

THE DIRTY 100 – The Story Behind the Litigation

Contraceptive Lawsuits: CEOs using religion to justify discrimination, deny women's equality

Summary

The more than 100 lawsuits seeking an exemption from the Patient Protection and Affordable Care Act's (ACA) (P.L. 111-148) mandate for insurance coverage of contraception in employee health plans are the products of a well-organized, professionally -orchestrated and heavily-financed campaign that uses religion as an excuse for discrimination and for placing business practices beyond the reach of governmental laws and regulations. A decision in favor of the plaintiffs could pave the way for certain corporations to deny thousands of employees the same kind of health coverage that employees in most other companies receive. In our view, this is straightforward sex discrimination as well as a violation of the First Amendment's Establishment Clause.

The U.S. Supreme Court is reviewing two of these Dirty 100 cases, *Sebelius v. Hobby Lobby Stores, Inc.* and *Conestoga Wood Specialties Corp. v. Sebelius* (consolidated), the nine justices having heard oral argument in late March. A decision is expected to be announced soon.

The corporations and organizations (NOW calls them the Dirty 100) that have filed suits similar to Hobby Lobby clearly do not represent the views of millions of Catholic, Protestant, and other religious and non-religious women: 99 percent of all women and 98 percent of Catholic women use contraceptives at some point during their child-bearing years. Nor do they represent the majority views of the general public: a tracking survey conducted by the Public Religion Research Institute in May found that 57 percent of respondents said privately held corporations should have to offer contraceptive coverage in their employer-sponsored health plans and 61 percent said publicly held corporations should have to offer coverage. In addition, 53 percent of Catholic voters (Public Policy Polling, February, 2012) said that they approved of the coverage mandate originally requiring religious employers to provide contraceptive coverage directly.

In seeking an exemption from the contraceptive insurance coverage mandate, plaintiffs claim that the requirement substantially burdens their religious liberty as protected by the Religious Freedom Restoration Act (RFRA- Pub.L. No. 103-141). RFRA states that the "Government shall not substantially burden a person's exercise of religion if even if the burden results from a rule of general applicability", [unless] the Government demonstrates the application of the burden to the person (1)" is in furtherance of a compelling government interest; and " (2)"is the least restrictive means of furthering that

compelling governmental interest.” Nothing in RFRA, however, gives corporate CEOs the right to impose their religious beliefs on their employees.

Moreover, there are some “beliefs,” no matter how sincerely held, that should simply not be respected by the United States government or by any government. A “belief” that works to the detriment of a specific demographic group that has historically been subjected to discrimination and oppression is simply a religious mask for bigotry. The world has rejected the religious “beliefs” that were offered to justify the apartheid regime in South Africa. Our nation long ago rejected the Southern Baptist Association’s religious “belief” in slavery and segregation. And more recently, the religious “beliefs” offered up in 2008 to justify California’s Proposition 8 banning same-sex marriage are now being roundly rejected. So it should be with the “belief” that women can be singled out for restrictions on their access to preventive health care like contraception. (We note that Catholic doctrine considers vasectomy a sin, but the Catholic bishops have not been walking up and down the halls of Congress, or orchestrating federal lawsuits, to demand the government create special rules blocking men’s access to that procedure.)

A decision by the Supreme Court to allow CEOs to block contraceptive coverage for their employees in the name of religious belief would tread heavily on the First Amendment’s Establishment Clause and further empower extremist groups allied against women’s equality. Such a decision would also further entrench corporate “personhood” claims, providing additional opportunities for private businesses to cite religious reasons to begin dismantling civil rights and other anti-discrimination laws and regulations.

It should be noted that although this case is a challenge to the contraceptive mandate, it is also a case about abortion. Hobby Lobby’s owners, members of the Green family, argue they only object to some, but not all, methods of contraception, claiming that IUDs and emergency contraception induce abortion. This claim lacks a factual basis. More importantly, the right to obtain an abortion has been affirmed by several Supreme Court decisions, if in increasingly narrow ways, for forty-one years. One in three women will have an abortion by the age of 45, making that procedure a common and necessary aspect of women’s reproductive health care. Whether the Greens’ objection is to coverage for contraception or for abortion care, their arrogant assertion of a right to interfere in their employees’ medical decisions should be an affront to all who care about women’s health and equality.

