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"Déjà Vu All Over Again": Executive Action and ERISA Litigation

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In 2015, President Obama posthumously awarded the Presidential Medal of Freedom to the one of baseball's favorite philosophers, Yogi Berra, with a borrowed Yogi-ism: "One thing we know for sure: if you can't imitate him, don't copy him." One of a kind, Berra could sum up a complex situation with a pithy phrase. "It's déjà vu all over again" seems to sum up the possible course of ERISA benefits litigation as the nation careens through 2021. In breaking news as this article went to press, the Supreme Court reversed the Fifth Circuit's decision finding the Affordable Care Act unconstitutional. In an early decision of its 2020-2021 term, the Court continued its course correction for ERISA preemption. Other ERISA litigation will

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undoubtedly reflect the recent change in administrations and may reflect the loss of Justice Ruth Bader Ginsburg as well.

The great catcher Lorenzo (Lawrence) Pietro (Peter) "Yogi" Berra signed with the Yankees just before serving in World War II. On D-Day, 19-year-old Berra manned a machine gun aboard a small landing craft support missile boat during the Allied attack on the coast of Normandy. He received a Purple Heart, a Distinguished Unit Citation, two battle stars, and a European Theatre of Operations ribbon during the war, as well as the U.S. Navy Lone Sailor Award in 2009.[1]

Returning from the war to the Yankees' minor league team briefly[2] before the club called him up to "the show," Berra became a hero "all over again" as one of baseball's greatest catchers. He played 18 seasons for the Yankees, won three American League Most Valuable Player awards, collected 10 World Series Championship rings as a player, caught 173 shutouts (including two post-season shutouts and three no-hitters – perhaps most famous of all, the perfect game pitched by Don Larsen in Game 5 of the 1956 World Series, after which Berra leapt into Larsen's arms as he came off the mound), and was elected to the Baseball Hall of Fame in 1972. That year, the Yankees retired his uniform. Fans elected him to the Major League Baseball All-Century Team in 1999.[3] In 2015, President Obama posthumously awarded the Presidential Medal of Freedom to the late Berra, paying tribute with a borrowed Yogi-ism: "One thing we know for sure: if you can't imitate him, don't copy him."[4]

One of a kind, Berra could sum up a complex situation with a pithy phrase. "It's déjà vu all over again" seems to sum up the potential course of benefits litigation under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") as the nation careens through 2021.

ERISA litigation will reflect the changes in administration and may reflect the loss of Justice Ruth Bader Ginsburg. As this article went to press, the Supreme Court issued a decision reversing the decision of the Court of Appeals for the Fifth Circuit that had held the Affordable Care Act unconstitutional for lack of standing of the plaintiffs to seek a declaration of unconstitutionality. In an early decision of its 2020-21 term, *Rutledge v. Pharmaceutical Care Management Association*,[5] the Supreme Court held that an Arkansas statute withstood ERISA preemption as a "cost regulation" of pharmaceutical benefit managers ("PBMs") of the sort upheld by the Supreme Court in the *Travelers* trilogy. In a separate concurrence, Justice Thomas observed that the decision faithfully followed the Court's precedents, but then repeated his now familiar stance against the ERISA preemption jurisprudence that he himself helped to fashion.

In short order since the January 20 inauguration, the Biden administration charted a different course than the prior administration in Affordable Care Act litigation just decided by the Supreme Court.[6] The

Biden administration has halted for review or reversed eleventh-hour and earlier regulatory actions of the prior administration promulgated pursuant to a broad reading of a permitted 30-day comment period under the Administrative Procedure Act ("APA") in last term's *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*,[7] and reversed executive orders entered by President Biden's one-term predecessor.

RUTLEDGE: A SUCCINCT PRIMER ON ERISA PREEMPTION

The Sotomayor Opinion

Writing for a unanimous Court (with Justice Barrett not participating) in *Rutledge*, Justice Sotomayor, perhaps Justice Ginburg's closest successor on the Court, succinctly summarized ERISA jurisprudence and the Court's renewed understanding of the goal of ERISA "to make the benefits promised by an employer more secure by mandating certain oversight systems and other standard procedures," as it had articulated four years earlier in *Gobeille v. Liberty Mut. Ins. Co*.[8] Additionally, citing *Ingersoll-Rand Co. v. McClendon*,[9] the Court reaffirmed its long-standing understanding (to which it had returned in *Gobeille*) that Congress sought "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law" in order to "minimize the administrative and financial burden of complying with conflicting directives" and to ensure that plans need not tailor substantive benefits to requirements in multiple jurisdictions.[10]

The Court recounted that, before the district court issued its opinion in *Rutledge*, the U.S. Court of Appeals for the Eighth Circuit had issued its opinion in *Pharmaceutical Care Mgmt. Assn. v. Gerhart*,[11] holding that ERISA preempted an Iowa statute similar to the Arkansas statute at issue in *Rutledge*. The Eighth Circuit reasoned that the Iowa statute "implicitly referenced" ERISA by regulating PBMs that administered ERISA plan benefits, and that the statute had an impermissible connection to an ERISA plan because the statute's appeal process requirement for pharmacies to challenge PBM reimbursement rates and its restriction on pricing sources limited a plan administrator's ability to control the calculation of benefits.[12] Not surprisingly, the district court in *Rutledge* followed suit, and the U.S. Court of Appeals for the Fifth Circuit affirmed.

