

## **Court can't control fallout from ruling - Oregonian, The (Portland, OR) - July 6, 2014 - page 04**

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On Monday, the Supreme Court issued its much awaited and predictably divided 5-4 decision, holding that closely held for-profit corporations need not comply with the Affordable Care Act's requirement that employees' health insurance cover certain contraceptives.

This was not a constitutional decision: The issue was governed by a federal statute called the Religious Freedom Restoration Act. The RFRA, enacted in 1993, was Congress' attempt to roll back a 1990 Supreme Court decision that made it more difficult to get religious exemptions under the U.S. Constitution's Free Exercise Clause. The RFRA provides that people are entitled to an exemption from a legal requirement that "substantially burdens a person's exercise of religion," unless the requirement is the least restrictive means to further a compelling governmental interest.

The government argued that Hobby Lobby, the corporate employer of 13,000 employees, was not entitled to an exemption because:

- A for-profit corporation is not "a person" for purposes of the statute, as corporations cannot really "exercise religion."
- Even if it is "a person," the ACA's contraceptive requirement does not constitute a "substantial burden" on the exercise of religion.
- In any event, the statute employed "the least restrictive means to further a compelling governmental interest."

The court rejected all three arguments.

After holding that closely held (i.e., non-publicly traded) corporations are indeed "persons" for purposes of the statute, the court turned to the government's claim that though requiring contraceptive coverage may be distasteful to some employers, it does not amount to a "substantial burden" on religious freedom. The court disagreed, stating that courts must accept as a given the claim that the burden was a substantial one because the question is ultimately a theological one, and courts cannot answer theological questions. Instead, courts must restrict themselves to asking whether a claimant was faking its religious beliefs (no such assertion was made here), and whether it could easily avoid the allegedly substantial burden.

The government next claimed that Hobby Lobby could easily avoid the alleged burden by simply dropping employee coverage altogether and, instead, paying a tax (which goes to help pay for government subsidies for the uninsured). The burden on Hobby Lobby's exercise of religion could not be "substantial," argued the government, because the tax for dropping coverage was in fact

less costly than paying for employees' health insurance; dropping employees' coverage is often a lucrative proposition, and a number of corporations have done it voluntarily for that sole reason.

The majority rejected the claim by suggesting that paying for employees' health insurance may itself be a religious obligation of Hobby Lobby. (Who knew that corporate gods were so demanding?) And it added that, in fact, it was unclear to what extent the solution is a cost-saving measure, as the company may have to increase salaries to make up for its elimination of benefits. The court therefore concluded that the burden was substantial, could not be easily avoided, and was ultimately in violation of the federal statute.

Each of these steps was resisted by the dissent, which contended that the statute does not apply to for-profit corporations, that the burden was not substantial, and that the contraceptive requirement was in any event the least restrictive means of furthering the government's compelling interest in assuring the availability of contraceptives to women.

The dissent ended by asserting that the court has opened a Pandora's box that may allow corporations to refuse to pay, for example, for blood transfusions (if claimed by Jehovah's Witnesses), antidepressants (if claimed by Scientologists), or vaccinations (if claimed by Christian Scientists, among others). The majority rejected the claim, stating that the decision is a limited one and "should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs."

But the Supreme Court cannot, of course, control the consequences of its opinions. The court announces a principle; logic and consistency rather than expediency or premonition will control the application of that principle to future cases. Indeed, history is littered with failed attempts by Supreme Courts to confine the application of their decisions, the invalidation of prohibitions on same-sex marriage being just one recent example.

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