For-profit Companies Claim Religious Liberty Violation

The now 109 lawsuits come from 50 for-profit companies with 48 cases that are still pending in various courts. Seven of those have gone to circuit courts of appeal, with six issuing decisions. Three circuit court panels (3rd Circuit in Conestoga, 6th Circuit considering claims in two cases, Autocam and Eden Foods rejected the RFRA claims of the companies and their owners. According to a summary by the National Women’s Law Center, the courts held that a for-profit company is not a “person” capable of religious exercise under RFRA and that the owners’ personal religious exercise is not affected by

the birth control coverage requirement . The 6th Circuit also rejected the First Amendment claims of Autocam and its owners.

Three circuit court panels, the D.C. Circuit (*Gilardi v. Sibelius*), 7th Circuit (*Korte & Luitjohn Contractors v. Sebelius* and *Grote Industries v. Sebelius*) and 10th Circuit (*Hobby Lobby*), ruled that the corporations can strip contraception from their employees' health insurance plans.

Non-Profit Organizations Refuse Accommodation

Additionally, there are lawsuits from 59 non-profit entities, many of which are religiously-related organizations, with 36 pending. Several of the non-profit organizations' cases have been withdrawn or dismissed because the Obama administration has given non-profits with religious objections a delay in implementing the contraceptive benefit while the Obama administration developed an "accommodation" for these groups. The accommodation was finalized in June, 2013, relieving a non-profit entity which identifies itself as religious and claims to have religious objections to birth control from paying the premium for birth control coverage — the insurer is required to absorb the cost. Of that group, 34 non-profits do not accept the accommodation and are insisting that the federal court must remove contraception altogether from coverage.

A report on the status of each case can be found on the [website](#) of the National Women's Law Center.

Threshold Questions Are Key

The Supreme Court chose two of the for-profit companies' cases representing opposing decisions by the 3rd and 10th circuit courts about whether a for-profit company can have a religious belief, and if so, whether its religious rights under RFRA and/or the First Amendment are violated by the government requirement that health insurance companies cover contraception as basic preventive health care.

Hobby Lobby Stores, Inc. raised only the RFRA claim, but for Conestoga Wood Specialties Corp. the Court will consider both the First Amendment and RFRA challenges.

A Power Struggle Between Government and Conservative Religious Leaders

The two plaintiff corporations in *Hobby Lobby* want the "freedom" to deny important health care services to thousands of women who work for them – whether or not they share their bosses' religious faith or agree with their views on contraception. The plaintiffs, in other words, seek to extend their power as employers to include power over their employees' medical decision- making. But the case also reflects a power struggle between government and corporate power, twisting the First Amendment's religious

freedom guarantee into a club that enables a private business to act in ways that elected governments cannot limit or deny.

Contraception Is Basic Preventive Health Care for Women

The contraceptive insurance coverage requirement is part of the Women's Health Preventive Health Services Package in the Affordable Care Act which lists the basic preventive and screening services that must be provided with no co-payment and no cost sharing in all new health insurance plans. The recommendation for mandated coverage of the preventive care package was made in an [extensive report](#) to Congress by the Institutes of Medicine (IOM) which was tasked to determine which preventive and screening measures would most effectively meet women's health needs.

In addition to insurance coverage for about 20 FDA-approved contraceptives and related counseling, the IOM recommended that women receive such preventive health services as screening for gestational diabetes the addition of HPV DNA testing in addition to conventional cytology testing, annual counseling and screening for HIV for sexually-active women, comprehensive lactation support, screening and counseling for domestic violence and at least one well-woman preventive care doctor's visit annually to obtain the recommended preventive services, including preconception and prenatal care. The benefits in reduced illness and disease, unintended pregnancy and personal safety was well documented in the report, not to mention the impressive cost savings incurred by avoiding or minimizing the need for medical care later. The package of preventive health services was advanced in Congress for inclusion in health care reform legislation by Maryland Senator Barbara Mikulski.

