

OA 629

Pre-Show: Mar-a-Lago?

A. Updates

1) Trump on Tuesday

Trump - order entered, covered on Cleanup - candidates suggested on Friday - it's galling but not going to derail

Kel McClanahan, National Security Counselors

2 paths:

<https://lawandcrime.com/opinion/gaming-out-the-two-major-paths-forward-after-judge-grants-trumps-request-for-a-special-master-in-mar-a-lago-case/>

-makes an incredibly good point I haven't seen elsewhere, and it's based on this principle that I've talked about occasionally but probably not enough on the show in the age of Trump, which is: you can't always immediately appeal everything. Can you immediately appeal an order appointing a Special Master? In most cases, absolutely not. Here – maybe? So let's look at the background law.

Rule comes from a Supreme Court decision called *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), which is that as a general rule, only final judgments are appealable.

28 U.S.C. § 1291 ("The courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States.")

I DON'T EVEN KNOW WHAT THAT WOULD MEAN HERE BECAUSE THERE ISN'T A COMPLAINT, because this entire proceeding is complete nonsense. But usually that means resolution on the merits. And that makes total sense

Nonetheless, as noted in *Cohen v. Beneficial Loan Co.*, some interlocutory decisions act as final judgments to certain rights. Therefore, interlocutory decisions are appealable under the collateral order doctrine if they fulfill three conditions:

- 1) The interlocutory decision conclusively determined the disputed question
- 2) The disputed question is important and entirely separable from the merits of the action
- 3) The interlocutory decision is effectively unappealable after a final judgment is handed down

Today that's codified at 28 U.S.C. § 1292(b)

<https://www.law.cornell.edu/uscode/text/28/1292>

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order [1] involves a controlling question of law [2] as to which there is substantial ground for difference of opinion and [3] that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order

The district court judge gets to decide if it's interlocutory! Now, any fair judge would agree that her order almost certainly meets those criteria, but if Judge Cannon, FSW, were a fair judge we wouldn't be here.

So here's the brilliance of how the DOJ litigated this, h/t to Kel

<https://lawandcrime.com/opinion/gaming-out-the-two-major-paths-forward-after-judge-grants-trumps-request-for-a-special-master-in-mar-a-lago-case/>

- because Judge Cannon is just making stuff up, the DOJ pinned her down that she was granting injunctive relief under FRCP 65 & that's what the order says
- that triggers 28 U.S.C. § 1292(a)

<https://www.law.cornell.edu/uscode/text/28/1292>

(a) Except as provided in subsections (c) and (d) of this section, **the courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States**, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, **granting, continuing, modifying, refusing or dissolving injunctions**, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

So the DOJ can immediately appeal, or they can take their lumps and work with it.

- 2) More info on Alaska RCV
- a) Brianna Tittle on FB:

The two Alaska Native women Al Gross referenced when he dropped out were Peltola and fifth place, Tara Sweeney. Because Tara didn't move up, there was only one indigenous woman in the running. Also marginally fun fact - Don Young grabbed and flipped that seat in a special election when Nick Begich's dad (Rep. Nick Begich Sr.) died in a plane crash. So there's hope Mary will hold onto it for a while!

- b) Chris Kiser

1) overvotes invalidate a ballot when counting the round of the overvote. So a ballot ranking 1 candidate first and 2 candidates second will only be invalidated if the 1st rank candidate is defeated. This is why the election results have a row for overvotes when tabulating redistributed ballots.

2) There is a write-in box on the ballot for every election. Al Gross dropping out did not add a write-in box.

- c) Eran Segev

The reason the Democrat won is because on aggregate, more people voted for her than for any other candidate. The reason that's true is that in this system, each voter gets more than one vote! Most people don't think about it that way, but that's a mathematical truth. At the end, only one of your votes goes towards one of the final candidates, because your other votes went to unsuccessful candidates, but you still had many votes.

