Ruling on Obamacare's birth control mandate creates legal limbo

by Jessica Mendoza in the October 14, 2015 issue

(*The Christian Science Monitor*) A new federal appeals court ruling could put the Affordable Care Act's contraceptive mandate to the test.

The three-judge panel of the United States Court of Appeals for the Eighth Circuit in St. Louis issued a pair of decisions on September 17 that said requiring religiously affiliated employers even indirectly to provide insurance coverage for some contraceptives would violate the groups' religious freedoms. The court's position sets it apart from all other appellate courts that have considered the matter—a split that makes it more likely that the U.S. Supreme Court will address the legality of the ACA's birth control mandate in its coming term.

"When it comes to the accommodation of religion, there are always a number of variables in play, including the sincerity of the claimants' asserted beliefs, the strength of the government's interest in denying the exemption, and the nature of the burden that the government is imposing on religious exercise," wrote Richard Garnett, a political scientist at the University of Notre Dame, in an e-mail. "There is, at present, disagreement and even confusion among scholars and courts over how to identify and evaluate alleged burdens on religion."

Under the ACA, religious nonprofits that object to providing contraception through their employee health-care plan can submit a form to their insurer or notify the federal government of their objection. The government would then notify insurers and third-party administrators to provide separate coverage of contraceptive services, at no additional cost to the employer.

Those who fail to follow the opt-out process will be fined.

In this case, the plaintiffs argued that the scheme still violates their religious freedom rights because both options make them complicit in providing birth control—which is against their beliefs and conscience—and subjects them to fines for noncompliance. The Eighth Circuit agreed.

“If one equates the self-certification process with, say, that of obtaining a parade permit, then indeed the burden might well be considered light,” Judge Roger Wollman wrote for the panel. “But if one sincerely believes that completing Form 700 or HHS Notice will result in conscience-violating consequences, what some might consider an otherwise neutral act is a burden too heavy to bear.”

The Religious Freedom Restoration Act prevents the government from placing a substantial burden on someone’s religious exercise without providing a compelling government interest for doing so. The government must also prove that its pursuit of that compelling interest is being undertaken by using the ‘least restrictive means.’ ”

The law’s language can place the courts in a difficult position, Garnett noted.

“If courts are too strict, or if they second-guess claims, then claimants who could and should be accommodated might not be,” he wrote. “On the other hand, if they defer too much to claimants, it becomes very difficult, in a pluralistic society, for governments to function effectively.”

Other appeals courts have largely ruled in favor of the government’s accommodation.

“All plaintiffs must do to opt out is express what they believe and seek what they want via a letter or two-page form,” Judge Nina Pillard wrote for the Court of Appeals for the Washington, D.C., Circuit. “Religious nonprofits are excused from playing any role in the provision of contraceptive services, and they remain free to condemn contraception in the clearest terms.”

The Eighth Circuit’s dissent, however, makes the issue a likely case for the Supreme Court, said Holly Lynch, executive director of the Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics at Harvard Law School.

In a way, she notes, the matter is a sequel to *Burwell v. Hobby Lobby*, in which the high court ruled that family-controlled businesses with a religious objection to paying for contraceptives should be allowed to opt out—as long as they observe the government’s accommodation.

“Now the question will be, Is the accommodation sufficient?” Lynch said.

Warren Richey contributed to this report.

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