U.S. Unintended Pregnancy Rate High

One fact that weighed heavily in the minds of IOM report authors related to the fact that half of all pregnancies in the U.S. are unintended. The U.S. unintended pregnancy rate is significantly higher than the rate in many other developed countries. Among poor women aged 15-44 (with incomes at or below the poverty level), the rate in 2008 was 137 per 1000, more than five times the rate of women at the highest income level, at 26 per 1000. Unintended pregnancy is closely correlated with maternal and infant mortality, and is a risk factor for domestic violence homicide. It is not surprising, therefore, that in addition to high unintended pregnancy rates the U.S. has the highest maternal and infant mortality rates of any developed country, higher even than a number of developing countries.

Limiting Unintended Pregnancy is National Goal

Reducing the unintended pregnancy rate is a national public health goal and the U.S. Department of Health and Human Services' Healthy People 2020 campaign aims to reduce unintended pregnancies 10 percent over the next six years. Critical to that goal is the affordability of contraception. The relatively high cost of some types of contraception has proven to be a barrier for young women and lower income women. According to the [Guttmacher Institute](#), more than half of the 66 million women of reproductive age (13-44)

in the U.S. in 2010 were in need of contraceptives services and supplies and 19 million were in need of publicly funded services because they either had incomes below the federal poverty level or were younger than 20. IUDs can cost up to \$600, emergency contraception costs from \$40 to as high as \$70 and the monthly cost of daily birth control can range from \$35 to \$75 and sometimes more. Before the ACA, many private insurance plans required substantial co-payments for contraceptives, some as much as 50 percent. Obviously, the ACA's contraception mandate holds the promise of saving lives and improving the health and wellbeing of millions of women and the families who depend on them.

Provision of affordable birth control is also reduces overall health care costs, as many studies have indicated. A 2007 National Business Group on Health determined that public funding for contraceptive services in 2010 resulted in net public savings of \$10.5 billion. Those were savings that could be realized by the Medicaid program by averting costs for pregnancy-related care and infant care. Other studies show that insurance coverage with no-cost sharing for contraception can result in a \$97 annual savings for employers.

Contraceptive Coverage Supported by Majority of Public

The mass of lawsuits brought by for-profit companies and religiously-related non-profits challenging the contraceptive mandate are most definitely not a spontaneous outpouring of widespread opposition to birth control. A clear majority of the public believes that contraception coverage should be a standard part of all health care plans at 69 percent (as reported in the Journal of the American Medical Association, April, 2014) and 53 percent of Catholic voters (Public Policy Polling, February, 2012) said that they approved of the coverage mandate originally requiring religious employers to provide contraceptive coverage directly (Public Policy Polling, February, 2012). These views are hardly surprising, given that 99 percent of sexually active women, including 98 percent of Catholic and fundamentalist Protestant women, use birth control at some point — notwithstanding the strenuous objections of their (very predominantly male) religious leaders.

It is a tragedy for millions that the Catholic hierarchy and extremist fundamentalist Protestant groups continue to oppose contraception. Contraception has proven effective and useful to the vast majority of women of child-bearing age; the question of the legality of using birth control was settled by the *Griswold v. Connecticut* 381 U.S. (1965) decision recognizing a Constitutional right to privacy. The world has long since moved on.

None Cause Abortions

Conservative religious leaders for some time have dissembled about how certain contraceptives work, asserting they cause abortions. In fact, contraceptive scientists agree that none of these types of birth control have been shown to be abortifacients. According to the [American Congress of Obstetricians and Gynecologists](#), the copper IUD interferes

with the sperm's ability to move through the uterus and into the fallopian tubes, while the hormonal IUD releases progestin into the uterus that thickens the cervical mucus and thins the uterine lining, and may also make the sperm less active, decreasing the ability of egg and sperm to remain viable in the fallopian tube. Emergency contraceptive Plan B One-Step is a progestin-only pill that prevents ovulation. Ella, another type of emergency contraception, is ulipristal acetate, a non-hormonal drug that blocks the effects of key hormones necessary for conception. It acts by stopping or delaying the release of an egg from the ovary, so no egg will be available for a sperm to fertilize.

