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Supreme Court position on Obamacare birth control mandate a tough call

By Tom Howell Jr.

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When the Supreme Court next year decides whether the Obama administration can force for-profit companies to insure birth control, the punditry around abortion or the "war on women" will be overshadowed by legal precedent and acts by Congress that weigh religious liberty against government mandates, legal scholars say.

How the nine justices will rule on the contraception mandate — an outgrowth of President Obama's signature health care law — is anyone's guess, after federal appeals courts across the country could not agree on whether the government could force larger employers to insure a range of contraceptives as part of their health care plans.

"It's a difficult case," said Trevor Burrus, a research fellow at the Cato Institute's Center for Constitutional Studies.

It also probably will not matter that three of the court's justices — Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan — are female, even if the case involves the coverage of contraceptive services that are used by women, said Holly Lynch, a health care policy and bioethics specialist at Harvard Law School.

"I think this will really be an issue of religious freedom," she said, "divorced as much as possible from the specific content of the objectionable requirement."

The final say

The idea that the Supreme Court would have the final say over Mr. Obama's contraception mandate was never in doubt. In the wake of the Affordable Care Act's enactment in 2010, conservative lawmakers lambasted the contraceptive move as a serious affront to devout business owners in their districts.

Dozens of businesses sued, saying they run their companies in line with deeply held beliefs and that they particularly object to insuring morning-after pills, which they equate with abortion. They said that if the mandate stood, their firms would have to choose between violating their faith or dropping health care coverage for their employees.

The 10th U.S. Circuit Court of Appeals in Denver eventually said Hobby Lobby — a family-owned chain of craft stores based in Oklahoma — had a legitimate case against the administrative mandate. Some circuit courts agreed, but others didn't.

In November, the Supreme Court said it would consider challenges from Hobby Lobby and Conestoga Wood Specialties, a Pennsylvania-based firm whose Mennonite owners did not win their challenge at the circuit court level.

It is difficult to assess each justice's position on the question because it "really hasn't come before the court before," said Randy Barnett, a professor at the Georgetown Law Center.

Instead, it may be useful to look at how the high court has applied a key law aimed at protecting religious liberties, or other legal precedents at play.

Clues in case law?

Analysts pointed to a pair of Supreme Court decisions that came down before and after Congress passed the Religious Freedom and Restoration Act, a 1993 law aimed at preventing burdens on the right to exercise religious beliefs.

Congress passed the legislation, which figures prominently in lawsuits against the contraception mandate, in part as a response to the Supreme Court's decision in Employment Division v. Smith. In that case, the state of Oregon refused to provide unemployment benefits to American Indians who were fired from a rehabilitation clinic after testing positive for the key ingredient in peyote.

Justice Antonin Scalia, a devout Catholic with a conservative record, wrote the Smith opinion that effectively limited Americans' ability to cite their religious beliefs in seeking exemption from valid laws. Otherwise, Justice Scalia wrote at the time, it "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."

"The criticism he got from the religious community on that was huge," Mr. Burrus said.

After enactment of the Religious Freedom and Restoration Act, the court used the law in 2006 to uphold the religious freedoms of a New Mexico church whose sacramental tea had been seized by federal agents because it contained an illegal hallucinogen.

Mr. Barnett noted that Chief Justice John G. Roberts Jr., a member of the court's conservative wing, was aggressive in applying the act in the case Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, even if members of the conservative wing are not inclined to be lenient about drug use in general.

Free-speech questions

There also is a free-speech component to the case. The 10th Circuit judges who sided with Hobby Lobby cited the landmark Citizens United v. Federal Election Commission case of 2010, which held that corporations hold free-speech rights that entitle them to make independent political expenditures.

"The idea that people don't lose their rights when they organize in a corporate form is common to both situations," Mr. Barnett said.

Despite conventional wisdom that breaks the court into liberal and conservative wings and a swing vote — often Justice Anthony M. Kennedy — it is difficult to say which justices might uphold a business' right to religious freedom, the analysts said.

Mr. Burrus said Justice Stephen G. Breyer, who is typically associated with the court's liberal wing, is partial to judicial balancing tests, or measuring various interests against each other, or striking a balance between competing interests. The Obama administration has been giving out exemptions to the health care law as it grapples with the high number of people who lost existing health care plans that did not meet Obamacare's coverage requirements.

The administration also issued an accommodation for nonprofit employers who object to the contraception mandate, so it may be difficult for the government to argue that it is impossible for them to carve out an exception for the for-profit companies.