3) Indiana to tax student loan forgiveness

<https://www.wthr.com/article/news/education/indiana-will-tax-loan-forgiveness-similar-to-other-states/531-7533db3c-f43d-459a-b639-6f5779eb25b7>

-ordinarily, debt forgiveness is taxable. If you loan me \$10,000, and say “pay me back in five years,” and then five years from now you say, “you know what, it’s all good,” I have to report that on my federal taxes. I’ve gotten \$10,000 in income.

So, is the \$10-20,000 you’re getting from the Biden administration to forgive student loan debt taxable?

- a) Federally, the answer is no, and this is not a thing that the conservative courts can do ANYTHING ABOUT.

HOWEVER – and again, we’re going to get like five weirdos accusing us of “punching left” here because we always get that when we defend the Biden administration – but this is a deliberate thing they did to keep their campaign promise.

American Rescue Plan Act of 2021, H.R. 1319

March 11, 2021 – one of the first big accomplishments of the Biden administration upon taking office
\$1.9 trillion in relief

<https://www.congress.gov/117/plaws/publ2/PLAW-117publ2.pdf>

Under Part 8, “Miscellaneous provisions,” Section 9675 amends 26 U.S.C. 108 of the Internal Revenue Code

<https://www.law.cornell.edu/uscode/text/26/108>

That’s the section of the IRC that deals with special treatment for “income from the discharge of indebtedness.”

Adds Section (f)(5), which says:

(5) Special rule for discharges in 2021 through 2025 - **Gross income does not include any amount which (but for this subsection) would be includible in gross income by reason of the discharge (in whole or in part) after December 31, 2020, and before January 1, 2026, of—(A) any loan provided expressly for postsecondary educational expenses, regardless of whether provided through the educational institution or directly to the borrower, if such loan was made, insured, or guaranteed by—**

- (i) the United States, or an instrumentality or agency thereof,
- (ii) a State, territory, or possession of the United States, or the District of Columbia, or any political subdivision thereof, or
- (iii) an eligible educational institution (as defined in section 25A),

(B) any private education loan (as defined in section 140(a)(7) [1] of the Truth in Lending Act),

(C) any loan made by any educational organization described in section 170(b)(1)(A)(ii) if such loan is made—

- (i) pursuant to an agreement with any entity described in subparagraph (A) or any private education [2] lender (as defined in section 140(a) of the Truth in Lending Act) under which the funds from which the loan was made were provided to such educational organization, or
- (ii) pursuant to a program of such educational organization which is designed to encourage its students to serve in occupations with unmet needs or in areas with unmet needs and under which the services provided by

the students (or former students) are for or under the direction of a governmental unit or an organization described in section 501(c)(3) and exempt from tax under section 501(a), or (D) any loan made by an educational organization described in section 170(b)(1)(A)(ii) or by an organization exempt from tax under section 501(a) to refinance a loan to an individual to assist the individual in attending any such educational organization but only if the refinancing loan is pursuant to a program of the refinancing organization which is designed as described in subparagraph (C)(ii). The preceding sentence shall not apply to the discharge of a loan made by an organization described in subparagraph (C) or made by a private education lender (as defined in section 140(a)(7) of the Truth in Lending Act) if the discharge is on account of services performed for either such organization or for such private education lender.

Congress has taxing power, that law was passed, NOTHING the Supreme Court can do about it.

BUT! Can individual states screw with you?

Yes. Three questions: (1) the state “conforms” to the IRC in terms of adjudicating taxes. Most states do, but some don’t (like Arkansas and Mississippi). Even if it does, you have two more questions: is (2) when did they last conform? – some states have picked a date, and if it’s pre-2021, it would exclude the American Rescue Plan Act (like Minnesota – so you might want to contact your state legislature, because this is very likely just an accident). But then there’s a third category, and that’s states that conform to the IRC, post-ARPA, but decided to pass laws that specifically exclude § 108(f)(5).

And yes, states did this. In particular, states dominated by Republicans – Indiana and North Carolina – looked at that provision and said “oh, hell no, that’s not a tax cut for mega-corporations, so we don’t want you to have the benefit of it and think that government is a good thing.”

