,769 TB-1.<sup>103</sup> Trump Executive Order 13,783<sup>104</sup> revoked Obama Executive Order 13,653,<sup>105</sup> therein rescinding risk management strategies designed to address climate change. Trump Executive Order 13,840<sup>106</sup> revoked Obama Executive Order 13547<sup>107</sup> and eliminated President Obama's coordinated efforts regarding ocean, coastal, and Great Lakes waters. Through executive orders, President Trump both established<sup>108</sup> and terminated<sup>109</sup> the Presidential Advisory Commission on Election Integrity. Having determined that "detention operations at the U.S. Naval Station Guantánamo Bay are legal, safe, [and] humane[.]" Trump Executive Order 13,823<sup>110</sup> revoked Obama Executive Order 13,492,<sup>111</sup> which would have eventually closed the facility.

Congress may render an executive order moot by enacting or amending statutes to obviate the presidential instrument's effect.<sup>112</sup> Such congressional action is unlikely when the president and the congressional majority share the same political party. As of October 14, 2018, there were 235 Republicans, 193

99. *Id.* at 2408, 2415.

100. Elizabeth Van Nostrand & Tina Batra Hershey, "Stroke of the Pen. Law of the Land." *The Power and Appeal of Executive Orders*, JPHMP DIRECT (Feb. 13, 2017), <https://jphmpdirect.com/2017/02/13/stroke-of-the-pen-law-of-the-land-the-power-and-appeal-of-executive-orders/>.

101. Sarah Kessler, *There Are Three Ways to Revoke a U.S. President's Executive Orders, and They Rarely Succeed*, QUARTZ (Jan. 31, 2017), <https://qz.com/898683/can-an-executive-order-be-revoked/>.

102. Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,218 (Mar. 9, 2017).

103. *Id.*

104. Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,094 (Mar. 31, 2017).

105. *Id.*

106. Exec. Order No. 13,840, 83 Fed. Reg. 29,431 (June 22, 2018).

107. *Id.*

108. Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 16, 2017).

109. Exec. Order No. 13,820, 83 Fed. Reg. 969 (Jan. 8, 2018).

110. Exec. Order No. 13,823, 83 Fed. Reg. 4831 (Feb. 2, 2018).

111. *Id.*

112. VIVIAN S. CHU & TODD GARVEY, CONGRESSIONAL RESEARCH SERV., EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION 9 (2014), <https://fas.org/sgp/crs/misc/RS20846.pdf>.

Democrats, and seven vacant positions in the House of Representatives.<sup>113</sup> In the Senate, Republicans held fifty-one seats, the Democrats had forty-seven, and there were two Independents.<sup>114</sup> If Congress were to amend a statute to render an executive order moot, a two-thirds votes would be required to overturn a presidential veto.<sup>115</sup> Assuming that all Democrats and Independents would vote together in this scenario, 106 Republicans would need to vote against party lines to render an executive order ineffective.

### III. REPEAL AND REPLACE: TAKING AIM AT THE ACA

*“We’ve been hearing about the disaster of Obamacare for so long . . . I just keep hearing repeal, replace, repeal, replace. Well, we’re starting that process.”*<sup>116</sup> *President Trump’s Mission to Unravel the ACA*

Health care continues to be a dominant issue for Americans and is the top issue for voters in the 2018 mid-term elections.<sup>117</sup> President Trump, fulfilling campaign promises, has issued three executive orders directly aimed at dismantling the ACA: (1) Executive Order 13,765, “Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal,”<sup>118</sup> (EO-1) attacking the ACA’s individual mandate and required essential health benefits; (2) Executive Order 13,798, “Promoting Free Speech and Religious Liberty,”<sup>119</sup> (EO-2) targeting the ACA’s preventive care mandate; and (3) Executive Order 13,813 “Promoting Healthcare Choice and Competition Across the US”<sup>120</sup> (EO-3), weakening the Health Insurance Marketplace by encouraging individuals to purchase insurance outside of the Health Insurance Marketplaces.

113. *Congressional Profile: 115th Congress, 2nd Session*, OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, [http://clerk.house.gov/member\\_info/cong.aspx](http://clerk.house.gov/member_info/cong.aspx) (last visited Feb. 20, 2018).

