Supreme Court Protects Employers from Coercion, Fines in Insurance Mandate Case

Michael Hamilton

May 20, 2016

A unanimous U.S. Supreme Court ruling in*Zubik* v. *Burwell* instructs multiple federal appellate courts to reconsider the constitutionality of an Affordable Care Act (ACA) mandate, this time factoring in the federal government's admission the mandate needlessly violates employers' constitutional rights protected by the First Amendment and the Religious Freedom Restoration Act (RFRA).

Had the Supreme Court ruled in favor of the federal government, the U.S. Department of Health and Human Services (HHS) would have imposed hundreds of millions of dollars in penalties on the employers who brought the suit. The Court negated these fines by ruling "the Government may not impose taxes or penalties on petitioners for failure to provide the relevant notice" of their objection to HHS applying the mandate to them, because suing the government serves as sufficient notice.

Conscience v. Coercion

Petitioners had argued on March 23 the contested HHS mandate effectively requires employers, such as plaintiffs in this case Priests for Life and Little Sisters of the Poor, to aid HHS and insurers in offering health plans covering contraceptives. The petitioners said helping employees obtain contraceptive coverage would violate the employers' religious beliefs.

After hearing oral arguments, the Court instructed both sides to file additional briefs suggesting ways the federal government could accomplish the mandate's objective while accommodating employers who are conscientious objectors.

The federal government conceded such accommodations are possible, the Court stated in a *per curiam*—an unsigned, usually unanimous opinion—issued on May 16.

"The Government has confirmed that the challenged procedures 'for employers with insured plans could be modified to operate in the manner posited in the Court's order while still ensuring that the affected women receive contraceptive coverage seamlessly, together with the rest of their health coverage,'" wrote the Court in its opinion.

Partial Victories

Proponents for and against the mandate each claimed the decision as a partial victory.

Mark Rienzi, senior counsel at The Becket Fund for Religious Liberty, which represented Little Sisters of the Poor, says the Court essentially granted the petitioners' requests.

"This unanimous decision is a huge win for the Little Sisters, religious liberty, and all Americans," Rienzi said in a May 16 press release. "The Court has accepted the government's concession that it could deliver these services without the Little Sisters. The Court has eliminated all of the wrong decisions from the lower courts and protected the Little Sisters from government fines."

Siding with the Obama administration, Gretchen Borchelt, vice president for reproductive rights and health at the National Women's Law Center, says although the constitutionality of the HHS mandate remains in dispute, the case is not a loss.

"While we're disappointed the Court did not resolve this question once and for all … we're confident in the final outcome here," Borchelt told reporters on May 16, according to the news and research website *Modern Healthcare*.

Limited Value as Precedent

Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute, says the Court's ruling may not apply to future cases.

"Because this case arose under the Religious Freedom Restoration Act, its precedential value was always going to be limited," Shapiro said. "RFRA was designed in a way for judges to make case-by-case determinations as to whether a particular government action substantially burdened religious free exercise but was nevertheless justified by a compelling government interest that could not be achieved in a less-burdensome manner."

Despite its limited value as a precedent for future Court decisions, the case illustrates the Obama administration's willingness to implement ACA at society's expense, Shapiro says.

"Any particular case might have important practical, political, or symbolic effect," Shapiro said. "The Zubik-Little Sisters case surely is, because of what it says about government attitudes toward civil society when implementing massive regulatory schemes like Obamacare, but there's no real danger that it would set a far-ranging legal precedent."

Non-Judicial Non-Decision

Shapiro says the Court's unanimous ruling appears to be at odds with some of the justices' leanings.

"The Supreme Court's non-decision—the justices unanimously vacated all the previous rulings and told the lower courts to work out a compromise between the parties—is strikingly odd and non-judicial in nature," Shapiro said. "In other words, despite couched language in the opinion to the contrary, the Court clearly thinks that there's a high probability that there's a way to achieve

cost-free access to contraceptives while not implicating religious nonprofits in a scheme that they believe forces them to be complicit in sin."

To avoid a 4–4 split, the Court issued a unanimous extralegal opinion instructing U.S. Courts of Appeal to reconsider the case in light of the government's concession, Shapiro says.

"Clearly, there weren't five votes for that explicit outcome and, given that a 4–4 split would have resulted in the contraceptive mandate's surviving in parts of the country and not others, the chief justice and his colleagues decided to embark on this sort of extralegal settlement facilitation," Shapiro said.

In contrast to the opinion itself, the Court's manner of resolving *Zubik* v. *Burwell* is a mode of adjudication not worth repeating, Shapiro says.

"It sets a disturbing precedent for the rule of law," Shapiro said. "If the division among the justices really was intractable, the Court should have shelved the case for re-argument at a point when there's a deciding ninth justice on the bench."