Supreme Court takes up Hobby Lobby's challenge to the contraception mandate

by Lauren Markoe

March 25, 2014

WASHINGTON (RNS) When two corporations—one owned by evangelicals and one owned by Mennonites—filed suit over the Affordable Care Act, they described their complaint in stark and fairly simple terms: The government is forcing them to either break the law or betray their faith.

But at the Supreme Court on Tuesday (March 25), nothing was so clear as the justices explored the murky territory where an employer's religious rights collide with the interests of its employees or the government.

On the one side is the Hobby Lobby arts-and-crafts chain and Conestoga Wood Specialties cabinetry company, both owned by devout families. On the other is the federal government, which argues that the landmark 2010 health care law gives women a statutory right to choose among 20 methods of birth control.

The court, judging from the justices' questions, is clearly divided on this potential earthquake of a religious rights case. It could be yet another instance where Justice Anthony Kennedy provides the swing vote—in this case whether a corporation has religious rights, and whether those rights in this case have been trampled.

Hobby Lobby, owned by the Green family, and Conestoga, owned by the Hahns, object to paying for the full range of birth control drugs and devices as required by the Affordable Care Act. To them, a handful of the methods they must cover could cause abortion. Including these methods in their companies' insurance package is, in their eyes, sinful.

Justice Elena Kagan took up the government's case from the bench, avowing that the families' religious convictions were beyond doubt. But she suggested that exempting them from the law would open the door to exemptions for a slew of employers who didn't want to cover a host of medical services—from vaccinations to blood transfusions—because they conflicted with their religious beliefs.

Kagan suggested that the corporate owners have a choice other than breaking the law and betraying their religious principles. It's an option, she said, "that nobody talks about . . . Hobby Lobby could choose not to provide insurance." Under the health care law, the companies would have to pay a tax instead, but it would be comparable to the costs of insurance, she said.

Paul D. Clement, the lawyer for the companies, countered that such a tax would better be described as a penalty, and that the corporations would suffer for it, having to raise wages to compensate for their lack of a health care plan. "It certainly feels punitive," he said.

Clement, a former U.S. solicitor general, leaned heavily on the language of the other law that's central to this case: the 20-year-old Religious Freedom Restoration Act, which requires the government to meet the most stringent legal test before impinging on religious rights. The government must prove a compelling interest before it abridges religious rights, and then also show that it has chosen the least restrictive means possible to meet its goal.

One alternative is that a third party picks up the cost, Clement said. Why can't the government, he asked, step in and pay for the methods of birth control to which these corporations object? That's essentially what it does for employers with 50 or fewer employees. "They can do the same thing for objecting religious employers," he said.

And don't worry about company after company stepping up to claim exemptions the Green and Hahn families are entitled to, Clement said. With them, their religious sincerity is obvious. But an onslaught of corporations claiming exemptions under RFRA? "That's not going to happen in the real world," he said.

But Kagan retorted that courts have long avoided getting into the business of judging religious sincerity.

Solicitor General Donald B. Verrilli, who argued the government's case, tried to poke holes in Clement's position by first questioning whether the companies have a right to sue under RFRA in the first place. He argued that a corporation does not have religious rights.

If the court decided that companies do have religious rights, it would be "such a vast expansion of what Congress thought it was doing" in passing RFRA in 1993.

But Chief Justice John Roberts suggested that though the companies themselves might not have a religious conviction, that doesn't mean they don't have the right to be protected from religious discrimination. He made a comparison:

"Every court of appeal to have looked at the situation (has) held that corporations can bring racial discrimination claims as corporations," Roberts said. "Now does the government have a position on whether corporations have a race?"

"Yes," Verrilli replied. "We think those are correct and that this situation is different."

Looming in the background of the case was the court's 2010 *Citizens United* ruling, in which the court decided that corporations have free speech rights. Supporters of the families behind Hobby Lobby and Conestoga have argued that surely other First Amendment rights extend to corporations as well.

Justice Antonin Scalia brought up a potential weak point in the government's case: that because it has granted exemptions to the Affordable Care Act, the administration cannot prove that the law is designed to advance a "compelling interest." Businesses with 50 or fewer employees don't have to comply, and neither do churches.

As for a compelling interest, "you can't argue that here because the government has made a lot of exemptions," Scalia said.

Verrilli said that's a misconception. Yes, churches are exempt, but churches and other houses of worship have always enjoyed special treatment under the law.

Other religiously affiliated groups are mistakenly considered exempt, he said, when they have been accommodated: Their employees can still receive birth control.

As for employers with 50 or fewer employees, the Affordable Care Act exempts them now, Verrilli said. But that’s typical of important federal laws, such as the ACA and the Americans with Disabilities Act: It takes time before the law is applied to all.

“The right of the third-party employees are at center stage here,” Verrilli said, but they are not always treated that way. “They’re left on the sidelines.”

The court’s decision in the twin cases, *Sebelius v. Hobby Lobby Stores Inc.* and *Conestoga Wood Specialties Corp. v. Sebelius,* is expected by late June.