Supreme Court sends cases on contraceptive mandate back to lower courts

by Richard Wolf in the June 22, 2016 issue

The Supreme Court sought a compromise on challenges by nonprofit religious groups to the federal requirement that their insurance offer free coverage of contraceptives to female employees.

The justices unanimously sent the cases back to federal appeals courts in hopes that they can emerge with a way to honor the objections of religious nonprofit groups, such as charities and hospitals, while still guaranteeing free birth control to their employees.

“The court expresses no view on the merits of the cases,” the opinion stated. “In particular, the court does not decide whether petitioners’ religious exercise has been substantially burdened, whether the government has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest.”

The May 16 ruling was another example of the eight-member court’s relative inertia following the death of Justice Antonin Scalia. Already this year, the court has tied 4-4 in three cases, including a major labor rights case, and has greatly reduced the number of new cases it is accepting for next term.

Religious nonprofits that have fought the Obama administration’s contraceptives rule were pleased. Most appeals courts had sided with the administration, while only one went the other way.

“There is still work to be done, but today’s decision indicates that we will ultimately prevail in court,” said Mark Rienzi, senior counsel at the Becket Fund for Religious Liberty, which represented the Little Sisters of the Poor in one of the seven lawsuits.

Abortion rights and women’s groups opposed the decision.

“We are disappointed that the court did not resolve once and for all whether the religious beliefs of religiously affiliated nonprofit employers can block women’s seamless access to birth control,” Gretchen Borchelt of the National Women’s Law

Center said.

The battle over the so-called contraceptive mandate was one of the high court's biggest issues this term, pitting religious liberty against reproductive rights for the second time in three years. In 2014, the court ruled 5-4 that for-profit corporations whose owners objected to the rule could have their insurance plans deliver the health benefit directly.

That same accommodation previously had been offered to religious groups such as charities, hospitals, and universities, but dozens of them complained they would be tainted even by transferring responsibility for services they equate with abortion to insurers or third-party administrators. They sought the same blanket exemption granted churches and other religious institutions under the Affordable Care Act.

Justice Sonia Sotomayor reiterated that point in a concurrence signed by Justice Ruth Bader Ginsburg. The court's opinion, she wrote, "does not . . . endorse the petitioners' position that the existing regulations substantially burden their religious exercise or that contraceptive coverage must be provided through a 'separate policy.'"

The justices could have issued a 4-4 decision that would have upheld all lower court rulings, but those differ from one part of the country to another. They also could have rescheduled the case for when the court is back to full strength. But that could take a year or more, because Senate Republicans have refused to consider President Obama's nomination of Merrick Garland, a federal appeals court judge, to replace Scalia.

Instead, the court issued an unusual order shortly after hearing the case in which it suggested ways for the two sides to come together. Both sides responded, leading the justices to send the cases back to the four appeals courts from whence they came.

All but one of those courts had upheld the government mandate. The Eighth Circuit Court of Appeals—covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota—however, ruled in favor of the nonprofit organizations. — *USA Today*

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