The Supreme Court reversed and concluded that Arkansas Act 900, adopted in 2015, withstood ERISA preemption as a "cost regulation" of PBMs of the sort upheld in the *Travelers* trilogy. As Justice Sotomayor cogently explained, PBMs comprise "a little-known but important part of the process by which many Americans

get their prescription drugs" and "serve as intermediaries between prescription-drug plans and the pharmacies that beneficiaries use."[13] PBMs reimburse pharmacies for the drugs purchased by beneficiaries of prescription drug plans, less the amounts of copayments paid by the beneficiaries. Act 900 addressed the concerns that reimbursement rates set by PBMs did not cover the cost of the drugs to pharmacies, and that rural and independent pharmacies were "at risk of losing money and closing."[14] PBMs set reimbursement rates in their contracts with pharmacies according to lists developed by the PBMs setting maximum allowable costs ("MAC lists"). Then, in their contracts with prescription drug plans, PBMs also set reimbursement rates exceeding the MAC list reimbursement rates, thereby generating profits for PBMs.[15]

Act 900 required PBMs "to tether reimbursement rates to [Arkansas] pharmacies' acquisition costs by timely updating their MAC lists when drug wholesale prices increase.[16] The act also required PBMs to provide administrative appeal procedures through which pharmacies could challenge MAC-list reimbursement prices that fell below the pharmacies' wholesale costs[17] and to increase reimbursement rates if a pharmacy could not acquire the drug at a lower price from its "typical wholesaler."[18] The act mandated that PBMs allow pharmacies to "reverse and re[-]bill" reimbursement claims where pharmacies could not procure drugs from their "typical wholesaler[s] at a price equal to or less than the MAC reimbursement price."[19] Finally, the act permitted a pharmacy to refuse to sell a drug to a beneficiary if the PBM would reimburse the pharmacy at an amount lower than the pharmacy's acquisition cost.[20]

Justice Sotomayor began her summary of seminal ERISA preemption cases both before and after the *Travelers* trilogy in 1995 with the Court's touchstone for finding an impermissible connection with an ERISA plan: "this Court considers ERISA's objectives "as a guide to the scope of the state law that Congress understood would survive."[21] Citing *Gobeille* and *Ingersoll-Rand* as reinforcing a uniform body of benefits law "'in order to minimize the administrative and financial burden of complying with conflicting directives and ensuring that plans do not have to tailor substantive benefits to the particularities of multiple jurisdictions,"[22] the Court reaffirmed that ERISA primarily preempts state laws that require "providers to structure benefit plans in particular ways," that bind plan administrators to specific state rules for determining beneficiary status, or that exert "acute, albeit indirect, economic effects of state law designed to "force an ERISA plan to adopt a certain scheme of substantive coverage."[23] Absorbing the *Travelers* trilogy into its summary of ERISA preemption, the Court acknowledged that state laws that merely affect costs do not have an

impermissible connection to an ERISA plan.[24] Written by Justice Souter (also writing for a unanimous Court in 1995), *Travelers* presumed that insurers passed along to insurance purchasers, including ERISA plans, the surcharges of up to 13 percent that the state of New York imposed on hospital billing rates for plans other than Blue Cross Blue Shield plans.[25] The Court also reasoned that the pass-through might "affect a plan's shopping decisions, but it [did] not affect the fact that any plan will shop for the best deal it can get"; moreover, plans could still provide what the Court termed a "uniform interstate benefit package."[26]

In line with that reasoning and recognizing that "[t]he logic of *Travelers* decides this case,"[27] Justice Sotomayor recognized that such regulations remain simply "cost regulations" because they "merely increase costs or alter incentives without forcing plans to adopt any particular scheme of administrative coverage."[28] Finding Act 900 "less intrusive" than the New York surcharge law challenged in *Travelers*, the Court noted that Act 900 does not "refer" to ERISA, it does not act immediately and exclusively on ERISA plans, and ERISA plans "are not essential to [the act's] operation."[29] Accordingly, the Court concluded that Act 900 did not have an impermissible connection with an ERISA Plan.

