

Appeals Court Strikes Down Obamacare Birth Control Mandate

Background

The Religious Freedom Restoration Act of 1993 (RFRA) provides that the government “shall not substantially burden a person’s exercise of religion” unless that burden is the least restrictive means to further a compelling governmental interest.¹ As part of Obamacare’s passage, all group plans and health insurance issuers who employ 50 or more people must provide birth control and contraceptive coverage to all women with reproductive capacity, or else face a substantial financial penalty.² The insurance must include FDA-approved contraceptives at no extra cost to the employee.

In response to vigorous opposition, the Obama Administration exempted churches and religious-based organizations from the mandate.³ However, the Obama Administration declined to extend the exemption to for-profit businesses and their owners who have religious objections. As a result, a flurry of over 75 lawsuits have been filed, attacking the mandate as unconstitutional due to the burden it places on the business owners’ freedom to exercise their religion.⁴

One such suit, *Gilardi, et al., v. US Dept. of Health & Human Services, et al.*, was filed in the District Court of District Columbia and sought to enjoin the government from enforcing the mandate.⁵ Two brothers, Francis and Philip Gilardi, sued as individuals as well as owners of Freshway Foods and Freshway Logistics. The District Court held that the Gilardis’ personal beliefs were not transferred to the corporations they owned. Additionally, the Court found that the regulations do not require the Gilardis to support or engage in pro-contraception activity, but apply to the companies they own which

ISSUE SNAPSHOT

The Obamacare mandate that for-profit companies must provide contraceptive services to employees despite their religious objections has been enjoined by the D.C. Court of Appeals.

The D.C. Court held that either taking a heavy fine or providing services that run afoul of one’s religion is a “substantial burden.”

This issue appears destined to be decided by the U.S. Supreme Court as there is now a split among Circuit Courts of Appeals around the country.

have no free exercise rights. As a result, the District Court denied the request for an injunction.⁶ The Gilardis appealed the decision to the D.C. Circuit Court of Appeals.

The Gilardis presented the Court with the question of whether a for-profit corporation may deny mandated coverage for contraceptives based on the religious objections of the corporation’s owners.

The Decision

By a 2-1 vote, the D.C. Circuit concluded that the business owners may deny mandated coverage on religious reasons and reversed the district court’s denial of a preliminary injunction.⁷ One of the arguments cited by the opposition is the *Citizens United v. FEC* case in which the five-member conservative majority of the Supreme Court held that a corporation’s right to express itself for political purposes is protected by the First

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Amendment.⁸ The rationale follows that if corporations have a right to express themselves in the political realm, the First Amendment should also flow to their right to free exercise.⁹ However, the majority rejected this assertion finding that corporations are incapable of exercising a religious belief.

Turning to the Gilardis' personal claims, the majority found that the inclusion of contraceptive coverage in their companies' plans would be a compelled affirmation of a repugnant belief. Judge Janice Rogers Brown then summed up the decisions Obamacare is forcing business owners into, stating:

[The Gilardis] can either abide by the sacred tenets of their faith, pay a penalty of over \$14 million, and cripple the companies they have spent a lifetime building, or they become complicit in a grave moral wrong. If that is not substantial pressure on an adherent to modify his behavior and to violate his beliefs, we fail to see how the standard could be met.¹⁰

The majority also took note of the government's proffered compelling interest of "safeguarding the public health" as too "broad", "capacious", and "nebulous." While it may be substantial, the Court held that it is not compelling enough to trample on the religious rights of others.¹¹

Policy Consideration

Other appeals courts have heard similar cases. Most notably is the 10th Circuit Court of Appeals case involving Hobby Lobby. The 10th Circuit found that owners of profit-making companies may exercise religious beliefs and thus are protected from the mandate.¹² The 10th Circuit is joined by the 7th and 8th Circuits. However, both the 3rd and 6th Circuits rejected arguments that religious freedom is infringed by the Obamacare regulations.¹³

Because the D.C. Circuit concluded that the Giraldis likely will win, but did not issue a final determination, the case goes back to the district court for further

proceedings. However, the Giraldis' counsel, The American Center for Law and Justice, has indicated they will file a petition for a writ of certiorari to the United States Supreme Court.¹⁴ Their petition, which asks a higher court to "review" the record, is substantially similar to the petitions filed by both Hobby Lobby and the U.S. Government in the 10th Circuit case.¹⁵ It is now likely, with a circuit split of three circuits ruling one way, and two circuits the other, that the U.S. Supreme Court will grant certiorari and ultimately make a final determination.

¹ 42 U.S.C. §§ 2000bb *et seq.*

² 42 U.S.C. § 300gg-13(a)(4); Group Health Plans & Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012).

³ Dan Merica & Kevin Bohn, *Finalized Rules Let Religious Groups Opt Out of Contraception Mandate*, CNN.COM (June 28, 2013), <http://www.cnn.com/2013/06/28/politics/obama-contraceptives/>

⁴ Greg Clary, *Appeals Court Strikes Down Obamacare Birth Control Mandate*, CNN.com (Nov. 2, 2013) <http://politicalticker.blogs.cnn.com/2013/11/02/appeals-court-strikes-down-obamacare-birth-control-mandate/>

⁵ *Gilardi, et al., v. Kathleen Sebelius, et al.*, No. 13-104 (D.D.C. Mar. 3, 2013).

⁶ *Id.*

⁷ *Gilardi, et al., v. United States Dept. of Health & Human Serv., et al.*, No. 13-5069 (D.C. Cir. Nov. 1, 2013).

⁸ 558 U.S. 310 (2010).

⁹ *Gilardi, et al., v. United States Dept. of Health & Human Serv., et al.*, No. 13-5069 (D.C. Cir. Nov. 1, 2013).

¹⁰ *Id.* at pg. 20.

¹¹ *Id.* at 26-27.

¹² *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc).

¹³ Liz Goodwin, *Appeals Court Swipes Contraceptive Mandate, Likely Headed to Supreme Court*, YAHOO!NEWS (Nov. 1, 2013), <http://news.yahoo.com/appeals-court-strikes-down-contraceptive-mandate-likely-headed-to-supreme-court-191012577.html>

¹⁴ Jessica Karmasek, *Legal Group Calls D.C. Circuit's Contraceptive Mandate Ruling 'Partial Victory,' Plans to Appeal to U.S. SC*, LEGAL NEWSLINE (Nov. 4 2013), <http://legalnewsline.com/news/federal-government/245221-legal-group-calls-d-c-circuits-contraceptive-mandate-ruling-partial-victory-plans-to-appeal-to-u-s-sc>

¹⁵ Jonathan Easley, *Hobby Lobby Petitions Supreme Court to take up Birth Control Mandate Case*, THE HILL (Oct. 21, 2013), <http://thehill.com/blogs/healthwatch/legal-challenges/329697-hobby-lobby-petitions-supreme-court-to-take-up-birth-control-mandate-case>