
IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF NEBRASKA, et al.,

Appellants,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Honorable Warren K. Urbom, Senior United States District Judge, Presiding

APPELLANTS' MOTION FOR A STAY OF THE PROCEEDINGS

JON BRUNING, NE #20351
Attorney General of Nebraska
David D. Cookson, NE #18681
Chief Deputy Attorney General
Katherine J. Spohn, NE #22979
Deputy Attorney General
Ryan S. Post, NE #24714
David A. Lopez, NE #24947
Assistant Attorneys General
2115 State Capitol
Lincoln, NE 68509-8920
Phone (402) 471-2682
david.cookson@nebraska.gov
katie.spohn@nebraska.gov
ryan.post@nebraska.gov
dave.lopez@nebraska.gov

Rocky C. Weber, NE #18190
CROSBY GUENZEL LLP
134 S. 13th Street, Suite 400
Lincoln, NE 68508
Phone (402) 434-7300
rcw@crobylawfirm.com

Don Blankenau, NE #18528
BLANKENAU WILMOTH, LLP
206 S. 13th Street, Suite 1425
Lincoln, NE 68508
Phone (402) 475-7080
don@aqualawyers.com

Attorneys for Appellants

In light of the Federal Government's February 6, 2013 publication of proposed rules which would, if promulgated, make substantive changes to the constitutionally infirm regulations originally challenged by Plaintiffs-Appellants in this litigation, Appellants respectfully move for a limited stay of the proceedings in this appeal. For the reasons explained below, this matter should be stayed provisionally pending the Federal Government's proposed amendments to the regulations which were originally challenged in this litigation. *See Coverage of Certain Preventive Services Under the Affordable Care Act*, 78 Fed. Reg. 8456 (proposed Feb. 6, 2013) (hereinafter the "Proposed Amendments").

1. At issue in Appellants' underlying suit is a challenge to regulations requiring that certain preventive services, including contraception, sterilization, and abortifacients, be fully covered in group health plans with no cost-sharing. *See Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act*, 77 Fed. Reg. 8725 (Feb. 15, 2012) (hereinafter the "Final Rule"). These requirements will, upon the August 1, 2013 expiration of a Temporary Enforcement Safe Harbor, coerce religious organizations and individuals, including Appellants, to directly subsidize such preventive services in contravention with their religious beliefs and in violation of their First Amendment rights. Though the Final Rule includes an exemption for some

religious entities, the exemption is too narrow to include a host of other religious entities, including schools, hospitals, and social services organizations which have traditionally enjoyed a broad exemption from certain federal requirements bearing the potential to infringe upon the entities' religious freedom. As the Final Rule exists today, each of the Appellant individuals or organizations would eventually be subject to its requirements.

2. Appellees have previously argued against this suit's ripeness by relying on various promises of forthcoming constitutional relief, including administrative guidance, the Temporary Enforcement Safe Harbor, and even an "Advance" Notice of Proposed Rulemaking (which sought comments on "*potential*" future accommodations but included no proposed regulatory language whatsoever). 77 Fed. Reg. 16,501 (Mar. 21, 2012). It is worth noting that only now, almost a full year following the adoption of the Final Rule, the Federal Government has issued a regulatory document upon which Appellants may rely to justify requesting a stay in this litigation.

3. The Federal Government's Proposed Amendments, if adopted as currently written, may impact aspects of Appellants' appeal regarding the Final Rule as it currently exists (that is not to say, however, that the Proposed Amendments are without their own constitutional infirmities). This justifies a

provisional stay of the proceedings in this appeal during the pendency of the Federal Government's regulatory process.

4. A provisional stay of the proceedings in this appeal would be consistent with the action of the D.C. Circuit, which held a similar challenge to the Final Rule in abeyance in reliance upon the Federal Government's "binding representations" that the Federal Government "would *never* enforce [the Final Rule] in its current form against appellants or those similarly situated as regards contraceptive services" and that a Notice of Proposed Rulemaking containing accommodations would be published in the first quarter of 2013. *Wheaton College v. Sebelius, et al.*, No. 12-5273 (D.C. Cir. Dec. 18, 2012) (Order holding appeals in abeyance).

For the foregoing reasons, Appellants respectfully request this Court stay the proceedings in this appeal pending the Federal Government's promulgation of the Proposed Regulations. Appellants request the Court retain this matter on its docket in the event the Federal Government's proposed rulemaking fails to resolve the constitutional violations at issue in this case.

Appellants have conferred with Appellees regarding this Motion but were unable to obtain a response prior to filing.

Appellants request the Clerk of this Court suspend the briefing schedule during the Court's consideration of this Motion, pursuant to 8th Cir. R. 27A (a) (2).

Appellants' reply brief would otherwise be due February 13, 2013. In the event the Court denies Appellants' Motion for a Stay of the Proceedings, Appellants further request an extension of time to file a reply brief to 14 days following the date of the entry of the Court's order denying this Motion.

Respectfully submitted this 8th day of February 2013.

STATE OF NEBRASKA, et al.,

Appellants.

BY: JON BRUNING
Attorney General of Nebraska

BY: s/ Katherine J. Spohn
David D. Cookson
Chief Deputy Attorney General
Katherine J. Spohn
Deputy Attorney General
Ryan S. Post
David A. Lopez
Assistant Attorneys General
2115 State Capitol
Lincoln, NE 68509-8920
Phone (402) 471-2682
david.cookson@nebraska.gov
katie.spohn@nebraska.gov
ryan.post@nebraska.gov
dave.lopez@nebraska.gov

BY: s/ Rocky C. Weber
Rocky C. Weber
CROSBY GUENZEL LLP
134 South 13th Street, Suite 400
Lincoln, Nebraska 68508
Phone (402) 434-7300
rcw@crosbylawfirm.com

BY: s/ Donald G. Blankenau
Don Blankenau
BLANKENAU WILMOTH, LLP
206 South 13th Street, Suite 1425
Lincoln, NE 68508
Phone (402) 475-7080
don@aqualawyers.com

Attorneys for Appellants.

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2013, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Eighth Circuit using the CM/ECF system, causing notice of such filing to be served on Appellees' counsel of record.

By: s/ Katherine J. Spohn
Katherine J. Spohn