114. *Id.*

115. *Override of a Veto*, UNITED STATES SENATE, [https://www.senate.gov/reference/glossary\\_term/override\\_of\\_a\\_veto.htm](https://www.senate.gov/reference/glossary_term/override_of_a_veto.htm) (last visited Nov. 3, 2018).

116. Bob Bryan, *Trump Just Took a Big Step to Unravel Obamacare*, BUS. INSIDER (Oct. 12, 2017), <https://www.businessinsider.com/trump-ahp-healthcare-insurance-obamacare-executive-action-2017-10>.

117. Phil Galewitz, *Health Care Tops Guns, Economy as Voters’ Top Issue*, KAISER HEALTH NEWS (Oct. 18, 2018), <https://khn.org/news/health-care-tops-guns-economy-as-voters-top-issue/>.

118. Exec. Order No. 13,765, 82 Fed. Reg. 8351 (Jan. 20, 2017); Timothy Jost, *What Could President Trump Do Through Executive Order to Dismantle the ACA?*, HEALTH AFF. BLOG (Jan. 12, 2017), <https://www.healthaffairs.org/doi/10.1377/hblog20170112.058318/full/>.

119. Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017).

120. Exec. Order No. 13,813, 82 Fed. Reg. 48,385 (Oct. 12, 2017).

A. *The Individual Mandate: "We repealed the core of disastrous Obamacare. The individual mandate is now gone." President Trump in his January 30, 2018 State of the Union Address*<sup>121</sup>

EO-1 was issued hours after Donald Trump was sworn in as President of the United States.<sup>122</sup> Pending the repeal of the ACA, EO-1 directed the Secretary of Health and Human Services (HHS) and the heads of all other executive branch agencies to "waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the [ACA] that would impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals . . ." and other enumerated entities.<sup>123</sup>

In part, EO-1 attacks the individual mandate—the ACA requirement that most U.S. citizens and individuals lawfully residing here purchase "minimum essential" health insurance or make a shared responsibility payment to the Internal Revenue Service (IRS).<sup>124</sup> Four years before EO-1 was issued, the individual mandate withstood a judicial challenge from twenty-six states, "several individuals, and the National Federation of Independent Business[,] Inc. (NFIB).<sup>125</sup> In *NFIB v. Sebelius*, the plaintiffs alleged that Congress exceeded its enumerated powers under the Commerce Clause when enacting the individual mandate.<sup>126</sup> The Supreme Court agreed, reasoning that the Commerce Clause empowers Congress to *regulate* commerce, which presupposes that there is something in existence that needs to be controlled.<sup>127</sup> The individual mandate does not involve existing commercial activity; rather, it compels people to *participate* in commerce.<sup>128</sup> "Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority."<sup>129</sup>

Instead, although the ACA describes the shared responsibility payment as a "penalty," the Supreme Court deemed it to be a tax and constitutional under authority given to Congress pursuant to the Taxing and Spending Clause.<sup>130</sup> The Court explained that the shared responsibility payment is a tax rather than a

121. Bruce Japsen, *In State of the Union, Trump Touts End to Individual Mandate But Doesn't Ask for Obamacare Repeal*, FORBES (Jan. 30, 2018), <https://www.forbes.com/sites/brucejapsen/2018/01/30/in-state-of-the-union-trump-touts-end-to-individual-mandate-but-doesnt-ask-for-obamacare-repeal/#257d0babb164>.

122. Exec. Order No. 13,765, 82 Fed. Reg. at 8351.

123. *Id.*

124. Internal Revenue Code, 26 U.S.C. § 5000A (2018); Exec. Order No. 13,765, 82 Fed. Reg. at 8351.

125. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 540 (2012).

126. *Id.*

127. *Id.* at 550.

128. *Id.* at 552.

129. *Id.* (emphasis in original).

130. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 566, 570; U.S. CONST. art. I, § 8, cl. 1.

penalty, because the fee is not so onerous that individuals would have no choice but to purchase health insurance, nor is it limited to “willful violations” like many sanctions are.<sup>131</sup>

EO-1 was President Trump’s attempt to revisit this issue. Although other rules reference EO-1 as the basis for their justification (such as 340B Drug Pricing Program Ceiling Price and Manufacturer Civil Monetary Penalties Regulation that delays the implementation date for civil money penalties for manufacturers who charge more than the ceiling price for certain drugs),<sup>132</sup> Congress acted before a regulation was promulgated on point. On December 22, 2017, Congress passed H.R.1, “An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018,”<sup>133</sup> commonly referred to as the Tax Cuts and Jobs Act (TCJA). As of 2019, the TCJA eliminates the shared responsibility payment to the IRS; therefore, although there is still an individual mandate requirement, there is no penalty associated therewith.<sup>134</sup> While this change is estimated to reduce the federal budget deficits by approximately \$338 billion between 2018 and 2027, it is likely to increase the number of uninsured by 4 million in 2019 and 13 million in 2027.<sup>135</sup> Although premiums for unsubsidized enrollees for 2019 will be increased, the rise is not anticipated to destabilize the markets.<sup>136</sup>

The plaintiffs in *Texas v. United States* argue that the elimination of the individual mandate penalty is fatal to the ACA and, as such, the entire law must fail.<sup>137</sup> Instead of zealously arguing in favor of upholding a valid law, conversely, the federal defendants agree with many of the plaintiffs’ positions, including that the individual mandate and guaranteed issue provisions of the ACA are not severable.<sup>138</sup> The federal defendants agree with the plaintiffs that since the individual mandate is unconstitutional in light of the TCJA, the preexisting condition protections are also invalid.<sup>139</sup> As of October 23, 2018, the

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131. *The Roberts Decision—The Ends Justifies the Means*, BELLE LIBERTY’S BLOG (Jun. 30, 2012), <https://belleofliberty.wordpress.com/2012/06/30/the-roberts-decision-the-ends-justifies-the-means/>.

132. 340B Drug Pricing Program Ceiling Price and Manufacturer Civil Monetary Penalties Regulation, 83 Fed. Reg. 25,943, 25944 (Jun. 5, 2018).

133. *See generally* Individual Tax Reform and Alternative Minimum Tax, Pub. Law 115-97, 131 Stat. 2054 (Dec. 22, 2017).

134. *Id.*; ANNIE L. MACH, THE INDIVIDUAL MANDATE FOR HEALTH INSURANCE COVERAGE: IN BRIEF (Cong. Res. Serv., 2018).

135. REPEALING THE INDIVIDUAL HEALTH INSURANCE MANDATE: AN UPDATED ESTIMATE 1 (Cong. Budget Off., 2017).

136. FEDERAL SUBSIDIES FOR HEALTH INSURANCE COVERAGE FOR PEOPLE UNDER AGE 65: 2018 TO 2028 2, 6–7 (Cong. Budget Off., 2018).

137. *Texas v. United States*, 340 F. Supp. 3d 579, 585 (N.D. Texas 2018).

138. *Id.* at 591.

139. *See id.*

District Court for the Northern District of Texas has not yet ruled on the merits of the case.<sup>140</sup>

B. *State Relief and Empowerment Waivers: "The fact is, due to the ACA, states have largely lost the power to advance and adopt their own solutions. Instead, the ACA imposed a one-size-fits-all set of federal regulations that put a straightjacket on state innovation". October 22, 2018 Blog Post by CMS Administrator Seema Verma*<sup>141</sup>

EO-1 also directs the Secretary of HHS and the heads of all other executive branch agencies to "exercise all authority and discretion available to them to provide greater flexibility to States and cooperate with them in implementing healthcare programs."<sup>142</sup> On October 24, 2018, the Centers for Medicare and Medicaid Services (CMS) published new guidance<sup>143</sup> on the use of the ACA's § 1332 waivers. These waivers allow states to seek a five year waiver to implement innovative ways to provide quality health care that is at least as comprehensive and affordable as other health care options.<sup>144</sup> Under the ACA, such waivers could impact essential health benefits coverage and associated cost sharing, adjustments to premium tax credits, and modification or replacement of exchanges.<sup>145</sup>