The Court also concluded that Act 900 did not "refer to" ERISA. First, Justice Sotomayor reasoned that, because Act 900 applied to PMBs whether or not they managed ERISA plans, and because the act only affected those plans with which PBMs contract and to which they may pass along higher pharmacy rates, Act 900 "[did] not act immediately and exclusively upon ERISA plans."[30] Second, Justice Sotomayor reaffirmed that, because Act 900 regulated PMBs "whether or not the plans they service[d] fall within ERISA's coverage," the existence of ERISA plans was not essential to the law's operation, similar to the surcharges in *Travelers* and the California law in *Dillingham* regulating apprenticeship programs that need not be ERISA programs.[31]

Finally, the Court rejected PCMA's arguments for preemption. To PCMA's assertion that Act 900 affects plan design because it ignores preferences of pharmacies for MAC lists that contain costs and insure predictability, the Court repeated that regulating reimbursement rates does not "require plans to provide any particular benefit to any particular beneficiary in any particular way," but merely "establishes a floor for the cost of the benefits that plans choose to provide."[32] To PCMA's argument that Act 900's appeal procedure dictates the standard governing the resolution of an appeal, the Court replied that the appeal procedure does not govern central matters of plan administration and noted that ERISA did not preempt state-law mechanisms of executing judgments against ERISA plan benefits, even though allowing such garnishments prevented participants from receiving their

benefits.[33] To PCMA's argument that allowing pharmacies to decline to dispense a prescription interfered with central plan administration and prevented participants from receiving their benefits, the Court observed that, "when a pharmacy declines to dispense a prescription, the responsibility lies first with the PBM for offering the pharmacy a below-acquisition reimbursement."[34] To PCMA's final argument that the act created "operational inefficiencies," the Court reiterated that ERISA does not preempt a state law that merely increases costs, even if plans pass through the costs or decide to limit benefits.[35]

The Thomas Concurrence

In a separate concurrence, Justice Thomas conceded that the decision faithfully followed the Court's precedents, but then repeated his now familiar stance that he "continue[d] to doubt our ERISA preemption jurisprudence."[36]

In its place, he offered a two-part test in which two questions must be answered affirmatively in order to find ERISA preemption: (1) "[D]o any ERISA provisions govern the same matter as the state law at issue?" and (2) "[D]oes that state law have a meaningful relationship to ERISA plans?"[37]

The first question proceeds from a non-evident premise, i.e., that Congress may not preempt state law if state law frustrates the purpose of a federal act without duplicating its provisions or if Congress chooses not to provide a remedy in the federal law. That narrowing of ERISA preemption would fail to please Justice Thomas's ardent textualist compatriot, the late Justice Scalia, who called for a return to the Court's established jurisprudence concerning conflict and field preemption in his concurrence (joined by Justice Ginsburg) in *Egelhoff v. Egelhoff* and elsewhere.[38] In his own concurrence in *Gobeille*, Justice Thomas had floated what appeared to be a trial balloon: after more than 45 years since ERISA's passage, he suggested that the statute's expansive preemption provision might be unconstitutional.

The second question offers the vague standard of a "meaningful relationship" as a simplistic substitute for the more objective standards to which *Gobeille* and *Rutledge* return in order to determine preemption. Claiming somewhat disingenuously that the court has "paid little attention to the actual statutory text" and has "crafted our own," Justice Thomas elevates textual massaging over reviewing the structure and purposes of a federal statute. It is not surprising, then, that he avoids referencing Justice Souter's opinion in *Travelers*, which expressly sets forth the Court's method of statutory construction with the first step of explicating text: "[s]ince preemption claims turn on congress's intent, we begin as we do in any exercise of statutory construction with the

text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs."[39]

Although Justice Souter announces in *Travelers* that "relates to" in ERISA § 514(a) is limitless, Justice Thomas instead cites to Justice Scalia's concurrence in *Dillingham* for the observation that "relates to" is limitless. Justice Thomas, however, proposes a "reasonable person" standard for defining the term, a standard rooted in yet another non-evident premise that "many times, it is the ordinary, not literalist meaning that is the better."[40] In fact, in *Egelhoff*, Justice Thomas himself embraced and applied the *Dillingham* analysis of impermissible connection: "We have cautioned against an "uncritical literalism' that would make preemption turn on 'infinite connections.' *Travelers,* 514 U.S. at 656. Instead, 'to determine whether a state law has the forbidden connection, we look both to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive, as well as to the nature of the effect of the state law on ERISA plans."[41] Only belatedly, when he criticizes the tests in *Gobeille*, does Justice Thomas cite to Justice Scalia's concurrence in *Egelhoff* without mentioning its call for a return to field and conflict preemption.[42]

Lacking any frame of reference in his Urtext of the Federalist Papers for a statute conferring pension and welfare benefits, Justice Thomas reads the word "supersedes" as a replacement or substitution, rather than a blanket preemption. For that startling pronouncement, which no other member of the Court joins, Justice Thomas turns to a dictionary published two years *after* the passage of ERISA to justify that definition. He also cites two inapposite statutes not *in pari materia* where, he asserts, the plain language shows that Congress knows how to preempt state laws without replacing them, i.e., federal laws regulating cigarette package labeling and air carrier pricing, routes, or service.[43] Curiously, Justice Thomas neglects to mention that both federal statutes (i.e., 15 U.S.C. § 1334(b) and 49 U.S.C. § 41713) contain express exemptions for state and local regulation, much like ERISA § 514.[44]

Again, what he describes should sound familiar to ERISA practitioners as "oust the field" preemption, one of two types of ERISA preemption championed by his ardent textualist compatriot, the late Justice Scalia.

