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THE ELECTION OF DONALD TRUMP: DRAMATIC CHANGES FOR THE SUPREME COURT DOCKET¹

Highlighted as a central campaign issue during the 2016 presidential election, Donald J. Trump's election on November 8th signals potentially significant changes for the ideological make-up of the Supreme Court over the next four years. However, less obviously and more immediately, Trump's successful election as the 45th president also means that several cases currently pending before the Supreme Court and the circuit courts concerning actions of the Obama administration will likely be dismissed before they are resolved.² In essence, Trump will have the opportunity to begin shaping the judicial landscape even before he nominates and pushes through a Supreme Court justice to replace the late Antonin Scalia. Important issues in cases likely to be withdrawn or dismissed include immigration (in *United States v. Texas*³), transgender rights (in *Gloucester County School Board v. G.G.*⁴), religious exemptions to providing contraceptives under the Affordable Care Act (in *Zubik v. Burwell*⁵), and the Clean Power Plan.⁶

I. UNITED STATES V. TEXAS: THE FUTURE OF DEPORTATION

During his presidency, Obama implemented both an expansion to the Deferred Action for Childhood Arrivals (DACA) program and the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program.⁷ These executive reforms of immigration policy provide relief from deportation for millions of immigrants, with the express purpose of keeping families (especially those with children) together.⁸ The Obama administration expressed confidence that DACA and DAPA would bring new jobs and increase wages across the country.⁹

As soon as DACA and DAPA were announced in 2014, several states filed suit to challenge the President's authority to delay or defer

1. This article is an expansion on Debra Cassens Weiss' *Court dockets will shrink as Donald Trump rescinds Obama administration actions*, ABA JOURNAL (Nov. 14, 2016, 8:00AM), http://www.abajournal.com/news/article/court_dockets_will_shrink_as_donald_trump_rescinds_obama_administration_act.

2. *See id.*

3. *United States v. Texas*, No. 15-674, slip op. (June 23, 2016).

4. *Gloucester County School Bd. v. G.G.*, 136 S.Ct. 2442 (2016).

5. *Zubik v. Burwell*, 136 S.Ct. 1557 (2016).

6. *West Virginia v. EPA*, 136 S.Ct. 1000 (2016).

7. *Fact Sheet: Understanding the Legal Challenges to Executive Action*, AMERICAN IMMIGRATION COUNCIL (June 28, 2016), <https://www.americanimmigrationcouncil.org/research/legal-challenges-executive-action-on-immigration>.

8. *Id.*

9. *Id.*

deportations. In the case now known as *United States v. Texas*, the states won victories in both the federal district court and the Fifth Circuit on the grounds that the executive actions are unconstitutional and will invite an influx of new immigrants into the country.¹⁰ The courts found, despite the fact the President has discretion over which deportation cases to prosecute, the states had standing to bring the suit because of the potential administrative costs of deferred deportation and ultimately ruled that the programs were not procedurally sound because they did not conform to the Administrative Procedures Act (APA).¹¹ After the Fifth Circuit affirmed the injunction of the programs, the administration appealed to the Supreme Court. On June 23, 2016, the Supreme Court issued a 4-4 decision in the case, meaning that no majority was reached and the Fifth Circuit opinion issuing an injunction currently stands as law.¹²

While the case would normally be revisited after the appointment of a ninth Supreme Court justice to break the tie, Trump announced throughout his campaign he would do away with DACA and DAPA.¹³ If this is the case, the lawsuit will quickly become irrelevant. Even if the DACA and DAPA programs prove more difficult to undo, Trump's appointment of a conservative, Scalia-esque justice would almost certainly swing the vote in favor of the injunction. Whatever the reality of Trump's immigration policies come January, it seems clear the issue of the President's authority to defer deportations will have to wait for another day, and perhaps another administration.

II. TRANSGENDER RIGHTS IN GLOUCESTER COUNTY SCHOOL BOARD V. G.G.

The issue of LGBT rights has remained a constant during the Obama administration, culminating most recently in the *Gloucester County School Board v. G.G.* case considering whether transgender students in public schools should be allowed to use the bathroom facilities of their choice. The legal issue in this case is whether making transgender students such as Gavin Grimm use separate facilities is authorized by Title IX or is discriminatory.¹⁴ The Fourth Circuit mandated that schools allow transgender students use of the men's and women's bathrooms, but the school board appealed to the Supreme Court. In August, the divided Court stayed the Fourth Circuit's mandate in order to "preserve the status quo" while the justices wait to hear the case.¹⁵

10. *Id.*

11. *Texas v. United States*, 86 F.Supp.3d 591, 591 (S.D. Tex., 2016).

12. *United States v. Texas*, No. 15-674, slip op. (June 23, 2016).

13. Cindy Carcamo, *Beneficiaries of Obama's immigration relief worry about future under Trump*, L.A. TIMES (Nov. 13, 2016, 3:00AM), <http://www.latimes.com/local/california/la-ma-daca-recipients-face-uncertain-future-20161110-story.html>

14. *G.G. v. Gloucester County School Bd.*, 822 F.3d 709, 715 (4th Cir. 2016).

15. *Gloucester County School Bd. v. G.G.*, 136 S.Ct. 2442, 2442 (2016).