Hobby Lobby's Objection to Two Types

The owners of Hobby Lobby Stores say they do not object to all types of modern contraception, just those they claim are abortifacients, namely the IUD, Ella and Plan B One-Step. However, for years the corporation provided employee health insurance that included coverage for contraceptives including Ella and Plan B One-Step.

Mennonites Approve of Contraception

The Hahn family, owners of Conestoga Wood Specialties Corp., claim that as adherents of the Mennonite Christian faith they oppose the use of all forms of birth control. However, many Mennonites do use birth control, especially those that live in urban areas and are not dependent upon a large family size to assist in the operation of farms. The Mennonite Church USA, the General Conference of Mennonites and Conservative Mennonite Conference all have adopted statements indicating approval of modern methods of contraception. "The prevention of pregnancy when feasible by birth control with pre-fertilization methods is acceptable," according to What We Believe, a 1997 statement of the Conservative Mennonite Conference.

Catholic Leaders Approved Contraception

For conservative Catholic leaders who continue to wage this battle it has been a long downward path since the mid-1960's when a pontifical commission composed of 15 bishops, advised by 19 theologians and 35 Catholic laypersons, voted overwhelmingly to rescind the church's ban on "artificial" contraception. Nine bishops (three abstaining), 15 theologians and 30 of the commission's lay members approved of the majority report recommending a change. The bishops concluded that the teaching on birth control was not infallible, that the scripture on which the teaching had been based was improperly interpreted and that regulation of fertility was necessary for responsible parenthood.

After the more progressive Pope John XXIII passed away in 1963, the more conservative Pope Paul rejected the majority recommendation, incorrectly claiming it to be the minority report and issued a prohibition against "artificial" contraception in the encyclical, *Humanae Vitae*. It was met with a storm of protest, including a formal statement of dissent signed by 600 theologians. Reportedly, bishops around the world accepted the encyclical, but advised their parishioners to follow their consciences; the National Conference of Catholic Bishops said that Catholics in the U.S. should receive

the encyclical “with sincerity... study it carefully, and form their consciences in that light.” Later the bishops were pressured to say that Catholics must follow the pope’s teaching, though it was made clear at the time that Paul did not consider the encyclical an infallible declaration.

There is still an opportunity for Catholic Church leaders to reverse their mistaken and even cruel position on contraception, joining the modern world and perhaps regaining respect from the laity and the rest of the world.

The hierarchy’s ever-hardening stance on birth control – against the views of an overwhelming number of Catholics around the world – has resulted in a loss of active membership and an erosion of respect for certain religious rules. A recent Spanish language television network, Univision, survey of 12,000 Catholics in 12 countries across five continents and in nine languages found that 79 percent of respondents support the use of contraceptives. In Latin America, the approval was 91 percent, 84 percent in Italy, 75 percent in Poland and 93 percent in Brazil. That should tell religious leaders something!

Interest in the Supreme Court Case is Intense

Twenty-three amicus briefs on behalf of 170 organizations and individuals were submitted in support of the government position that the contraceptive coverage mandate serves a compelling governmental interest and does not constitute a burden on the employer. Included in that group are 44 professors of corporate and securities law and 21 church-state scholars, among others. Eighteen democratic senators joined Sen. Patty Murray (D- Wash.) and 91 members of the House, including Minority Leader Nancy Pelosi (D-Calif.) in submitting a brief defending the preventive care provisions of the Affordable Care Act.

A brief prepared by the National Women’s Law Center, and signed by 68 organizations including the National Organization for Women Foundation, notes that “The Government clearly has a compelling interest in safeguarding health care” and cites the recommendations of the “IOM report and the federal Health Resources & Services Administration (HRSA) Guidelines [which] make it clear, access to all FDA-approved contraceptives methods and patient education and counseling without cost-sharing are critical components of preventive care for women that have demonstrable benefits for the health of women and children.”

