

Supreme Court takes up contraceptive mandate, will rule on religious rights of corporations

David Gibson Religion News Service | Nov. 26, 2013

The Supreme Court announced Tuesday it will decide whether for-profit businesses can be treated like religious entities in a politically and constitutionally freighted test of the Obama administration's mandate that employers include free contraception coverage as part of their health plans.

The cases, which will probably be argued in March and decided in June, will not deal with a string of other lawsuits over the mandate that have been filed by nonprofit faith-based groups. Those complaints are still working their way through the lower courts.

Still, the cases the high court will now take up are likely to establish important precedents by setting the parameters of religious rights in two key arenas.

Religious Freedom Restoration Act

The main yardstick for the justices, according to legal experts, will be the 1993 Religious Freedom Restoration Act. Ironically, the law was backed by Democrats largely in response to an opinion by Justice Antonin Scalia, one of the bench's most conservative members, that limited the rights of religious objectors.

RFRA sought to redress Scalia's claims by mandating that the government may not "substantially burden a person's exercise of religion" without a "compelling" reason.

Now that threshold is expected to be a major hurdle for a Democratic administration as the White House tries to fend off challenges to the contraception mandate, which has become one of the president's most bitterly contested policies.

More than 80 lawsuits have been filed against the mandate by Christian groups and Christian-owned businesses -- many of them Catholic -- that object to providing birth control coverage or the coverage of sterilization procedures and what some believe are abortion-inducing drugs. Others object to the way the government decided which entities qualify for religious exemptions.

"It would be a huge expansion of RFRA to let businesses win cases under that statute," said Leslie Griffin, a law professor at the University of Nevada, Las Vegas, who has written widely on church-state issues and the contraception mandate.

Citizens United

The second, though perhaps less important, guidepost for the justices will be the controversial *Citizens United* decision of 2010 in which a sharply divided bench ruled that corporations have free speech rights and therefore cannot be prevented from spending money to support or oppose political candidates.

Now the justices will decide whether corporations whose owners espouse particular beliefs also have some of the same rights as individual believers and houses of worship. *Citizens United* has already been cited by lower court judges in ruling against the mandate.

"We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression," Judge Timothy M. Tymkovich wrote for the majority in a ruling for the 10th U.S. Circuit Court of Appeals in favor of Hobby Lobby Inc., a nationwide chain of crafts stores owned by the Green family, whose members are evangelical Christians.

The Hobby Lobby case is one of the cases the Supreme Court will now rule on; founder and CEO Steve Green welcomed Tuesday's action.

"This legal challenge has always remained about one thing and one thing only: the right of our family businesses to live out our sincere and deeply held religious convictions as guaranteed by the law and the Constitution," Green said. "Business owners should not have to choose between violating their faith and violating the law."

The other case is an appeal from Conestoga Wood Specialties Corp., a Mennonite-owned cabinetmaker in Pennsylvania that employs 950 people. Conestoga lost its case against the mandate in the lower courts and petitioned the Supreme Court to hear its claims.

Opponents of Conestoga and Hobby Lobby, which has 13,000 full-time employees, argue that because they are for-profit businesses they do not have the same rights as religious believers. They also note that the companies hire employees of varied faith backgrounds who also have religious rights. Another concern is that granting a religious exemption to businesses will allow companies to claim a range of other exemptions from other statutes.

Reactions to the high court's decision to consider the cases reflected the highly charged debate over the contraception mandate.

The American Civil Liberties Union, which supports the administration's position, said that "religious freedom does not include the right to impose your beliefs on others ... particularly where that means discriminating against their employees."

On the other side, Russell Moore, president of the Southern Baptist Convention's Ethics & Religious Liberty Commission, which filed an amicus brief against the mandate, said he hopes the Supreme Court "recognizes what the founders of this country saw, that religious liberty isn't a gift handed to us by Uncle Caesar."

Given the polemics, Notre Dame law professor Richard Garnett said he worries "that what I regard as accidental aspects of the case -- the *Citizens United* debate, the 'war on women' rhetoric from the last election, the controversies about (health care reform) -- will distract the court from the more specific legal question presented, which has to do, again, with the interpretation of a particular, and an important, federal statute."

Other legal experts said that even without the atmospherics surrounding the issue, it is going to be hard enough for the justices to sort through the arguments, and few were willing to predict how the case will turn out.

"It's one of the most difficult legal questions I've seen, in terms of all the issues that are intertwined," Howard Friedman, a retired law professor who runs the Religion Clause blog, told Christianity Today earlier this year.

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