Under the new guidance, which replaces the 2015 guidance document issued under the Obama administration, the waivers are renamed the State Relief and Empowerment Waivers (SREW).<sup>146</sup> In a major departure from the previous guidance, analysis of the comprehensiveness and affordability of coverage under a waiver will focus on *access* to coverage rather than on the coverage actually purchased.<sup>147</sup> While the new guidance continues to require that a comparable number of individuals remain covered, the definition of coverage includes more types of coverage, such as short-term, limited-duration plans.<sup>148</sup> Thus, if an individual chooses to purchase a plan with a lower premium and less comprehensive coverage (i.e., coverage that does not include the ACA's

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140. *See generally id.*

141. Seema Verma, *New State Relief and Empowerment Waiver Guidance Gives States Tools to Help Fix Broken Health Insurance Markets*, CMS: BLOG (Oct. 22, 2018), <https://www.cms.gov/blog/new-state-relief-and-empowerment-waiver-guidance-gives-states-tools-help-fix-broken-health-insurance>.

142. Exec. Order No. 13,765, 82 Fed. Reg. 8351 (Jan. 24, 2017).

143. *See generally* State Relief and Empowerment Waivers, 83 Fed. Reg. 53,575, 53,576 (Oct. 24, 2018).

144. *Id.* at 53,577, 53,580.

145. Jennifer Tolbert & Karen Pollitz, *Section 1332 State Innovation Waivers: Current Status and Potential Changes*, KAISER FAM. FOUND. (2017), <https://www.kff.org/health-reform/issue-brief/section-1332-state-innovation-waivers-current-status-and-potential-changes/>.

146. State Relief and Empowerment Waivers, 83 Fed. Reg. at 53,576.

147. *Id.* at 53,578–79.

148. *Id.* at 53,576, 53,578.



essential health benefits), the ACA's guardrails will be considered to be satisfied as long as at least one ACA-compliant plan is offered in the state.

In addition, under the new guidance, states can allow individuals to use subsidies to purchase plans that are not ACA compliant,<sup>149</sup> which was not previously permitted. In a nod towards the power of executive orders, in certain circumstances, a waiver may be authorized via governor's executive order rather than state legislation.<sup>150</sup>

*C. The Preventive Care Mandate: "A landmark day for religious liberty."  
House Speaker Paul D. Ryan's (R-Wis.) response when the Trump  
Administration Issued New Regulations in Accordance with EO-2*<sup>151</sup>

With the exception of grandfathered plans, the ACA generally requires employers with fifty or more full-time employees to offer group health plans or coverage that provide "minimum essential coverage" without cost sharing.<sup>152</sup> Included within the essential minimum coverage are preventive care and screenings for women, frequently referred to as the preventive care mandate.<sup>153</sup> The specific services to be offered under this provision are determined by the Health Resources and Services Administration (HRSA),<sup>154</sup> a department within HHS. In August 2011, HRSA, basing its suggestions on Institute of Medicine recommendations, indicated that the preventive care mandate was to include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling . . ." <sup>155</sup> Exceptions were established for employers with fewer than fifty employees,<sup>156</sup> certain religious employers (including churches and their integrated auxiliaries),<sup>157</sup> religious nonprofit organizations,<sup>158</sup> and grandfathered health

149. *Id.* at 53,578.

150. *Id.* at 53,582.

151. Amy Goldstein et al., *Trump Administration Narrows Affordable Care Act's Contraception Mandate*, WASH. POST (Oct. 6, 2017), [https://www.washingtonpost.com/national/health-science/trump-administration-could-narrow-affordable-care-acts-contraception-mandate/2017/10/05/16139400-a9f0-11e7-92d1-58c702d2d975\\_story.html?utm\\_term=.2fb36328ff1f](https://www.washingtonpost.com/national/health-science/trump-administration-could-narrow-affordable-care-acts-contraception-mandate/2017/10/05/16139400-a9f0-11e7-92d1-58c702d2d975_story.html?utm_term=.2fb36328ff1f).

152. 26 U.S.C. § 5000A(f)(2) (2012); *see also id.* § 4980.

153. *Preventive Care Benefits for Women*, HEALTHCARE.GOV, <https://www.healthcare.gov/preventive-care-women/> (last visited March 1, 2019).

154. 42 U.S.C. § 300gg-13(a)(4) (2012).

155. *Women's Preventive Service Guidelines*, HEALTH RESOURCES & SERV. ADMIN., <https://www.hrsa.gov/womens-guidelines/index.html#2> (last visited on March 1, 2019).