The brief further notes the unintended pregnancy rate being significantly higher in the U.S. than in other comparably-developed countries and that the consequences of unintended pregnancy include delayed or no prenatal care, depression for the woman and a higher risk of domestic violence. Unintended pregnancy can also cause negative health consequences for the children resulting from that pregnancy, such as low birth weight and small-for-gestational-age births. Children are less likely to be breastfed, more likely to experience poor mental and physical health during childhood and have lower educational attainment as well as more behavioral issues in their teen years.

Compelling Governmental Interest is Clear

The NWLC group's brief asserts that promoting gender equality, including equal access to health care, is a compelling governmental interest. It refers to the [EEOC ruling](#) that if employer-based health policies include comprehensive prescription coverage, they may not selectively exclude contraception without running afoul of Title VII's prohibition against sex discrimination in the workplace. An additional point in the brief: women's disproportionate share of health care costs, including the costs of contraceptives, harms women's health and economic status.

As to the RFRA claim of the companies, the NWLC group's brief states that the exemptions from contraception coverage would harm employees and dependents covered by the HHS contraception coverage regulations. When applying RFRA's compelling interest test, the brief reminded the Court that "its previous construction of the Free Exercise clause, include the principle that "[t]he First Amendment must apply to all citizens alike, and can give to none of them a veto over public programs that do not prohibit the free exercise of religion.") *Lyng v. Nw. Indian Centre Protective Assoc.* 485 U.S. 439, 452 (1988). The brief also noted that the Free Exercise Clause does not ensure freedom from any and all regulations of general applicability to which a party claims religious objection.

Religious Exercise Should Not Harm Others

The Supreme Court has also declined to protect discriminatory practices that harm others and, by extension, the public interest – such as in the *Bob Jones University* case when the Court upheld the denial of tax-exempt status for a university that had racially discriminatory practices. This case and others demonstrate that the Court has never held that religious exercise provides a license to harm or violate the rights of others. The plaintiff companies have asserted that because the administration's extension of "exemptions" to religious organizations undermines the government's position on compelling interest. However, as the NWLC brief shows, the fact that 27 million women are now covered by the birth control benefit and that many more millions will receive coverage as grandfathered plans lost their status attests that the government's compelling interest is strong. Additionally, according to the brief, "it is not uncommon for federal statutes promoting equality interests to have limited exemptions," for example several long-standing exemptions for small companies under Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act. The brief adds, "Yet no court has found or suggested that, as a result of such exemptions, these federal statutes do not forward the government's compelling interest in eliminating discrimination."

The National Organization for Women has long maintained that no employer — whether a religious organization like a church or mosque, or religiously affiliated like a university or nursing home facility — should be exempted from the ACA's contraception coverage mandate. However, the Obama created a limited exemption in an effort to reach a workable compromise with religious organizations that would still maintain the integrity of the public scheme and promote the compelling governmental interest in advancing

women's equality and reducing the mortality rates of infants and pregnant women in the U.S.

Amicus briefs submitted on behalf of the 50 for-profit companies supporting Hobby Lobby Stores, Inc.'s challenge are a testament to the extensive degree of recruiting by conservative religious and political groups.

The Hobby Lobby Claim

Hobby Lobby Stores, Inc., an arts and crafts retail chain, is privately held as a trust managed by the Green family, with 626 stores in 47 states. The Green family (David Green, Barbara Green, Steve Green, Mart Green, and Darsee Lett) identify as Christian. David Green is the founder of the chain and a billionaire. The Greens say that they run their stores based on biblical principles, beginning staff meetings with Bible readings, closing their stores on Sundays, playing religious music in the stores and advertising their religious orientation. Based in Oklahoma City, the company reported revenue of about \$3 billion in 2011. They provide health insurance for about 13,000 full-time employees. The Greens also own Mardel, Inc., a chain of 35 Christian book stores, which has about 400 employees and is part of the trust.

Currently, Hobby Lobby is operating under a temporary exemption from the contraceptive mandate that was granted by U.S. District Judge Joe Heaton in July, 2013.

