



## COVID-19 Litigation Docket

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The COVID-19 pandemic has resulted in rapid and significant changes to the country's health care system. State Medicaid programs, state insurance departments, and the federal government have responded in a variety of ways. This docket will track state and federal litigation stemming from the COVID-19 response and relating to Medicaid, the Affordable Care Act, or other important health care protections. This docket was last updated July 31, 2020 and will be updated periodically.<sup>1</sup>

Since this docket was published on June 22, 2020, there have been litigation developments in *City of Chicago v. Azar*, which challenges the administration's refusal to open a special enrollment period during the pandemic; a preliminary injunction entered in *American College of Obstetricians and Gynecologists v. Food and Drug Administration* prohibiting the FDA from imposing in-person dispensing requirements on an abortion medication; and a preliminary injunction entered blocking the public charge rule during the public health emergency.

### Affordable Care Act

*City of Chicago v. Azar*, No. 1:20-cv-1566 (D.D.C)

On June 15, 2020, the City of Chicago filed a [complaint](#) against Alex Azar, the Secretary of the Department of Health and Human Services, challenging the **refusal to open a special enrollment period** (SEP) for individuals to enroll in health coverage on the federal Marketplace. The lawsuit alleges that the Affordable Care Act requires an SEP in the face of "exceptional circumstances," 42 U.S.C. § 18031(c)(6), and that the ongoing pandemic clearly constitutes an exceptional circumstance. The City brings three claims under the Administrative Procedure Act. The City moved for a [preliminary injunction](#). Several [states](#) and the [United States House of Representatives](#) filed amicus briefs in support. The defendants have moved to [dismiss](#) the case.

<sup>1</sup> Links to publicly-available copies of pleadings have been included where possible. The remainder pleadings can be obtained through PACER or upon request to the author.

## Public Charge

*Make the Road New York v. Pompeo*, No. 1:19-cv-11633 (S.D.N.Y.)

In ongoing litigation regarding the public charge rule, the District Court for the Southern District of New York granted a nationwide [preliminary injunction](#) to **stop the implementation of the public charge rule for the duration of the national health emergency**. Although the Supreme Court [stayed](#) an earlier injunction, the District Court cited new evidence demonstrating that immigrants were being deterred from accessing care in the midst of the public health crisis and that the [alert](#) issued by U.S. Citizen and Immigration Services was insufficient to mitigate those harms.

## Medicaid Managed Care

*Saint Anthony Hospital v. Eagleson*, No. 1:20-cv-2561 (N.D. Ill.)

Saint Anthony Hospital, located in Chicago, filed a [lawsuit](#) on April 27, 2020 alleging that **Illinois' Medicaid managed care program has failed to make timely and accurate payments** to the hospital as required by federal Medicaid law and regulations. According to the hospital, the loss of revenue and increased costs of the pandemic have put the hospital on the brink of closing. The hospital brings claims under § 1983 to enforce, 42 U.S.C. §§ 1396a(a)(37), 1396u-2(f), 1396b(m)(2)(A)(xii), and 1396a(a)(8).

## Nursing Home Oversight

*Gill v. Pennsylvania Department of Health*, No. 2:20-cv-2038 (E.D. Pa.)

Nursing home residents filed a [lawsuit](#) on April 28, 2020 alleging that the Pennsylvania Department of Health has **failed to provide adequate oversight to nursing homes** during the coronavirus pandemic. The residents allege that the State must inspect nursing homes and take measures to ensure the safety of the residents, but that the inspections have stopped, and the State is taking insufficient actions to protect residents against the risk of infection. The plaintiffs bring claims under the Rehabilitation Act, the Americans with Disabilities Act, the Affordable Care Act (42 U.S.C. § 18116), the Social Security Act (42 U.S.C. 301, et seq., and its implementing regulations, 42 C.F.R. 483.1 et seq.), the Federal Nursing Home Reform Amendments (42 U.S.C. § 1396r), certain state laws, and the Nuremberg Code and Declaration of Helsinki.

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*Phoenix Newspapers v. Arizona Department of Health Services*, No. 2020-5385 (Az. Sup. Ct.)

On May 5, 2020, several news organizations in Arizona brought an [action](#) under state **public records laws** seeking the number of COVID-19 cases and deaths among residents of nursing, long-term care, and retirement facilities. A judge ruled on May 29, 2020, that the State did not have to disclose that information because it pertained to private health information was thus protected under the public records law. Separately, CMS has [announced](#) that long-term care facilities will be required to report information about the number of suspected and confirmed COVID-19 cases and deaths to the federal agency.

## Abortion Access

*American College of Obstetricians and Gynecologists v. Food and Drug Administration*, No. TDC-20-1320 (D. Md.)

Plaintiffs [challenge](#) the FDA's failure to suspend, for the duration of the COVID-19 pandemic, an **in-person dispensing requirement** relating to medication abortion. Under the FDA's Risk Evaluation and Mitigation Strategy for mifepristone, one of the two medications needed for a medication abortion, the drug must be picked up at the clinician's hospital, clinic, or medical office, and while there, the patient must sign a form containing information about the treatment and acknowledging potential risks. The FDA has refused to waive the in-person requirement during the COVID-10 pandemic. The plaintiffs claim the FDA action violates the Fifth Amendment of the United States Constitution and have moved for a [preliminary injunction](#). Several states sought to [intervene](#) on the side of the FDA, and the District Court denied the motion. 2020 WL 3184024 (D. Md. June 15, 2020). The District Court [granted](#) a preliminary injunction, blocking the in-person requirement. The preliminary injunction lasts until [30 days](#) after the end of the public health emergency. 2020 WL 3960625 (D. Md. July 13, 2020).