156. *Find Out How ACA Affects Employers with Fewer Than 50 Employees*, IRS (May 13, 2015), <https://www.irs.gov/affordable-care-act/individuals-and-families/find-out-how-aca-affects-employers-with-fewer-than-50-employees>.

157. 45 C.F.R. § 147.131(a) (2016).

158. *Id.* at § 147.131(b).

plans (i.e., those plans existing prior to March 23, 2010 that had not made specified changes after that date).<sup>159</sup>

EO-2 instructs the Secretaries of Treasury, Labor, and HHS (collectively the Departments) to "consider" issuing amended regulations to address conscience-based objections to the preventive care mandate.<sup>160</sup> Subsequently, on October 6, 2017, two companion interim final rules (the 2017 IFRs) became effective: the "Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act,"<sup>161</sup> and the "Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act."<sup>162</sup> The 2017 IFRs expand the exemptions to cover not only individuals who object to contraceptive coverage on religious grounds, but also individuals and entities that object on moral bases as well.<sup>163</sup> According to HRSA guidance, entities entitled to exemptions from providing the contraceptives under the preventive care mandate include for-profit entities that are publicly traded, closely held for-profit organizations, and institutions of higher learning.<sup>164</sup>

Legal justification for expanding the exemptions was based on two Supreme Court cases. In *Burwell v. Hobby Lobby Stores*, two privately owned companies objected to the ACA requirement that insurance plans provide coverage for certain forms of birth control, including emergency contraceptive pills and intrauterine devices, claiming that providing such coverage was against their religion.<sup>165</sup> The two companies alleged that the coverage requirement violated the First Amendment and the Religious Freedom Restoration Act of 1993 (RFRA).<sup>166</sup> The Supreme Court held that the protections offered to individuals under RFRA also extend to closely-held, for-profit corporations.<sup>167</sup> In *Wheaton College v. Burwell*, decided just days after *Hobby Lobby*, a nonprofit liberal arts college in Illinois sought an injunction claiming that the requirement that it must designate an agent to pay for objectionable contraceptives was in violation of

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159. *Id.* § 147.130(d); *Grandfathered Health Plan*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/grandfathered-health-plan/> (last visited March 1, 2019).

160. Exec. Order No. 13,798, 82 Fed. Reg. 21675 (May 9, 2017).

161. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017).

162. Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838 (Oct. 13, 2017).

163. *Id.* at 47,840, 47,843

164. THE U.S. DEP'T OF HEALTH & HUMAN SERVS., FACT SHEET: RELIGIOUS AND MORAL EXEMPTIONS AND ACCOMMODATIONS FOR COVERAGE OF CERTAIN PREVENTIVE SERVICES UNDER THE AFFORDABLE CARE ACT, <https://www.hhs.gov/sites/default/files/fact-sheet-religious-exemptions-and-accommodations-for-coverage.pdf> (last visited Nov. 11, 2018).

165. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2755, 2759, 2765–66 (2014).

166. *Id.* at 2766; *see also*, 42 U.S.C. § 2000bb-1 (2012).

167. *Burwell*, 134 S.Ct. at 2759.

the First and Fifth Amendments and RFRA.<sup>168</sup> The Supreme Court granted the application for injunction and recognized that the college did not need to use any governmental forms in order to receive an exemption.<sup>169</sup> Rather, all that was required was informing the Secretary of HHS that “it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services . . . .”<sup>170</sup> The Court declined to rule on the merits of the claim.<sup>171</sup>