Court: Substantial Burden Imposed

In ruling in favor of *Hobby Lobby Stores*, the 10th Circuit agreed that the ACA's contraception mandate substantially burdened the corporation's exercise of its religion. The court applied strict scrutiny to the ACA regulation and found the government's interest in promoting women's health and equality was too "broadly formulated," and was undercut by the granting of exemptions to religious and religiously-affiliated organizations. The court also opined that the mandate was not the "least restrictive means" of achieving the government's goals because it could easily block coverage of IUDs and emergency contraception as demanded by the devout Greens.

RFRA Provisions Prohibit Burden on Religious Practice

The Religious Freedom Restoration Act of 1993 (Pub.L. No. 103-141 Stat. 18-488) provides that government agencies (only at the federal level, since the act no longer applies at the state and local levels) may not impose a substantial burden on "a person's" exercise of religion, even with a law of general applicability, unless the government can show it is pursuing a compelling interest and used the least restrictive means to achieve it.

The *Hobby Lobby* plaintiffs are represented by the Beckett Fund for Religious Liberty, an ultra-conservative legal advocacy firm that also represents a number of the Dirty 100 plaintiffs. The Beckett Fund is the recipient of funding raised by the Knights of Columbus, the largest Catholic man's lay organization in the world with 1.8 million

members, which financially supports campaigns against abortion rights, birth control, and same sex marriage. In the U.S., the Knights raise and spend tens of millions of dollars and distribute funding to numerous organizations opposing women's and LGBT equality.

Sounds Like Hypocrisy

For many years the Hobby Lobby Stores' employee health insurance plans did cover emergency contraception but not IUDs. The company dropped those drugs from their insurance plans just very recently when they were considering filing a lawsuit against the Affordable Care Act. Mother Jones magazine reported in April that Hobby Lobby's 401(k) employee retirement plan has \$73 million invested in mutual funds, which in turn are invested in manufacturers of contraception products, including Plan B emergency contraception, a copper IUD, a hormonal IUD and several different drugs used to induce abortions. They are also invested in two health insurance companies, Aetna and Humana, which cover surgical abortions, abortion drugs, and emergency contraception in many of the health care plans they offer.

Conestoga Wood Specialties Corp. Claim

Conestoga Wood Specialties Corp., a kitchen and bath cabinet maker based in Lancaster County, PA is owned by the Hahn family (Norman Hahn, Norman Lemar Hahn and Anthony H. Hahn) who are Mennonite Christians. Conestoga Wood Specialties avoids the media and is the silent partner in the consolidated case. The company is has 950 employees, with annual revenue under \$500 million. Little more is known about the company as the owners have declined to be interviewed or make public statements about their company as it relates to the case.

The Hahn family lawsuit states that, as Mennonites, they have strict objections to contraception, although as previously noted, the position of three major Mennonite organizations in the U.S. is supportive of birth control.

Like Hobby Lobby, Conestoga Wood Specialties also claims that the contraceptive coverage mandate violates the corporation's rights under the Religious Freedom Restoration Act and the First Amendment's Free Exercise of Religion clause. They are being represented by the Alliance for Defending Freedom, a Christian Legal aid organization based in Scottsdale, AZ.

However, the U.S. Court of Appeals for the Third Circuit concluded that neither Conestoga Wood Specialties nor the owners could claim First Amendment religious exercise rights because a for-profit corporation is not a "person" capable of religious belief and is not affected by the birth control coverage requirement and because the owners chose to adopt the corporate structure for their business which distances the business from the owners' personal interests.

Oral Arguments Before the Court Reveal Split

The attorneys who represented the parties for the oral arguments were Washington attorney and former U.S. Solicitor General Paul D. Clement, arguing for the plaintiffs and the current Solicitor General, Donald B. Verrilli, Jr., arguing for the government. Both previously argued on opposing sides the constitutionality of the ACA, in 2013 they argued on opposing sides in the challenge to the constitutionality of the Defense of Marriage Act.

Accounts of the March 25th 90 minute oral arguments note that the three women justices were aggressive in their questioning of Hobby Lobby's lawyer, Paul D. Clement, asking whether other companies should be allowed to refuse to cover other procedures, like blood transfusions and vaccines, if the company's owners had religious objections to those. Justice Elena Kagan noted that, "There are quite a number of treatments that could be religiously objected to".