While President-elect Trump has previously said that transgender students should use the bathroom they feel is appropriate,¹⁶ Vice President-elect Mike Pence has been very vocal that transgender policies should be a matter of local control,¹⁷ which in this case would let the school board decide on separate facilities. Echoing the discussion on immigration, a conservative Supreme Court nominee will likely swing the vote toward Pence's policy of allowing states to decide transgender policies, and we will continue to lack a nationwide policy on transgender rights.

III. THE AFFORDABLE CARE ACT AND CONTRACEPTIVES

After the passage of the Affordable Care Act, a number of nonprofit religious organizations protested being obligated to pay for birth control for their employees under the new regime.¹⁸ When the challenge to this provision made it to the Supreme Court, the Court took the unusual step of remanding the case for supplemental briefing.¹⁹ In the course of arguments, the Court found that a compromise could settle the issue without proceeding to its constitutional merits. If insurance could provide contraceptive coverage to employees without giving notice to or implicating the employer in any way, then the coverage would perhaps not be as morally repugnant to the employers and would still allow them to comply with the Affordable Care Act provisions.²⁰

However, this laudable attempt at compromise might ultimately be unnecessary in the wake of Trump's election. While recent news suggest Trump may be "waffling" on a complete repeal of the Affordable Care Act, the continued providing of contraceptives free of cost under most insurance plans will likely not make the list of provisions Trump wants to keep.²¹ In his recent interview with *60 Minutes*, the president-elect made it clear he wants to give control of abortion rights to the states, which is indicative of an ideology that may not bode well for mandatory, nationwide contraceptive coverage.²² Eliminating the contraceptive coverage provisions from national healthcare policies necessarily makes case such as *Zubik v. Burwell* moot, leaving undecided the question of wheth-

16. Duaa Eldieb, *What a Trump presidency might mean for transgender students in school*, CHICAGO TRIBUNE (Nov. 14, 2016, 6:54AM), <http://www.chicagotribune.com/news/local/breaking/ct-trump-transgender-schools-met-20161111-story.html>.

17. Will Drabold, *Here's What Mike Pence Said on LGBT Issues Over the Years*, TIME (Jul. 15, 2016), <http://time.com/4406337/mike-pence-gay-rights-lgbt-religious-freedom/>.

18. *Zubik v. Burwell*, 136 S.Ct. 1557, 1559 (2016).

19. *Id.* at 1560.

20. *Id.*

21. David Cutler, *Here's why Trump is already waffling on Obamacare*, THE WASHINGTON POST (Nov. 12, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/11/12/heres-why-trump-is-already-waffling-on-obamacare/>.

22. Julie Hirschfeld Davis, *Donald Trump Appears to Soften Stance on Immigration, but Not on Abortion*, THE NEW YORK TIMES (Nov. 13, 2016), http://www.nytimes.com/2016/11/14/us/politics/donald-trump-twitter-white-house.html?_r=0.

er religious organizations can be exempted from healthcare mandates based on claims of religious freedom.

IV. CLEAN POWER PLAN: IGNORING GLOBAL WARMING?

Following the implementation of President Obama's Clean Power Plan, several states immediately filed challenges to the constitutionality of the plan. The overall goal of the plan is for existing power plants to slash their greenhouse gas emissions by 32 percent from 2005 levels by 2030, which has been met with strong resistance from those involved in the emission-heavy coal industry.²³ The cases were consolidated to be heard in front of the D.C. Circuit Court, but in a surprising move, the Supreme Court stayed implementation of the plan until after the circuit court's review.²⁴ While we would normally expect the case then to be appealed back to the Supreme Court on the merits at a later date, the recent change in administration may kill the plan entirely.

President-elect Trump made headlines when he appointed lead climate change skeptic Myron Ebell to his transition team for the EPA and has expressed a general disdain for environmental regulations promulgated under the Obama administration.²⁵ Because voters in the rust belt, including many current and former coal workers, were crucial to Trump's successful election, he likely feels even more pressure to dismantle the Clean Power Plan. However, because a repeal of the plan would be subject to normal administrative procedures such as notice and comment, any changes will likely take months or even years to implement.²⁶ As far as the challenge currently pending in the D.C. Circuit Court, Trump's administration may simply refuse to continue to defend the lawsuit, removing it from the Supreme Court's docket.²⁷

V. CONCLUSION

Despite the uncertainty surrounding the future policies that will be propagated under President-elect Trump's administration, it seems the issues of deferred deportation, transgender rights, contraceptives, and the Clean Power Plan will likely be removed from the Supreme Court's consideration within the immediate future.

23. EPA, FACT SHEET: CLEAN POWER PLAN BY THE NUMBERS 1 (2015).

24. Debra Cassens Weiss, *In SCOTUS first, court stays clean power rule pending DC circuit review; four justices dissent*, ABA JOURNAL (Feb. 10, 2016, 7:22AM), http://www.abajournal.com/news/article/in_scotus_first_court_stays_clean_power_rule_pending_dc_circuit_review_four.

25. Chelsea Harvey, *Trump has vowed to kill the Clean Power Plan, here's how he might – and might not – succeed*, THE WASHINGTON POST (Nov. 11, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/11/11/trump-has-vowed-to-kill-the-clean-power-plan-heres-how-he-might-and-might-not-succeed/>.

26. *Id.*

27. *Id.*

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