The 2017 IFRs were recently challenged on procedural grounds in *State of California v. Health and Human Services*.<sup>172</sup> California, Delaware, Maryland, New York, and Virginia claim that the Departments violated the Administrative Procedure Act (APA) by forgoing the appropriate notice and comment procedures when promulgating the 2017 IFRs.<sup>173</sup> Notice and comment requirements can be waived “when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”<sup>174</sup> Although the Departments solicited public comment on the 2017 IFRs until December 5, 2017, the regulations were effective immediately on the date of promulgation.<sup>175</sup> The District Court held that the Departments had no statutory authorization to waive the APA’s notice requirement nor did it have good cause for doing so.<sup>176</sup> The failure to provide advance notice and comment processes were deemed not to be a harmless error, and the plaintiff states were likely to suffer irreparable harm if the provisions in the interim final rules moved forward; thus, the court granted plaintiffs’ motion for a preliminary injunction.<sup>177</sup> The number of states challenging the implementation of the rules has grown to fourteen. On January 13, 2019, the United States District Court for the Northern District of California granted the states’ motion for preliminary injunction but limited the scope of the injunction to the individual states, even though “[t]he Court fully recognizes that limiting the scope of this injunction to the Plaintiff States means that women in the other states are at risk of losing access to cost-free contraceptives when the final Rules take effect.”<sup>178</sup>

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168. *Wheaton College v. Burwell*, 134 S.Ct. 2806, 2808–10 (2014).

169. *Id.* at 2814.

170. *Id.* at 2807.

171. *Id.*

172. *California v. Health and Human Servs.*, 281 F. Supp. 3d 806, 813 (N.D. Cal. 2017).

173. *Id.*

174. 5 U.S.C. § 553(a)(3) (2018).

175. *California*, 281 F. Supp. 3d. at 819–20.

176. *Id.* at 827.

177. *Id.* at 829.

178. *California v. Health and Human Servs.*, 351 F. Supp. 3d 1267, 1300 (N.D. Cal. 2019).

D. *The Health Insurance Marketplace: "Since Congress can't get its act together on HealthCare, I will be using the power of the pen to give great HealthCare to many people – FAST." President Trump's October 10, 2017 tweet providing justification for EO-3*<sup>179</sup>

EO-3, issued October 12, 2017, allows individuals to sign up for health care plans that are less regulated and provide less comprehensive coverage than those required under the ACA.<sup>180</sup> President Trump claims that these changes are necessary because the ACA places severe limitations on health care options that results in expensive insurance premiums.<sup>181</sup> Three unrelated private-sector health coverage options are targeted for amendment: association health plans (AHPs); short-term, limited duration insurance (STLDI), and health reimbursement arrangements (HRAs).<sup>182</sup>

AHPs are arrangements that provide health coverage to a collective body of small businesses.<sup>183</sup> They could be exempt from the ACA's requirement to cover essential health benefits but, currently, must comply with other ACA mandates, including protecting people with preexisting conditions.<sup>184</sup> In accordance with EO-3, on January 5, 2018, the Department of Labor issued a proposed regulation to amend the federal definition of "employer."<sup>185</sup> On June 21, 2018, the definitional change was adopted in a final rule.<sup>186</sup> The definition was expanded to allow certain AHPs that were formerly regulated as individual or small-group coverage to be regulated as large-group coverage.<sup>187</sup> This change allowed small employers to join together to buy insurance in the large group market, including purchases across state lines.<sup>188</sup> Critics of the expansion argue that it will create

179. Olga Khazan, *How Trump's Executive Order Might Raise Costs for the Sick*, ATLANTIC (Oct. 12, 2017), <https://www.theatlantic.com/health/archive/2017/10/executive-order-associated-health-plans/542718/>.

180. Joseph R. Antos & James C. Capretta, *The President's Executive Order: Less Than Meets the Eye?*, HEALTH AFF. BLOG (Oct. 20, 2017), <https://www.healthaffairs.org/do/10.1377/hblog20171020.496593/full/>.

181. Exec. Order No.13,813, 82 Fed. Reg. 48,385, 48,385 (Oct. 17, 2017).

182. *Id.*

183. *See id.*

184. BERNADETTE FERNANDEZ ET AL., CONG. RESEARCH SERV., BACKGROUND INFORMATION ON HEALTH COVERAGE OPTIONS ADDRESSED IN EXECUTIVE ORDER 13813 7 (2018); *see also* Antos & Capretta, *supra* note 178.

185. Definition of "Employer" Under Section 3(5) of ERISA—Association Health Plans, 83 Fed. Reg. 614, 615 (Jan. 5, 2018).

186. Definition of "Employer" Under Section 3(5) of ERISA—Association Health Plans, 83 Fed. Reg. 28,912, 28,915 (June 21, 2018).

