

The Washington Post

No 'mulligan' for the Supreme Court on Obamacare

By: Jennifer Rubin - November 26, 2013

The Post reports: "The Supreme Court agreed Tuesday to consider a new challenge to President Obama's Affordable Care Act (ACA) and decide whether employers with religious objections may refuse to provide their workers with mandated insurance coverage of contraceptives. The cases accepted by the court offer complex questions about religious freedom and equality for female workers along with an issue the court has not yet confronted: whether secular, for-profit corporations are protected by the Constitution or federal statute from complying with a law because of their owners' religious beliefs."

There are two cases involved, one from the 10th Circuit that went for the plaintiff ("The full U.S. Court of Appeals for the 10th Circuit in Denver said forcing the company to comply with the contraceptive mandate would violate the Religious Freedom Restoration Act"), and the other one from the 3rd that went in favor of the government.

Unlike the case that previously ruled upon on the constitutionality of the entire statute, these two cases don't implicate the entire ACA. Randy Barnett, one of the lawyers in the cases that challenged Obamacare previously, told me that "this is not a mulligan" for Chief Justice John Roberts. While this is an important First Amendment case, it doesn't go to the heart of Obamacare. Ilya Shapiro from the Cato Institute concurred. "This is just [about] the contraceptive mandate, [and] doesn't threaten the whole edifice," he e-mailed.

The cases as a legal matter may not threaten the viability of Obamacare, but they are important beyond the First Amendment issue for a couple of reasons. First, it is yet another reminder that, even if constitutional, Obamacare is a brazen power grab that intrudes into decisions never before the province of the federal government. Obamacare opponents, perhaps not in the legal sense but in the political realm, argue that the deprivation of economic and religious liberty takes decision-making away from doctors, employees and employers in favor of centralized government edicts. Second, if the government loses in these cases, the process of turning Obamacare into Swiss cheese will continue. Some of the changes have been by court design (e.g. coming up with a Medicaid "opt-in"). Others have been by executive fiat. The more often this occurs, the more compelling the case is that we might redo the entire legislative mess — and by the constitutionally proscribed manner (pass a law!).

The case puts front and center the two parties' contrasting views of liberty. For Democrats, "rights" are the right to get something from the government (health care and birth control specifically). Those who want the goods and services to be available but not mandated are labeled "anti-woman" or "anti-health care." Republicans see government as there to protect liberties, including freedom of conscience and the free market in which employees and employers, citizens and insurers negotiate items like health care (albeit in a highly regulated industry).

No wonder the two sides talk past one another; Democrats and Republicans can't agree on the meaning of "rights" or the nature of political liberty. The Supreme Court, at least in this instance, will answer the question: Does a woman's right to have the government force her employer to provide contraception as part of health care insurance trump the employers' freedom of religion?