RH Reality Check
Information and Analysis for Reproductive Health

More Challenges to the Affordable Care Act Percolating in D.C. Circuit Court of Appeals

By: Jessica Mason Pieklo
Date: April 8, 2014

Next month, a panel of judges for the U.S. Court of Appeals for the D.C. Circuit will hear oral arguments in two very different challenges to the Affordable Care Act (ACA). The first involves claims brought by Roman Catholic nonprofit groups that are challenging the broad exemption for religiously affiliated nonprofits to the birth control benefit under the ACA. The second involves a more obscure challenge to the health-care law's individual mandate that argues it violates the Origination Clause of the Constitution. While the two cases represent divergent lines of attacks by conservatives to the Obama administration's signature domestic policy achievement, they also underscore the importance of the political fight over the D.C. Circuit Court of Appeals.

The U.S. Court of Appeals for the D.C. Circuit is widely considered the second-most important court in the country. Approximately one-third of the cases it hears involve appeals of federal agency decisions. By comparison, federal appeals courts nationwide have less than 20 percent of their caseload comprised of federal agency appeals. That means the D.C. Circuit Court of Appeals often oversees many tests of federal agency power. Up until last year, the D.C. Circuit Court of Appeals was roughly split between four Republicans and four Democrats, with three open seats. President Obama tried for years to fill those three open seats, losing one nominee to a smear campaign coordinated by the National Rifle Association and anti-choice advocacy groups and having his others filibustered by Senate Republicans while they advanced a legislative plan to cut off any further nominations to the court. It wasn't until Senate Democrats exercised the so-called nuclear option to end the filibuster of some judicial and cabinet appointees that the battle over the D.C. Circuit Court of Appeals ended and President Obama was finally able to appoint three judges to fill the D.C. Circuit Court of Appeals' vacancies.

Two of those judges, Nina Pillard and Robert Wilkins, are on the panel considering these latest challenges to Affordable Care Act. The third judge, Judith Rogers, is a Clinton nominee who was confirmed to fill the vacancy left by now Supreme Court Justice Clarence Thomas.

Just how different is the D.C. Circuit Court of Appeals with Pillard and Wilkins on the bench? Consider the last time the court considered a challenge to the birth control benefit. In November 2013, Janice Rogers Brown, one of the most conservative members of the federal bench nationwide, authored a 2-1 majority opinion that found in favor of two Catholic brothers who operate Freshway Foods, a 400-person, secular, for-profit produce company in their challenge to

the birth control benefit. Referring to the health-care law as the "behemoth known as the Affordable Care Act," Brown went on to write that the birth control benefit burdens the religious beliefs of corporate owners at the outset while completely ignoring any interest or rights employees may have in accessing that coverage. "The burden on religious exercise does not occur at the point of contraception purchase; instead, it occurs when a company's owners fill the basket of goods and services that constitute a health care plan," wrote Brown.

By contrast, while a professor at Georgetown Law School, Pillard argued that access to contraception and abortion is an important part of ensuring gender equality. As a litigator, she argued, and won, the landmark cases of *United States v. Virginia*, which opened the Virginia Military Institute to women, and *Nevada Department of Human Resources v. Hibbs*, which successfully defended the Family and Medical Leave Act against claims it was unconstitutional.

The difference can be seen in cases beyond the birth control challenges. On the same day the Supreme Court heard oral arguments in the *Hobby Lobby* and *Consestoga Wood Specialties* cases, a different panel of D.C. Circuit Court of Appeals judges heard arguments in *Halbig v. Sebelius*, a lawsuit cooked up by the Cato Institute that challenges the federal government's ability to offer subsidies to help consumers pay for private insurance plans on the federal exchange. Should the challengers be successful, those individuals who live in states where conservative governors and state legislators refused to set up state-run exchanges would no longer qualify for subsidies to help them purchase insurance under the ACA.

Like *Halbig*, the arguments in *Sissel v. Sebelius* challenging the individual mandate in the Affordable Care Act have flown under the radar. The gist of the challenge brought by Iowa business owner Matt Sissel is that since the individual mandate is a "tax," it should have originated in the House of Representatives and not the Senate. Because it did not, Sissel's lawyers argue, the mandate violates the Constitution. It's a technical argument that under most circumstances would prompt a legislative, not judicial fix. Both *Halbig* and *Sissel* lost in the lower courts, and both lawsuits had been largely dismissed as more political challenge than legal. That is until two conservative judges on the D.C. Circuit Court of Appeals appeared to give new life to the *Halbig* suit during oral arguments in March. In May, we'll see how a similar case—framing a political objection to the health-care law as a technical legal violation—will fare in front of more centrists judges.

It's never clear which cases will end up before the Supreme Court and which ones will not, but the remaining challenges to the ACA percolating in the D.C. Circuit Court of Appeals have as good a shot as any. The religious nonprofit challenges like *Priests for Life* could end up before the Supreme Court as early as next term given the number of appellate courts considering challenges. In fact, they already have, sort of: Last year, Justice Sonia Sotomayor granted a last-minute request for emergency relief from Little Sisters of the Poor, an organization that runs assisted-living facilities. That order prevented the Obama administration from enforcing the coverage requirement against Little Sisters while its case challenging the constitutionality of the accommodation proceeds, and suggests at least some interest by the justices to weigh in later.

So while the Roberts Court ponders *Hobby Lobby*, *Conestoga Wood Specialties*, and whether or not corporations can avoid complying with the birth control benefit by claiming religious rights,

there’s every reason to think that no matter what decision the Court issues this summer, the legal challenges to health-care reform are far from over.