187. *Id.* at 28,912; *see also* Stephen Miller, *DOL's Final Rule on Association Health Plans Expands Options*, SOC'Y FOR HUMAN RES. MGMT. (June 20, 2018), <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/dols-final-rule-association-health-plans.aspx>.

188. Katie Keith, *Final Rule Rapidly Eases Restrictions on Non-ACA-Compliant Association Health Plans*, HEALTH AFF. BLOG (June 21, 2018), <https://www.healthaffairs.org/do/10.1377/hblog20180621.671483/full/>.

even higher premiums for those with more significant health care needs and destabilize the individual market.<sup>189</sup>

STLDI is gap insurance that can be purchased by certain qualifying individuals.<sup>190</sup> Formerly, STLDI provided coverage for up to three months for those individuals who were transitioning from one type of coverage to another.<sup>191</sup> Prompted by EO-3, the Departments promulgated a final rule on August 3, 2018 that extends the definition of “short-term” to “less than 12 months.”<sup>192</sup> “Limited duration” is defined as thirty-six months.<sup>193</sup> Young, healthy individuals would be inclined to seek insurance in non-ACA compliant plans, while those with serious health issues would be limited to insurance sold on the health care exchanges.<sup>194</sup> This scenario would negatively impact the risk pool for the individual market resulting in market destabilization, especially when coupled with the dissolution of the individual mandate penalty.<sup>195</sup> Further, it is estimated that these changes will result in increased premiums for ACA-complaint plans by about 6 percent<sup>196</sup> and cause 2.6 million individuals to lose long-term insurance.<sup>197</sup> High cost is the primary factor for individuals choosing to terminate insurance coverage.<sup>198</sup>

HRAs are those in which employers agree to pay or reimburse employees for medical expenses up to a certain dollar amount.<sup>199</sup> HRAs are attractive to employees, because they are excluded from income and are not subject to income tax.<sup>200</sup> On October 23, 2018, the Departments announced “a proposed

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189. See FERNANDEZ ET AL., *supra* note 184, at 8.

190. *Id.* at 10 (noting these include people who need temporary coverage after leaving their job, young adults no longer eligible to be on their parents’ plans who have not yet secured employment coverage, retired people not yet eligible for Medicare, and people who commonly travel internationally are not in the U.S. much).

191. *Id.* at 9.

192. Short-Term, Limited-Duration Insurance, 83 Fed. Reg. 38,212, 38,216 (Aug. 3, 2018).

193. *Id.*

194. See FERNANDEZ ET AL., *supra* note 184, at 13, 14.

195. *Id.* at 14.

196. Letter from Paul Spitalnic, Chief Actuary, Ctrs. for Medicare & Medicaid Servs., on Estimated Financial Effects of the Short-Term, Limited-Duration Policy Proposed Rule (Apr. 6, 2018).

197. Linda J. Blumberg et al., *Updated: The Potential Impact of Short-Term Limited-Duration Policies on Insurance Coverage, Premiums, and Federal Spending*, URBAN INST. 6 (2018), [https://www.urban.org/sites/default/files/publication/98903/2001951\\_updated-estimates-of-the-potential-impact-of-stld-policies\\_0.pdf](https://www.urban.org/sites/default/files/publication/98903/2001951_updated-estimates-of-the-potential-impact-of-stld-policies_0.pdf).

198. Press Release, Ctrs. for Medicare & Medicaid Servs., High Costs, Lack of Affordability Most Common Factors that Lead Consumers to Cancel Health Insurance Coverage, (June 12, 2017).

199. SISCO BENEFITS, COMPLIANCE OVERVIEW: HEALTH REIMBURSEMENT ARRANGEMENTS (HRAs) 1 (2017), <http://www.siscobenefits.com/wp-content/uploads/2017/05/ACA-Health-Reimbursement-Arrangements-HRAs-03-14-17.pdf>.