Indiana has specifically come out and confirmed it. Go check with your state’s Dept of Revenue or equivalent. (*Don’t take legal or tax advice from a podcast.)

B. *Braidwood Management, Inc. v. Becerra* (N.D. Texas 2022)

REPUBLICANS AREN’T GOING TO STOP AT BANNING ABORTION – THEY WANT YOU DEAD (DON’T CARE)
42 U.S.C. § 300gg – section of the ACA regulating “fair health insurance premiums”
<https://www.law.cornell.edu/uscode/text/42/300gg>

The Patient Protection and Affordable Care Act (“ACA”) requires **most private health insurance to cover certain “preventive care.”** 42 U.S.C. § 300gg-13. Specifically, group health plans and health insurance issuers **must “provide coverage for and shall not impose any cost sharing requirements for” four categories of preventive care [as defined by].** Id. The ACA empowers **three agencies** affiliated with the Department of Health and Human Services (“HHS”) to determine what services fall within those four categories. Id. **First**, the U.S. Preventive Services Task Force (“PSTF”) recommends **“evidence-based items or services that have in effect a rating of ‘A’ or ‘B.’”** Id. § 300gg-13(a)(1). **Second**, the Advisory Committee on Immunization Practices (“ACIP”) recommends **certain immunizations.** Id. § 300gg-13(a)(2). **Third**, the Health Resources and Services Administration (“HRSA”) issues **“comprehensive guidelines” with respect to infants, children, and adolescents for “evidence-informed preventive care and screenings.”** Id. § 300gg-13(a)(3). **And fourth**, HRSA issues **“comprehensive guidelines” with respect to women for “such additional preventive care and screenings”** not covered under § 300gg-13(a)(1). Id. § 300gg-13(a)(4). Private health insurance must cover the services identified by the three agencies under these categories.1 Id. § 300gg-13(a).

U.S. Preventive Services Task Force (“PSTF”) makes recommendations. The purpose of PSTF is to “review the scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services for the purpose of developing recommendations for the health care community, and updating previous clinical preventive recommendations.” Id. By statute, PSTF and its members “shall be independent and, to the extent practicable, not subject to political pressure.” Id. § 299b-4(a)(6).

Under #1

In 2019, PSTF recommended pre-exposure prophylaxis (“PrEP”) drugs to prevent HIV infection. See Defs.’ App. 385, ECF No. 65. PSTF issued an “A” recommendation for PrEP drugs for individuals who are at high risk of HIV acquisition, which meant that health insurance plans must cover PrEP drugs under 42 U.S.C. § 300gg-13(a)(1).

Under #2

Starting in 2007, the Advisory Committee on Immunization Practices (“ACIP”) began recommending the HPV vaccine for girls aged eleven to twelve. ACIP currently recommends the HPV vaccine for **all children** ages eleven to twelve, plus various catch-up vaccination plans for older populations. Health insurance plans must cover the HPV vaccine under 42 U.S.C. § 300gg-13(a)(2).

Under #3

Health Resources and Services Administration (“HRSA”). In 2010, HRSA promulgated a series of comprehensive guidelines for infants, children, and adolescents. The guidelines include counseling for alcohol abuse, screening and behavioral counseling for sexually transmitted infections, screening and behavior interventions for obesity, and counseling for tobacco use. In 2011, HRSA promulgated additional guidelines requiring nonexempt employers to cover “[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.” Health insurance plans must cover the services recommended by HRSA under 42 U.S.C. § 300gg-13(a)(3) and (a)(4).

