Supreme Court sends contraceptive-mandate cases back to lower courts

May 16, 2016

The Supreme Court has sent the *Zubik v. Burwell* contraceptive-mandate cases—filed by faith-based nonprofits that claim the Affordable Care Act's birth-control provision violates their religious beliefs—back to the lower courts.

The high court's short, unsigned May 16 opinion stated the court "expresses no view on the merits" of the seven cases that had been combined under *Zubik v. Burwell*. Instead, the court provided instruction for the lower courts, based upon a supplemental briefing it handed down in March.

At that time, the Supreme Court asked the faith-based nonprofits and the government to determine how the organizations' employees could receive seamless contraception coverage without requiring the nonprofits to provide separate notice of their objection. The religious groups had claimed notification made them complicit in providing contraceptive coverage.

Some of them—including East Texas Baptist University and Houston Baptist University—have resisted involvement in providing so-called "morning after" drugs, which they claim could terminate a pregnancy after conception.

Further refinement expected

Holly Hollman"Today's decision does not resolve the controversy, nor will it necessarily change the results in the lower courts that previously ruled in favor of the government," said Holly Hollman, general counsel of the Baptist Joint Committee for Religious Liberty, which filed a brief in the case, supporting the government's efforts to accommodate religion.

"It does, however, allow the parties to further refine their arguments about notice requirements and how employees will be covered," Hollman said

The BJC's brief explained how, under the 1993 Religious Freedom Restoration Act, the far-reaching claims of the nonprofits can harm religious liberty. The court's May 16 opinion did not rule on whether the accommodation for religious employers violates RFRA.

"The government provided a process that allows objecting employers to avoid paying or contracting for contraceptives while ensuring that employees still would receive those benefits," Hollman said. "Instead of ruling on whether this accommodation satisfies the Religious Freedom Restoration Act, the court is directing the lower courts to reconsider the question in light of the parties' supplemental arguments."

The court did not interpret RFRA's provisions. The opinion states: "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."

Concurring opinion

In a concurring opinion, Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsburg, noted the court's opinion should not be interpreted as supporting the nonprofit organizations' position that anything short of a "separate policy, with a separate enrollment process" would be unacceptable. It reminds the lower courts they may reach the same conclusion they reached previously or reach a different conclusion.

The court's May 16 decision is the latest in a case full of unusual developments. Its March 29 order for supplemental briefings came six days after oral arguments. The order asked the parties to file new briefs addressing whether and how their employees can obtain contraceptive coverage through the organizations' insurance companies "in a way that does not require any involvement of (the organizations) beyond their own decision to provide health insurance without contraceptive coverage to their employees."

Those briefs led to the most recent decision.

During the March 23 oral argument, the eight justices appeared divided. The Baptist Joint Committee's brief was mentioned several times during the argument and may have inspired the court's hypothetical example in its order for supplemental briefs.

RFRA provides legal protection against government actions that substantially burden the exercise of religion. The Baptist Joint Committee chaired the diverse coalition of organizations that pushed for the legislation, providing a high legal standard for all free-exercise claims without regard to any particular religious practice.

The statute was intended to restore the "compelling interest" standard, which the Supreme Court used prior to its 1990 decision in *Employment Division v. Smith*. The law creates a unique balancing test between

substantial burdens on religion and the compelling interests of the government.

The BJC's brief was written by law professor and religious liberty advocate Douglas Laycock.

Click here to read the BJC's brief and additional information about the case.