BREAKING NEWS: THE SUPREME COURT REVERSES THE FIFTH CIRCUIT'S INVALIDATION OF THE AFFORDABLE CARE ACT

After hearing oral argument on November 10, 2020 in two consolidated cases (*California, et al. v. Texas, et al.* and *Texas, et al. v.*

California, et al.), on June 17, 2021, the Supreme Court reversed the Fifth Circuit's decision invalidating the entire Affordable Care Act because of Congress's 2017 elimination of a monetary payment under 26 U.S.C. § 5000A of ACA, a/k/a the "individual mandate" from which only certain statutorily enumerated individuals remain exempt.

A quick recap: in 2017 Congress did not entirely eliminate the provision for non-exempt individuals who failed to procure health insurance: it simply lowered the payment to zero. The lower court, Judge Reed O'Connor of the Northern District of Texas, no stranger to striking down various provisions of ACA and Obama administration ACA regulations, found that setting the payment provision at zero vitiated the constitutional source of authority for that provision identified in *National Federation of Independent Business v. Sibelius* ("*NFIB*").[45] In an amicus brief, four law professors divided in their positions on ACA but united in their analysis of severability succinctly summarized the principles of severability in Supreme Court jurisprudence and advised the district court that courts prefer partial severability over full invalidation of a legislative act, and that courts seek to ascertain Congressional intent for the remainder of the act shorn of the unconstitutional provision. The professors reasoned that Congress clearly did not intend to invalidate the act in 2017 because it had only reduced the payment to zero, effective in 2019, but left the provision intact in the act.

No friend of ACA and a favored jurist for its opponents,[46] Judge O'Connor issued his decision on December 14, 2018, finding the individual mandate unconstitutional and inseverable from the rest of the Act.[47] On December 30, 2018, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, Judge O'Connor entered partial summary judgment on Count I of plaintiffs' amended complaint (which had sought a declaratory judgment that the individual mandate was unconstitutional and inseverable) but stayed its judgment pending appeal.[48] On appeal, the Fifth Circuit partially affirmed the district court's opinion in a 2-1 decision issued at the end of 2019 and revised in January 2020, finding the individual mandate unconstitutional, but remanding to the district court for additional analysis on the question of severability.[49] The Fifth Circuit majority opinion addressed the issue of the Commerce Clause as the constitutional source of authority for Congress's enactment of the ACA individual mandate.

Commerce Clause Holding or Dicta?

In following *NFIB*, the Fifth Circuit simplistically stitched together five votes (the four dissenters and the Chief Justice) and the discussion

of the Commerce Clause as an inadequate source for Congress's adoption of the individual mandate by Justice Roberts, writing only for himself alone in the majority opinion, and the discussion of the Commerce Clause by the four dissenters.[50] Rumors flew at the time that the Court issued *NFIB* that the four dissenters (led by Justice Kennedy) angrily refused to sign Justice Roberts' analysis because of his last-minute defection from their ranks.

On a principled basis that respected stare decisis, the late great Justice Ginsburg dissented from any discussion of the Commerce Clause and the Necessary and Proper Clause in the Roberts opinion as unfortunate and ill-reasoned dicta.[51] In her view, because Justice Roberts had found one source of constitutional authority for Congress's passage of the individual mandate in the Levy and Spending Clause, his unnecessary discussion of the lack of constitutional authority in the Commerce Clause and the Necessary and Proper Clause violated long-standing Supreme Court precedent. Indeed, some constitutional scholars have treated *NFIB* and the *Citizens United* decisions as major lapses in the Court's adherence to the doctrine of constitutional avoidance[52] articulated by Justice Frankfurter[53] and developed by Justice Brandeis in his seminal concurring opinion in *Ashwander v. Tennessee Valley Authority* ("*TVN*").[54] In articulating the principle of judicial minimalism, Justice Brandeis cautioned that a court should not formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.[55]

Following the Fifth Circuit's split decision in *Texas v. USA,* the Democratic attorneys general who intervened in the case, led by then California Attorney General Xavier Becerra (now serving as Secretary of Health and Human Services), sought immediate appeal from the Supreme Court. The Court granted the appeal in both Texas cases and consolidated the cases on appeal.

The Change in Administrations

Presidential administrations have differed in their respect for the Federal Constitution's Take Care Clause. For example, when the Internal Revenue Service determined that Edie Windsor did not qualify for the marital exemption from the federal estate tax because Section 3 of the Defense of Marriage Act then denied federal recognition to same-sex marriages, Windsor sued the United States for a tax refund on the ground that DOMA § 3 violated the Federal Constitution.[56] During the pendency of the *Windsor* litigation, the attorney general notified the Speaker of the House of Representatives, pursuant to 28 U.S.C. § 530D, that the Justice Department would no longer defend the constitutionality of DOMA § 3, given President Obama's conclusion that

statutory provisions based on sexual orientation should be subject to a heightened standard of scrutiny, but that the Executive Branch would continue to enforce the law consistent with the Constitution's Take Care Clause, absent a judicial determination of unconstitutionality.[57]