As related in a summary by Slate.com writer Dalia Lithwick, Kagan continued her questioning of Clement, by saying "So one religious group could opt out of this and another religious group could opt out of that and nothing would be uniform." She continued, "Your interpretation of [RFRA] would essentially subject the entire U.S. code to the highest test in constitutional law, to a compelling interest standard, and allow employer after employer to voice religious objections to sex discrimination laws and minimum wage laws and family leave and child labor laws. All of which would be subject to what she describes as this "unbelievably high test, the compelling interest standard. Employers would, under that standard, virtually win all."

Kagan also noted that "because you say you cannot test the sincerity of religion. I think a court would be, their hands would be bound when faced with these challenges."

Clement asserted that such challenges would not actually come before a court and that no company had ever challenged the minimum wage law, for instance, based on religious beliefs of the owners.

Justice Anthony Kennedy, who is reputed to be the swing vote in this case, asked Clement why the company couldn't just choose to provide health insurance at all, pay the tax and then raise salaries to allow employees to purchase health care on their own. If the costs in each case are nearly equal, Clement was asked, "Then what would your case be?"

Kennedy asked, "How would we consider the rights of the employees? The employees may not believe ... in the religious beliefs of the employer. Does the religious belief just trump?"

Justice Antonin Scalia, wondered why the government couldn't simply pay for the "three or four" kinds of birth control that some religious employers consider to be "abortifacients" such as the morning-after pill and intrauterine devices. "That's not expensive, is it?" Scalia asked.

The attorney for the administration, Donald Verrilli Jr., responded that state and federal laws “don’t consider these particular forms of contraception to be abortion.” He noted that the some two million women who take those forms of birth control don’t believe that are “engaged in abortion.”

Several justices asked whether for-profit corporations had the right to claim religious freedom exemptions from any federal laws. Justice Sonia Sotomayor asked, “How does a corporation exercise religion?”

Justice Ruth Bader Ginsberg noted that it would have been strange for a large bipartisan part of Congress to pass a piece of legislation, the Religious Freedom Restoration Act, if they believed that it would allow for for-profit corporations to be exempt from federal laws because of the religious beliefs of their shareholders. Ginsberg pointed out that an amendment along those lines was rejected by the Senate.

Clement explained why a corporation can be “persons” under the Dictionary Act which prompted Justice Sotomayor to press Clement by asking, about how “a corporation can exercise religion. Who determines the corporate religion? The majority of shareholders? The corporation officers? Is it 51 percent?”

Clement could only reply that this line of questioning goes to a question of sincerity, and if some large corporation asserts some claim that’s going to save them lots of money, I would think that the government in those kinds of cases is really going to resist the sincerity piece of the analysis.

Not giving up, Sotomayor replied that the courts aren’t supposed to be in the business of testing religious sincerity in the first place.

A brief submitted by Verrilli argued, “Allowing a corporation, through shareholder vote or board resolution, to take on and assert the religious beliefs of its shareholders in order to avoid having to comply with a generally-applicable law with a secular purpose is fundamentally at odds with the entire concept of incorporation.”

Other questioning revolved around the rights of employees (Kennedy), impacts on third parties (Verrilli), the limitation on religious freedom when activities affect or collide with the liberties of others or the public (Verrilli) and whether the government really has a compelling interest because it made so many exemptions for so many classes of employers (Scalia).

By the tenor of the questioning, the Court again appeared to be divided along the familiar five/four , conservative/liberal lines. Not surprisingly, the most conservative Justices were reported to appear to accept the plaintiffs’ argument that the ACA allows them to an exception from the ACA’s regulation, while the three women justices were clearly supportive of the contraceptive mandate.

Should the Supreme Court decide in favor of the corporate plaintiffs, the church-state dividing line will come closer to being obliterated. The owners of these companies are free to practice their religious faiths, but should not be allowed to use – some would say “abuse”- their religion to deny or limits that by law are owed to their employees. If the Court somehow decides that “closely held” companies where the owners’ religious faith justifies an exemption from the contraceptive mandate, this would indeed have wide-ranging impacts that seriously undermine the contraceptive coverage requirement. We hope that this will not be the case.

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