So:

Individual named Plaintiffs John Kelley, Joel Starnes, Zach Maxwell, and Ashley Maxwell provide health coverage for themselves and their families. They want the option to purchase health insurance that excludes or limits coverage of PrEP drugs, contraception, the HPV vaccine, and the screenings and behavioral counseling for STDs and drug use. They say neither they nor their families require such preventive care. Id. **They also claim that compulsory coverage for those services violates their religious beliefs by making them complicit in facilitating homosexual behavior, drug use, and sexual activity outside of marriage between one man and one woman.**

(hold on)

Plaintiff Kelley Orthodontics provides health insurance for its employees. Kelley Orthodontics is a Christian professional association that wishes to provide health insurance for its employees that excludes coverage of preventive care such as contraceptives and PrEP drugs. Id. at 39. Plaintiff John Kelley, the owner of Kelley Orthodontics, says that providing such coverage violates his religious beliefs. Id. Plaintiff **Braidwood Management Inc.** is a **Christian for-profit corporation** owned by Steven Hotze. Id. at 69. Braidwood provides health insurance to its approximately seventy employees through a self-insured plan, and Hotze **wishes to provide health insurance for Braidwood’s employees that excludes**

coverage of preventive care such as contraceptives and PrEP drugs. Id. at 70–71. Hotze, like Plaintiffs Kelley, Starnes, and the Maxwells, objects to coverage of those services on religious grounds. Id. at 72–73. Hotze **also wants the option to impose copays or deductibles for preventive care in Braidwood’s self-insured plan.** Id. at 70, 73. Plaintiffs argue that Defendants’ enforcement of the preventive-care mandates limits their ability to obtain or provide insurance that excludes their unwanted coverage.

I don’t know where to begin with how wrong that is.

HPV is not about “promiscuous sex”

PrEP is not about being gay.

https://en.wikipedia.org/wiki/Pre-exposure_prophylaxis

-reduces the risk of acquiring HIV by up to 99%, according to the CDC

-AIDS is not about being gay

PrEP is one of a number of [HIV](#) prevention strategies for people who are HIV negative but who have a higher risk of acquiring HIV, including sexually active adults at increased risk of contracting HIV, people who engage in intravenous drug use (see [drug injection](#)), and [serodiscordant](#) sexually active couples (partner is HIV positive).

So you can be straight and monogamous and married, EVERYTHING these Christians say they want and still be recommended PrEP, the HPV vaccine, and good god.

Held:

- 1) PSTF violates the Appointments Clause. The Court GRANTS Plaintiffs’ summary judgment motion and DENIES Defendants’ summary judgment motion on Claim 1 as to 42 U.S.C. § 300gg-13(a)(1). The Court reserves ruling on the appropriate remedy.
- 2) The PrEP mandate violates Braidwood’s rights under RFRA. The Court GRANTS Plaintiffs’ summary judgment motion and DENIES Defendants’ summary judgment motion on Claim 5 as to Braidwood. The Court reserves ruling on Claim 5 as to the remaining Plaintiffs and reserves ruling on the appropriate remedy. – **Uncertain about HPV**

Why?!?!?

1) Appointments

The Appointments Clause lays out the permissible methods of appointing “Officers of the United States.” U.S. Const. art. II, § 2, cl. 2. Principal officers must be nominated by the President and confirmed by the Senate. Id. But Congress can authorize the appointment of “inferior Officers” by the President alone, the courts, or “the Heads of Departments.” Id.

A person is an officer of the United States if he (1) occupies a “‘continuing’ position established by law” and (2) exercises “significant authority pursuant to the laws of the United States.”

First - there is a principal officer – Xavier Becerra, director of HHS. Ratifies the decisions of ACIP and HRSA. So those challenges were preposterous on face, and even this court didn’t try and say they violated that law.

But not PSTF – why? Independence from political decision-making LIKE THIS

PSTF is different. According to Defendants, the Secretary may not direct PSTF to “give a specific preventive service an ‘A’ or ‘B’ rating, such that it would be covered pursuant to 42 U.S.C. § 300gg-13(a)(1).” Defs.’ Suppl. Filing 3, ECF No. 86. That is because all PSTF members “and any recommendations made by such members, shall be independent and, to the extent practicable, not subject to political pressure.” 42 U.S.C. § 299b-4(a)(6). The Secretary, a political actor, thus does not have authority to direct what services are covered under § 300gg-13(a)(1). Arguably, the phrase “to the extent practicable” permits some level of direction by the Secretary. Id. But whatever that phrase means, it does not provide an exception for the Secretary to decree recommendations unilaterally. That exception would swallow the rule that “recommendations” must be “independent” and “not subject to political pressure.” Id. Because the Secretary lacks authority to determine or direct what services receive an “A” or “B” rating, he cannot ratify PSTF’s decisions on that subject. See Gordon, 819 F.3d at 1191.