Writing for the Court in *Windsor*, Justice Kennedy noted that the typical Section 530D letter typically followed an adverse judgment by a federal court, and no such federal judgment had preceded the Section 530D letter described in *Windsor*.[58] Nonetheless, as Section 530D contemplated, once so notified, the Bipartisan Legal Advisory Group ("BLAG") of the House of Representatives moved to intervene in the litigation to defend the constitutionality of DOMA § 3. The district court denied intervention as of right, since the Justice Department already represented the United States, but permitted BLAG to intervene as an interested party.[59]

President Trump eschewed the Section 530D letter in favor of an executive order on his first day in office. Executive Order 13765 announced the policy of the Trump administration to repeal ACA and required the Secretary of Health and Human Services and the heads of all other executive departments and agencies with authorities and responsibilities under ACA to "exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the act that would impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications."[60] Despite the Obama administration's defense of the individual mandate as constitutional in *NFIB*, the Trump administration simply undid the federal government's positions by executive fiat.

Within three weeks of President Biden's inauguration and after the November 10, 2020 oral argument in the case, the Deputy Solicitor General of Justice Department notified the Supreme Court by letter dated February 10, 2021, of the following:

- "The federal respondents had previously filed a brief contending that Section 5000A(a) is unconstitutional and is inseverable from the remainder of the ACA, although the scope of relief should be limited to the provisions shown to injure the plaintiffs . . . [and had] advanced the same positions at oral argument";

- After the change in administrations, the Justice Department had reconsidered the government's position in the two cases and "no longer adheres to the conclusions in the previously filed brief of the federal respondents";

- After reconsideration, "it is now the position of the United States that the amended Section 5000A is constitutional" under the *NFIB* analysis that "the payment provision could be sustained as a valid exercise of Congress's constitutional power because it offered a choice between maintaining health insurance and making a tax payment," and because "the Court had noted that no negative legal consequences attached to not buying health insurance requiring a payment to the IRS, and that the government's position in the case confirmed that if someone chooses to pay rather than obtain health insurance, that person has fully complied with the law"; and

- In 2017, the Congress amended Section 5000A(c) by reducing to zero the shared responsibility payment assessed under Section 5000A(b) but did not amend Section 5000A(a) or (b); thus, Congress's decision to reduce the payment amount to zero "did not convert Section 5000A from a provision affording a constitutional choice into an unconstitutional mandate to maintain insurance."[61]

The February 20 letter also informed the Court that, if the Court found Section 5000A unconstitutional, the federal government now took the position that the payment provision in Section 5000A(c) is severable, because "the presumption of severability cannot be overcome here, particularly where the 2017 Congress that reduced to zero the amount of the shared responsibility payment option under Section 5000A simultaneously left in place the remainder of ACA."[62] In short, like his immediate predecessor, President Biden reconsidered the issues and notified the Court that the government had, in essence, again switched sides.

The Supreme Court's June 17, 2021 Opinion

On June 17, 2021, by a 7-2 vote, the Supreme Court reversed the Fifth Circuit decision invalidating ACA and remanded to that court with instructions to dismiss the case. The Court found that none of the state and individual plaintiffs, even those with what the Court called a "pocketbook injury," had proven any past or future concrete or particularized injury that the plaintiffs could "fairly trace" to ACA § 5000A(a) or that the Court could remedy. In effect, the Court declined to issue an advisory opinion because Article III of the Federal Constitution prohibits it from doing so.

Writing for the majority, Justice Breyer carefully stated that the Court "does not reach these questions of the Act's validity" because Texas

and the other plaintiffs – now "federal respondents" in the lead case – lacked the standing necessary to raise those issues.[63] The majority opinion also declined to address a novel theory of standing offered by the individual plaintiffs but never argued below, as well as a novel theory of standing for the state plaintiffs advanced only by the dissenters, but not by the parties themselves.[64]

The Court concluded that the federal respondents could not fairly trace their injuries to § 5000A(a), the statutory provision that they challenged.[65] Assuming a "pocketbook injury" for the individual plaintiffs, the Court noted that, to fulfill the the "live case or controversy" under Article III, § 2 of the Federal Constitution, the plaintiffs must still trace their alleged pocketbook injury to § 5000A(a).[66] Put another way, the plaintiffs had failed to demonstrate redressability, i.e., that a court could enjoin an action by a federal official or employee. The individual plaintiffs, however, had relied solely on cases with penalties still in effect.[67] Without an enforceable penalty, since the 2017 amendment had reduced the penalty to zero, no injunction would lie against HHS or Treasury. Nor, as Justice Breyer had observed, had plaintiffs sought to enjoin Congress. Thus, the individual plaintiffs had not shown, and could not show, any kind of governmental action or conduct that had caused or would cause them an injury that they could fairly trace to § 5000A(a).[68]

Similarly, the Court concluded that the states challenging ACA as unconstitutional had not demonstrated injuries fairly traceable to § 5000A(a). Instead, Texas and its state allies had simply asserted increased costs in the running of state-operated insurance programs, as well as increased administrative expenses necessitated by compliance with ACA's minimum essential coverage requirement. The Court noted that other ACA sections, and not ACA §5000(A)(a), contained those requirements.[69]