### *State Abortion Coverage Restrictions*

Several states have attempted to prohibit providers from performing abortions during the COVID-19 pandemic. They have suspended "nonessential medical procedures" and interpreted that term to include abortions. There are several pending cases:

**Alabama:** *Robinson v. Marshall*, No. 2:19-cv-365 (M.D. Ala.); *Robinson v. Attorney General*, No. 20-11401-B (11th Cir).

Providers moved to preliminarily enjoin enforcement of State's order mandating postponement of all non-emergency medical and surgical procedures during the COVID-19 outbreak, which they feared would be applied by the State to abortions. The

District Court [granted](#) the preliminary injunction, concluding the restrictions, if applied to abortions, would be unconstitutional. No. 2:19CV365-MHT, 2020 WL 1847128 (M.D. Ala. Apr. 12, 2020). The State appealed and sought a stay of the preliminary injunction pending appeal. The Court of Appeals denied the request for a stay. *Robinson v. Attorney Gen.*, 957 F.3d 1171 (11th Cir. 2020).

**Arkansas:** *Little Rock Family Planning Services v. Rutledge*, No. 4:19-cv-00449 (E.D. Ark); *In re Rutledge*, No. 20-1791 (8th Cir.)

The Little Rock family planning clinic sought to [enjoin](#) enforcement of a directive issued during the COVID-19 pandemic requiring that surgical abortion procedures be postponed. The District Court granted an ex parte temporary restraining order. No. 4:19-CV-00449-KGB, 2020 WL 1862830 (E.D. Ark. Apr. 14, 2020). State officials petitioned for writ of mandamus, which the Eighth Circuit granted, reasoning that in the face of a public health crisis, constitutional rights can be curtailed if the state's action "bears a real and substantial relation to the State's interest in protecting public health," and finding that Arkansas's directive satisfied that standard. *In re Rutledge*, No. 20-1791, 2020 WL 1933122 (8th Cir. Apr. 22, 2020).

**Ohio:** *Preterm-Cleveland v. Attorney Gen. of Ohio*, No. 1:19-CV-00360 (S.D. Ohio); No. 20-3365 (6th Cir.)

Providers [challenged](#) an Ohio Executive Order barring all non-essential medical procedures that require the use of personal protective equipment after receiving letters from the State warning them that performing surgical abortions violated the Order. The District Court granted a [temporary restraining order](#), and the Sixth Circuit dismissed the appeal for lack of jurisdiction. No. 20-3365, 2020 WL 1673310 (6th Cir. Apr. 6, 2020). The District Court subsequently granted the Plaintiffs' motion for a preliminary injunction. No. 1:19-CV-00360, 2020 WL 1957173, at \*17 (S.D. Ohio Apr. 23, 2020).

**Oklahoma:** *South Wind Women's Center v. Stitt*, No. 5:20-CV-00277 (W.D. Okla.); No. 20-6045 (10th Cir.)

The Governor of Oklahoma issued an Executive Order requiring medical providers to postpone elective surgeries and minor medical procedures. Although the Order did not specify whether abortions were included, the Governor issued a press release stating that the Order extended to abortions. Providers [challenged](#) the suspension of abortions and, on April 6, 2020, the District Court granted a temporary restraining order, specifically ordering that (1) "The prohibition on surgical abortions may not be enforced with respect to any patient who will lose her right to lawfully obtain an abortion in Oklahoma on or before the date of expiration of the Executive Order; and (2) The

prohibition on medication abortions may not be enforced” No. CIV-20-277-G, 2020 WL 1677094 (W.D. Okla. Apr. 6, 2020). On expedited review, the Court of Appeals [dismissed](#) the appeal for lack of jurisdiction and denied the emergency motion for stay pending appeal as moot. No. 20-6045, 2020 WL 1860683 (10th Cir. Apr. 13, 2020).

**Tennessee:** *Adams & Boyle, P.C. v. Slatery*, No. 3:15-cv-00705 (M.D. Tenn.); No. 20-5408 (6th Cir.)

Providers challenged the Governor’s Executive Order barring all non-essential procedures until April 30, 2020, as applied to “procedural abortions,” which it defined to include both “aspiration” and “dilation and evacuation” procedures. The District Court granted a preliminary injunction finding the providers were likely to succeed on their substantive due process claim. No. 3:15-CV-00705, 2020 WL 1905147 (M.D. Tenn. Apr. 17, 2020). On appeal, the Sixth Circuit upheld the preliminary injunction but directed the District Court to modify it so that it only covered patients if the delay in the procedure would cause them to (1) lose their ability to obtain an abortion altogether, (2) undergo a lengthier and more complex procedure, or (3) be forced to undergo a two-day procedure. 956 F.3d 913, 917 (6th Cir. 2020).

**Texas:** *Planned Parenthood Center for Choice v. Abbott*, No. A-20-CV-323 (W.D. Texas); *In re Abbott*, No. 20-50296 (5th Cir.)

Abortion providers filed a § 1983 [action](#) challenging on substantive due process grounds the Governor’s Executive Order and a Texas Medical Board emergency rule requiring health care professionals and facilities to postpone non-essential surgeries. The District Court entered a temporary restraining order enjoining enforcement of order and rule. 2020 WL 1815587 (W.D. Tex. Apr. 9, 2020). On appeal, the Fifth Circuit reversed, holding that the TRO was not narrowly tailored, that it was patently erroneous, and that the Ex parte Young exception to Eleventh Amendment immunity did not apply to the Governor or the Attorney General. 956 F.3d 696 (5th Cir. 2020). Although the providers applied to the Supreme Court to vacate the Fifth Circuit’s decision, the application was later [withdrawn](#).