



The COMMENT

Justices divided over health law birth control plan The Comment

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March 24, 2016

But it did not appear likely that the liberal justices would be able to attract the crucial vote of Justice Anthony M. Kennedy, who repeatedly questioned whether the accommodation was making the groups "complicit in a moral wrong" by hijacking their insurance plans.

Justice Samuel Alito, writing for the majority in that case, said there was a better alternative to the mandate, one that the government had offered to nonprofit groups with religious objections. Arguing for the religious groups, Noel Francisco claimed that his clients should get the same accommodation that actual churches received: to be completely exempted from the contraceptive mandate. Everyone says "my soul will be damned" due to any number of objections countered Sotomayor, so "how will we ever have a government that functions?"

Because of the death of Justice Antonin Scalia, the court is operating with eight members.

Substantial burden tests-which are quite common in the law-require courts to measure a law's impact on fundamental rights, limiting judicial intervention to cases in which laws deeply intrude on protected liberty.

On the anniversary of the passing of the Affordable Care Act, the nation's highest court heard another case regarding the heavily-litigated law. Lots of employers, courts and legislators - even Mike Huckabee's Arkansas! - agreed, but not all did, leaving many women paying for contraceptives out of their own pocket. "It's about the First Amendment and freedom of religion".

The dispute stems from the requirement that contraceptive coverage be included in employee and student health plans.

"As usual, all eyes will be on Justice Kennedy", Elizabeth B. Wydra, president of the left-leaning Constitutional Accountability Center, said during a discussion of the case last week at the Cato Institute.

But there was no opt-out clause for non-profit groups such as religiously-affiliated schools, colleges, hospitals or charities. Eventually the full appeals court ruled in the nuns' favor, but the Obama administration appealed.

But the groups say that even that step would implicate them in sin and that they face ruinous fines if they refuse to comply. She added that "neither religious belief nor practice ends at the threshold of a house of worship".

The case, *Zubik v. Burwell*, was not a challenge to the overall contraception mandate, but rather the accommodation provided by the Department of Health and Human Services to religious nonprofits who object to birth control on religious grounds.

A decision is expected by June.

Kagan emphasized, "Churches are special" in Supreme Court precedent and rules given to churches can not thereby also be given to each and every religious and non-profit organization.

The eight justices now serving on the bench also heard its most important abortion case in a generation earlier this month and appeared sharply divided.

What does the law require? A group of nuns is spearheading a Supreme Court challenge to argue that even filling out paperwork to be exempt from the mandate violates their religious freedom. But no one knows when that will be.

"When the government handed down this mandate, they miscalculated how strongly women in particular feel about the right to live according to their beliefs", she said. "If accepted, that claim would deny tens of thousands of women the health coverage to which they are entitled under federal law, and subject them to the harms the law is created to eliminate".

Challengers say the opt-out process violates the Religious Freedom Restoration Act because it leads to contraceptive coverage for their employees by third parties. "There is the fact that the government demands more than an objection, the fact that it enforces it with massive penalties, and the reality that if that happens, then they are going to hijack our health plans and provide the coverage against our will".

The RFRA prohibits the federal government from taking any action that substantially burdens the exercise of religion, unless that action constitutes the least restrictive means of serving a compelling government interest.

In ruling for *Hobby Lobby*, the court's conservatives suggested that one reason the business owners in that case had a valid complaint was that the government had made special arrangements for churches and religious nonprofits but not for them. A tie would be especially problematic now, because the federal courts of appeal were not in agreement on the issue currently before the court.

However, the Little Sisters argue that this still violates their religious beliefs because they would ultimately be facilitating access to services they believe are immoral. But the New Orleans-based USA 5th Circuit Court of Appeals - considered the most conservative appellate court in the

country - later reversed that decision. It might have used the time and energy to find creative ways to offer free birth control to religious groups' employees.

It's a tricky question to which there isn't a fully established answer (though I've ruminated on the topic before).