Given the substantial majority for a lack of standing, Justice Thomas's compliment to Justice Alito's conclusion in dissent that "the Court has gone to great lengths to rescue the Act from its own text" did not disturb the standing analysis. Nonetheless, Justice Thomas expressly recognized that "today's result [was] not the consequence of the Court once again rescuing the Act, but rather of us adjudicating the claims that the plaintiffs chose to bring."[70] After reading the Court's prior ACA cases as the dissenters did, Justice Thomas departed from the dissenters on the issue of relief.[71] He concluded, as did the majority opinion, that the plaintiffs did not demonstrate harm that the Court could redress. Continuing to believe that ACA should not survive, he discussed the dissenters' standing-through-inseverability argument as a "merits-like exercise," perhaps suggesting issues that those who would advance such an argument should anticipate and preemptively dispute.[72]

Joined by Justice Gorsuch in dissent, Justice Alito characterized the decision as "the third installment in our epic [ACA] trilogy, and it follows the same pattern as installments one and two. In all three episodes with [ACA] facing a serious threat, the Court has pulled off an improbable rescue."[73] The dissenters would find standing through the heretofore barely discussed standing-as-inseverability doctrine and would have held that the taxing power of Congress could not sustain the ACA penalty once Congress reduced it to zero, and that other ACA sections "inextricably linked" to the individual mandate were also unenforceable.[74] Reiterating that a court may address the merits even if only one plaintiff has standing, the dissent criticized the majority opinion as a distortion of standing jurisprudence and extensively discusses two examples of traceability and redressability.[75]

Although Justice Alito then cautioned that merits-like determination should not be "crammed" into standing questions, the dissent reached arguments that seemed to address the merits, particularly in its discussion of traceability, and cited several cases from an earlier era of Commerce Clause interpretation that addressed the merits as part of a standing inquiry.[76] Because the dissent also believed that the states had established constitutional injury, it too reached the merits, first finding that the reduction of the penalty to zero vitiated the constitutional source of authority for the individual mandate,[77] and then finding that those provisions linked to ACA § 5000A also fell as inseverable and therefore unenforceable against the federal respondents.[78]

EXECUTIVE ORDERS AND REGULATORY ACTIONS HALTED OR REVERSED

In contrast to his predecessor, President Biden's executive orders and directives from the White House to executive departments have supported ACA, particularly in a time of pandemic. Beginning with his January 20 and 28, 2021 executive orders in the first 10 days of his presidency, President Biden announced his administration's commitment to strengthen Medicaid and ACA. The President also expressly revoked executive orders of his predecessor, many issued in the waning hours of the prior administration under the shortened comment period approved by the Supreme Court in *Little Sisters of the Poor*[79] that sought to render all regulations and guidance prior to the Trump administrations invalid.

In Section 2 of Executive Order 13992, issued on January 20, 2021, President Biden expressly revoked the following executive orders of the former president:

> Sec. 2. Revocation of Orders. Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs), Executive Order 13777 of February 24, 2017 (Enforcing the Regulatory Reform Agenda), Executive Order 13875 of June 14, 2019 (Evaluating and Improving the Utility of Federal Advisory Committees), Executive Order 13891 of October 9, 2019 (Promoting the Rule of Law Through Improved Agency Guidance Documents), Executive Order 13892 of October 9, 2019 (Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication), and Executive Order 13893 of October 10, 2019 (Increasing Government Accountability for Administrative Actions by Reinvigorating Administrative PAYGO), are hereby revoked.[80]

Of particular interest for litigators who must identify the appropriate regulatory context for actions taken by plan sponsors, plan administrators, and other plan fiduciaries, the revoking of Executive Orders 13891 and 13892 in Section 2 overturns the prior administration's attempt to cancel all "guidance" interpreting long-standing statutes (including labor and employment statutes) in the guise of promulgating the first "regulations" during the Trump administration.

In Section 1 of Executive Order 14009, issued on January 28, 2021, President Biden renewed the federal government's renewed support of the ACA:

> In the 10 years since its enactment, the Affordable Care Act (ACA) has reduced the number of uninsured Americans by more than 20 million, extended critical consumer protections to more than 100 million people, and strengthened and improved the Nation's healthcare system. At the same time, millions of people who are potentially eligible for coverage under the ACA or other laws remain uninsured, and obtaining insurance benefits is more difficult than necessary. For these reasons, it is the policy of my Administration to protect and strengthen Medicaid and the ACA and to make high-quality healthcare accessible and affordable for every American.[81]

Reversing the Trump administration's drastic cuts in funding for navigators and for promotion of the ACA Marketplace on August 17, 2017, the January 28 executive order promised to spend $50 million for ACA Marketplace outreach.[82] In addition, on April 21, 2021, the Department of Health and Human Services ("HHS") announced that it would provide $80 million in funding for navigators for the 2022 plan year.