Is PSTF even an officer?

-significant authority pursuant to the laws of the US? Dubious.

-not sure it’s continuing, they serve part time. Three times a year for TWO DAYS

-unpaid

-all they do is come up with what services get an “A” or “B” rating and thus become mandatory. But the mandate was authorized by Congress – this is like our ATF example, does this gun count as a semiautomatic? THEY DIDN’T MAKE THE POLICY, they don’t set out the criteria, they just do an administrative job.

Bonkers.

EVEN THEN, are they “principal officers”? OF COURSE NOT. They don’t make policy.

Inferior officers, then, are “officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”

Obviously under the supervision of HHS.

This court blows up the entire PSTF because it wants to rule in favor of Christians who hate gay people and are stupidly wrong about facts.

2) RFRA

The PrEP mandate substantially burdens the religious exercise of Braidwood’s owners. Braidwood is a for-profit corporation owned by Steven Hotze. Pls.’ App. 69, ECF No. 46. Hotze objects to providing coverage for PrEP drugs because he believes that (1) the Bible is “the authoritative and inerrant word of God,” (2) the “Bible condemns sexual activity outside marriage between one man and one woman, including homosexual conduct,” (3) providing coverage of PrEP drugs “facilitates and encourages homosexual behavior, intravenous drug use, and sexual activity outside of marriage between one man and one woman,” and (4) providing coverage of PrEP drugs in Braidwood’s self-insured plan would make him complicit in those behaviors. Id. at 72.

Yet the ACA requires Braidwood to provide coverage for PrEP drugs. See 26 U.S.C. § 4980H(c)(2); 42 U.S.C. § 300gg-13(a)(1); 45 C.F.R. § 147.130(b)(1). If Braidwood does not provide coverage for PrEP drugs, it faces a substantial monetary penalty. See 26 U.S.C. §§ 4980D, 4980H.

Braidwood is not merely alleging a traditional “pocketbook injury.” *California v. Texas*, 141 S. Ct. 2104, 2114 (2021). Distinct from his risk of pecuniary harm, Hotze asserts an ongoing dignitary harm, claiming that merely “providing this coverage in Braidwood’s self-insured plan would make [him] complicit” in behaviors that violate his religious beliefs. Pls.’ App. 72, ECF No. 46. Therefore, Braidwood faces not only a potential future injury in the form of paying for preventive care, but also a current injury in the form of underwriting services that violate Hotze’s religious beliefs.

Rather than disputing the law, Defendants dispute Hotze’s beliefs. They argue that Hotze’s claim that PrEP drugs facilitate various kinds of behavior is an empirical one that requires factual support. See Defs.’ Summ. J. Br. 66–67, ECF No. 64. But Defendants inappropriately contest the correctness of Hotze’s beliefs, when courts may test only the sincerity of those beliefs. The Supreme Court has “made it abundantly clear that, under RFRA, [HHS] must accept the sincerely held complicity-based objections of religious entities.” *Little Sisters of the Poor*, 140 S. Ct. at 2383. Defendants may not “tell the plaintiffs that their beliefs are flawed” because the connection between the morally objectionable conduct and complicity in the conduct “is simply too attenuated.” *Hobby Lobby Stores*, 573 U.S. at 723–24. In other words, “[i]f an employer has a religious objection to the use of a covered contraceptive, and if the employer has a sincere religious belief that compliance with the mandate makes it complicit in that conduct, then RFRA requires that the belief be honored.” *Little Sisters of the Poor*, 140 S. Ct. at 2390 (Alito, J., concurring).

Braidwood has shown that the PrEP mandate substantially burdens its religious exercise. The burden thus shifts to Defendants to show that the PrEP mandate furthers a compelling governmental interest and is the least restrictive means of furthering that interest. Defendants have not carried that burden.