US Supreme Court hears corporate challenge to Obamacare contraception provision

Barry Grey
26 March 2014

The US Supreme Court on Tuesday heard oral arguments in a case with far-reaching anti-democratic implications. The justices allotted an unusual 90 minutes for arguments for and against corporate plaintiffs seeking an exemption on religious grounds from a provision of the Obama administration's Affordable Care Act (ACA) requiring that employers providing insurance to their employees include free-of-charge access to all contraceptive drugs and devices approved by the federal government.

The two cases, heard on a consolidated basis, involved for-profit corporations owned and run by fundamentalist Christians who cited the 1993 Religious Freedom Restoration Act (RFRA) to claim that certain birth control methods approved by the Food and Drug Administration and mandated under the ACA (better known as Obamacare) violated their religious convictions. In particular, they objected to intrauterine devices (IUDs) and morning-after pills on the grounds that their use constituted abortion.

The two cases are *Hobby Lobby Stores, Inc. v. Sebelius* and *Conestoga Wood Specialties Corporation v. Sebelius*. Hobby Lobby is an Oklahoma City-based retail chain with some 600 stores in 41 states, employing over 13,000 people. The company's founder and CEO, David Green, is a multi-billionaire evangelical Christian. He also owns Mardel, Inc., a chain of Christian bookstores.

Conestoga Wood Specialties is a cabinet-making company based in East Earl, Pennsylvania that employs 950 people. Its owners belong to a sect of Mennonite Christians.

Kathleen Sebelius is the secretary of health and human services in the Obama administration.

Hobby Lobby and Conestoga Wood Specialties are just two of nearly 50 for-profit companies that have sued the Obama administration seeking exemptions from birth control provisions of the ACA on religious grounds. Many of these have asserted a blanket objection to all forms of contraception.

A ruling in favor of Hobby Lobby and Conestoga would mark a historic and unprecedented attack on the principle of separation of church and state, whose centrality to the constitutional structure and democratic rights laid down in the US Constitution is indicated by the fact that it is the first principle spelled out in the First Amendment, one of the ten amendments that comprise the Bill of Rights. The First Amendment, which guarantees freedom of speech, press and assembly, begins: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Granting the two companies exemptions to the federal law would constitute precisely an "establishment of religion" banned by the First Amendment.

Such a ruling would open the door to corporations demanding, ostensibly on religious grounds, to be exempt from everything from Social Security taxes, to child labor laws, to minimum wage and overtime statutes, to health and safety regulations. It would strip workers—in the first instance the employees of the two firms involved—of their right to legally protected health care services, and open the way to even greater incursions into workers' legal rights.

At the same time, such a ruling would vastly expand the definition of corporations as "persons" under the law, since the 1993 law has to date applied only to individuals, and no federal courts have in the past claimed that for-profit companies have religious exercise rights. This would extend the reactionary legal trajectory initiated with the 2010 Citizens United Supreme Court ruling, which removed legal restrictions on corporate campaign donations on the grounds that corporations enjoyed the same rights to contribute to electoral campaigns as individuals.

The oral argument revealed a divided court, with the

three female associate justices—Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan—challenging the arguments of the plaintiff's lawyer, Paul Clement (solicitor general under George W. Bush); Stephen Breyer, the other "moderate" justice, seemingly looking for a compromise; and the right-wing block led by Chief Justice John Roberts, Associate Justice Antonin Scalia and Associate Justice Samuel Alito peppering the Obama administration's solicitor general, Donald Verrilli, with hostile questions.

Associate Justice Anthony Kennedy, generally part of the right-wing bloc but often the swing vote, at various points seemed to challenge both the plaintiffs and the Obama administration, suggesting that he may determine the disposition of the ultimate ruling, expected to be handed down in late June.

Two things stood out in the oral argument. First, the degree to which the Obama administration had undermined its own health care law and weakened its legal case by capitulating to previous demands from the Catholic Church and the religious right. In 2012, the White House caved in to objections from these quarters to the contraception provisions of the ACA by exempting religious-affiliated hospitals, charities and non-profits from having to provide birth control to their employees. Instead, the administration issued an executive order requiring private insurers to provide such coverage, subsidized by the government.

In his argument, Clement, the lawyer for the plaintiffs, repeatedly cited the exemptions given in 2012 as a model for a settlement with his corporate clients. Justices Breyer and Scalia seemed to take up Clement's argument, suggesting that the government could accommodate religious objections by paying for the challenged contraceptives itself. Such a deal would represent a massive breach of the First Amendment Establishment Clause and open the door to further legal exemptions for corporations.

The second feature of major importance was the lack of any principled defense of either the First Amendment or the rights of workers—women and men alike—by Solicitor General Verrilli or the defenders of the ACA on the court.

At one point, Justice Alito asked Verrilli point blank: "Well, is it your argument that providing the accommodation that's requested here would violate the Establishment Clause?"

Verrilli replied: "It's not our argument that it would violate the Establishment Clause."

At another point, Justice Kagan argued that Hobby Lobby and Conestoga Wood Specialties did not meet the "substantial burden" threshold under the Religious Freedom Restoration Act because they had an alternative under the ACA to paying millions of dollars in fines for refusing to provide emergency contraceptives as part of their employee health plans. Touting one of the most reactionary, anti-working class aspects of Obamacare, she said the companies could simply drop their health plans altogether and pay far less in tax penalties under the health care law.

"There's one penalty that is if the employer continues to provide health insurance without this part of the coverage," Kagan said, "but Hobby Lobby could choose not to provide health insurance at all. And in that case, Hobby Lobby would pay [a penalty tax of] $2,000 per employee, which is less than Hobby Lobby probably pays to provide insurance to its employees.

"So there is a choice here. It's not even a penalty in the language of the statute. It's a payment or a tax. There's a choice… There are employers all over the United States that are doing this voluntarily because they think that it's less."

Some major press outlets, such as Reuters and the *Los Angeles Times*, ran reports on the oral argument predicting that the court would rule in favor of the companies, or at least uphold the claim that corporations have the same religious rights as individuals.

At one point Chief Justice Roberts seemed to tip his hand, suggesting that a pro-plaintiff ruling could be limited to closely held enterprises such as Hobby Lobby and Conestoga. That would leave the issue of larger corporations claiming religious freedom rights for another day, he said. Justice Breyer suggested he might be open to that type of decision.