Consistent with Section 2 of his January 28 executive order, in which President Biden extended the special enrollment period for workers who lost health care coverage due to the COVID-19 public health emergency, CMS issued guidance relating to the Special Enrollment

Period ("SEP") established from February 15 to August 15, 2021.[83] On March 23, CMS issued an updated technical guidance featuring FAQs addressing issues relating to the SEP.[84]

In Section 4 of the January 28 executive order, President Biden expressly overturned his predecessor's January 20, 2017 executive order (Minimizing the Economic Burden of the [PPACA] Pending Repeal). In Section 3, President Biden directed all Executive Branch agencies to review the policies and actions of the agencies during the Trump administration inconsistent with President Biden's announced policy in Section 1 to strengthen Medicaid and ACA and to make high-quality healthcare accessible and affordable for every American."[85]

In Section 4 of the January 28 executive order, President Biden again expressly revoked his predecessor's October 20, 2017 Executive Order 13813 (Promoting Healthcare Choice and Competition Across the United States). Sub-part (b) of Section 4 took the extraordinary action of directing all agencies to identify Trump administration agency actions "relating to or arising from" the two revoked executive orders and to consider suspending, revising or rescinding such agency actions:

> (b) As part of the review required under section 3 of this order, heads of agencies shall identify existing agency actions related to or arising from Executive Orders 13765 and 13813. *Heads of agencies shall, as soon as practicable, consider whether to suspend, revise, or rescind – and, as applicable, publish for notice and comment proposed rules suspending, revising, or rescinding – any such agency actions, as appropriate and consistent with applicable law and the policy set forth in section 1 of this order.*[86]

Executive Order 13813 had authorized rule-making that specifically expanded the use of Associated Health Plans ("AHPs"), Short-Term Limited Duration Insurance ("STLDI"), and Health Reimbursement Arrangements ("HRAs"). Although courts had issued injunctions against the expanded AHPs and STLDI, the HRA rule had been promulgated and provided small employers with the option to provide individual HRA coverage for employees. Under the Biden executive order, the agencies must determine whether the HRA expansion is consistent with the policies of the Biden administration articulated in Section 1 of the January 28 executive order.

CONCLUSION

As one of baseball's favorite philosophers, Yogi Berra captured the most nominations from scores of readers in *The Economist* magazine's

2005 Christmas competition to earn the title "Wisest Fool of the Past 50 Years."[87] As employee benefits designers and litigators approach the half-century mark since the passage of ERISA, Berra's observation that "it's déjà vu all over again" rings eerily true. Practitioners may feel that this term's *Rutledge* decision and *Gobeille* represent yet another course correction in ERISA preemption analysis, not – at the moment – as dramatic a shift in ERISA preemption analysis as the *Travelers* trilogy in 1995. Nonetheless, the ground has quietly shifted. Far more rapid, the pace of change in the federal government's position in ACA litigation and the wholesale revocation of overreaching regulations of a one-term administration will inspire yet another wave of ACA litigation, one that bedevils employee benefits designers and litigators alike as they try to counsel clients.

To borrow the title of the radio show on which New York Times best-selling author Jon Passen pitched his 2020 biography of baseball's veritable Shakespearean Fool:[88] "Everything old is new again."

NOTES

1. *See https://www.mlb.com/news/yogi-berra-had-decorated-military-career-too/c-151195348.*

2. The Newark Bears manager, Hall of Famer Bill Dickey, the great catcher whose uniform the Yankees retired when they retired Berra's, became his mentor: "Everything I did in baseball I learned from Bill Dickey."

3. *See https://www.yogaberramuseum.org/about-yogi/.*

4. *See https://www.aol.com/article/2015/11/24/obama-honoring-spielberg-streisand-and-more-with-medal-of-freed/21272337/?icid=maing-grid7%7Chtmlws-sbbb%7Cdl3%7Csec1_lnk3%26pLid%3D-40526639.*

5. ___ U.S. ___, 141 S.Ct. 474 (2020) (Justice Barrett not participating).

6. *California, et al v. Texas, et al.*, No. 19-840, and *Texas, et al. v. California, et al.*, No. 19-1019, issued on June 17, 2021. A footnote to the Syllabus indicates that the Texas case was "together with" the California case.

7. 591 U.S. __, 140 S.Ct. 2367, 2386 (2020) Case No. 19-431, together with Case No. 19-454. *Trump, President of the United States, et al v. Pennsylvania et al.,* (Thomas opinion) (hereinafter *Little Sisters*) (italics added).

8. 577 U.S. 312, 320-21, 136 S.Ct. 936 (2016).

9. 498 U.S. 133, 142, 111 S.Ct. 478 (1990).

10. *Rutledge*, 141 S. Ct. at 480 (citing *Ingersoll-Rand*, 498 U.S. at 142).

11. 852 F.3d 722 (8th Cir. 2017).

12. *Id.* at 729 and 726, 731.

13. *Rutledge*, 141 S.Ct. at 478.

14. *Id.* at 478-79.

15. *Id.* at 478.

16. *Rutledge*, 141 S.Ct. at 479, citing Ark. Code Ann. § 17-92-507(c)(2) (Supp. 2019).

17. *Id.*, citing Ark. Code Ann. § 17-92-507(c)(4)(A)(i)(b).