200. *Id.* at 2.

regulation [in response to EO-3] that expands the usability of health reimbursement arrangements (HRAs)."<sup>201</sup> The proposed rule, to be published in the Federal Register on October 29, 2018, will undo prohibitions put into place by the Obama administration that did not allow employers to use HRAs to reimburse employees for the cost of individual health insurance coverage.<sup>202</sup> Under the new regulatory scheme, employers will be able to "reimburse employees for the cost of individual health insurance coverage" in certain circumstances, thereby extending the tax advantage that traditional employer-sponsored coverage receives to HRAs.<sup>203</sup> In addition, the proposed rule permits employers that provide "traditional employer-sponsored coverage to [fund] an HRA of up to \$1,800 per year . . . to reimburse an employee for certain qualified medical expenses, including premiums for short-term, limited duration insurance plans."<sup>204</sup>

#### IV. CONCLUSION

*"How much damage the executive order can do . . . [to] the ACA will depend on arcane details in the regulations yet to come." Larry Levitt, Senior Vice President, in a tweet dated October 12, 2017*<sup>205</sup>

The president is tasked with ensuring that the laws are "faithfully executed[,]" including those that he does not favor.<sup>206</sup> Under the Constitution, the ACA remains the law of the land until Congress rescinds it using the same procedures as when the statute was enacted.<sup>207</sup> On August 2, 2018, Baltimore, Cincinnati, Chicago, and Columbus, as well as a married couple who purchased health insurance on Virginia's health insurance marketplace, filed suit against President Trump, the Secretary of HHS, HHS, the Administrator of CMS, and CMS,<sup>208</sup> averring that not only are the defendants in violation of their constitutionally-imposed duty, but that they are deliberately "sabotag[ing]" the ACA.<sup>209</sup> Plaintiffs claim that the actions of the Trump administration, through a myriad of misdeeds, including the elimination of ACA guarantees, deterring enrollment in the health insurance marketplace plans, exacerbating health

201. U.S. Dep't. of Labor News Release 18-1715-NAT (Oct. 23, 2018).

202. *Id.*; Stephen Miller, *Regulations Aim to Let Employees Use HRAs to Buy Health Insurance*, SOC'Y FOR HUM. RESOURCE MGMT. (Oct. 26, 2018), <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/regulations-to-let-employees-use-hras-to-buy-health-insurance.aspx>.

203. U.S. Dep't. of Labor News Release 18-1715-NAT, *supra* note 201.

204. *Id.*

205. Larry Levitt (@larry\_levitt), TWITTER (Oct. 12, 2017, 8:52 AM), [https://twitter.com/larry\\_levitt/status/918504721140236288](https://twitter.com/larry_levitt/status/918504721140236288).

206. U.S. CONST. art. II, § 3.

207. *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983) (citing U.S. CONST. art. I, §§ 1, 7).

208. Complaint for Plaintiffs at 1, 9, 129, *City of Columbus et al. v. Donald J. Trump et al.*, No. 18-02364 (D. Md. filed Aug. 2, 2018).

209. *Id.* at 4.

insurance costs, and undermining the individual mandate, are in direct disregard and violation of an existing law.<sup>210</sup> Specifically, plaintiffs urge the court to enjoin the defendants from implementing EO-1 and EO-2, which were expressly issued “to undermine, rather than faithfully execute, the ACA.”<sup>211</sup> At the time of this writing, the outcome of this case is yet to be determined.

Candidate Trump unequivocally assured the Nation that he was “going to take care of everybody. . . . Everybody’s going to be taken care of much better than they’re taken care of now.”<sup>212</sup> He promised that his administration’s health care insurance would be less expensive and far better than that provided under the ACA.<sup>213</sup> Candidate Trump even vowed to support universal coverage so that every American would receive adequate health care.<sup>214</sup> Regrettably, the agenda of President Trump and his administration, as reflected through executive orders, proclamations, agency guidance documents, and legal positions, suggests otherwise.

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210. *Id.* at 29, 37, 46, 68.

211. *Id.* at 128.

212. *60 Minutes: Trump* (CBS television broadcast Sept. 27, 2015), <https://www.cbsnews.com/news/donald-trump-60-minutes-scott-pelley/>; Scott Pelley, *Trump Gets Down to Business on 60 Minutes*, CBS NEWS (Sept. 27, 2015), <https://www.cbsnews.com/news/donald-trump-60-minutes-scott-pelley/>.

213. *60 Minutes: Trump*, *supra* note 212; Pelley, *supra* note 212.

214. *60 Minutes: Trump*, *supra* note 212; Pelley, *supra* note 212.