18. *Id.*, citing Ark. Code Ann. § 17-92-507(c)(4)(C)(i)(b).

19. *Id.*, citing Ark. Code Ann. § 17-92-507(c)(4)(C)(iii).

20. *Id.*, citing Ark. Code Ann. § 17-92-507(e).

21. *Rutledge*, 141 S.Ct. at 480, quoting *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 117 S. Ct. 832 (1997).

22. *Id.*

23. *Id.*

24. *Id.* at 480-81.

25. *Id.* at 480.

26. *Id.*

27. *Id.* at 481.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* and citing *Dillingham*, 519 U.S. at 328.

32. *Id.* at 482.

33. *Id.*

34. *Id.*

35. *Id.* at 483.

36. *Id.* (Thoma's concurrence).

37. *Id.*

38. 532 U.S. 141, 152-53 (2001) (J. Scalia, concurring).

39. *Travelers*, 514 U.S. at 655 (citations omitted).

40. *Rutledge,* 141 S.Ct. at 484.

41. *Egelhoff,* 532 U.S. at 147 (2001) (citing *Dillingham*, 519 U.S. at 325).

42. *Rutledge*, 141 S.Ct. at 485.

43. *Id.* at 484.

44. 29 U.S.C. § 1144.

45. 567 U.S. 519, 132 S.Ct. 2566 (2012).

46. *See* this author's article, "Death By a Thousand Cuts: The Embattled ACA," *Benefits Law Journal*, Vol. 32, No. 2, Summer 2019.

47. *State of Texas v. U.S.A.*, 340 F.Supp.3d 579 (N.D. Tex. 2018).

48. *State of Texas v. U.S.A.*, 362 F.Supp.3d 665 (N.D. Tex. 2018) (entering Rule 54(b) partial summary judgment and entering stay pending appeal).

49. *State of Texas v. U.S.A.*, 945 F.3d 355 (5th Cir. 2019) (as revised January 1, 2020).

50. 945 F.3d at 387-91.

51. *NFIB*, 567 U.S. at 623 and footnote 12, 132 S.Ct. at 2629 and footnote 12.

52. *See, generally*, Andrew Nolan, "The Doctrine of Constitutional Avoidance: A Legal Overview," Congressional Record Service Report, September 2, 2014 (summarizing the long-standing principles of constitutional avoidance, including judicial minimalism, Alexander Bickel's passive virtues theory of judicial restraint, and the perception that *NFIB* and *Citizens United* were major exceptions to those principles).

53. *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 103 (1944).

54. 297 U.S. 288, 345-48 (1936) (J. Brandeis, concurring).

55. *Id.*

56. *Windsor v. U.S.*, 833 F.Supp.2d 394 (S.D.N.Y. 2012) (holding DOMA § 3 unconstitutional and mandating a tax refund for Edie Windsor).

57. *U.S. v. Windsor,*133 S.Ct. 2675, 2682-84 (2013).

58. *Id.* at 2683.

59. *Id.* at 2684.

60. "Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal." *See https://www.whitehouse.gov/the-pressoffice/2017/01/2/executive-order-minimizing-economic-burden-patient-protection-and-affordable-care-act.*

61. *https://www.scotusblog.com/wp-content/uploads/2021/02/No.-19-840-US-Letter.pdf.*

62. *Id.*

63. *California, et al v. Texas, et al.*, slip op, Majority Opinion, at 2.

64. *Id.* at 10.

65. *Id.* at 5-6.

66. *Id.*

67. *Id.* at 6.

68. *Id.* at 9.

69. *Id.* at 10-15.

70. *California, et al v. Texas, et al.*, slip op, Concurrence (J Thomas) at 1.

71. *Id.* at 3-6.

72. *Id.* at 5-6 and n. 2.

73. *California, et al v. Texas, et al.*, slip op, Dissent (J Alito, joined by Justice Gorsuch) at 1.

74. *Id.* at 4.

75. *Id.* at 8-13.

76. *Id.* at 13-20.

77. *Id.* at 20-27.

78. *Id.* at 27-32.

79. 591 U.S. ____, 140 S.Ct. 2367 (2020) Case No. 19-431, together with Case No.19-454, *Trump, President of the United States, et al v. Pennsylvania et al.*

80. 2021-01767, 86 FR 7049.

81. 2021-02252, 86 FR 7793. *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/28/executive-order-on-strengthening-medicaid-and-the-affordable-care-act.*

82. *Id.*

83. *https://www.cms.gov/newsroom/fact-sheets/2021-special-enrollment-period-response-covid-19-emergency.*

84. CMS "Updated and New Special Enrollment Period for COVID-19 Public Health Emergency." Technical Stakeholder Guidance, March 23, 2021; *see https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/2021-SEP-guidance.pdf.*

85. *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/28/executive-order-on-strengthening-medicaid-and-the-affordable-care-act.*

86. *Id.* (italics added).

87. *The Economist*, "Wisest Fools," January 27, 2005, retrieved from archive on February 27, 2021.

88. *Yogi: A Life Behind the Mask* (Little, Brown and Company, 2020).

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