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## Is Contraception Mandate 'No Big Deal?'

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# Is contraception mandate 'no big deal?'



ALAN GARFIELD

Justice Samuel Alito implied that Monday's contraception mandate decision was no big deal. Let's see if he was right.

The case concerned religious objections brought by owners of two for-profit corporations. The Green family controls Hobby Lobby, an arts and crafts chain with 500 stores and over 13,000 employees. The Hahns control Conestoga Wood Specialties, which makes wooden cabinets and has 950 employees.

The Affordable Care Act required both companies to provide health insurance for their employees including preventive care for women. The Department of Health and Human Services said that the latter requires companies to provide their female employees with coverage for all FDA-approved contraceptives.

The Greens and Hahns believe some of these contraceptives operate by destroying a fertilized egg, which their religion equates with the destruction of a human life. Consequently, they refuse to let their companies provide coverage for these products.

The families sought relief under a federal law called the Religious Freedom Restoration Act. RFRA provides that people are entitled to be exempted from any federal law that substantially burdens their religious practice. The only exception is if the law furthers a compelling governmental interest and there is no other way to achieve that interest other than burdening a person's religious practice. In that case, the person is not exempt and must comply with the law.

Justice Alito said that Hobby Lobby and Conestoga could raise the objections of their owners even though the corporations are separate legal entities. He also said judges were not allowed to second-guess the families' sincerely held beliefs that providing

contraceptive coverage substantially burdened their religious practice.

Alito did assume, in the government's favor, that the contraception mandate furthered compelling governmental interests in advancing women's health and promoting workplace gender equality. But he said the government had other ways of furthering these interests without burdening religious business owners. For example, he said the government could itself provide contraceptive coverage for female employees. But he also focused on a work-around solution that HHS had previously created for nonprofit religious employers like Catholic universities and hospitals.

Under this work-around, a nonprofit employer can notify its health insurance provider that it objects to paying for contraceptive coverage. The insurance company must then exclude this coverage from the employer's health plan. But the insurance company must itself provide this coverage to the employer's women employees.

Alito said that HHS determined that imposing this obligation on insurance companies did not subject them to additional costs because the added cost of providing contraceptive care was offset by the savings that resulted from covering fewer unintended pregnancies.

If the government could offer this solution to nonprofit religious employers, Alito wondered, why couldn't it offer the same thing to for-profit employers?

This certainly sounds like a win-win-win solution. The Greens and the Hahns don't have to violate their faith. The female employees still get contraceptive care. And the insurance companies come out even.

I hope Alito's right that this work-around will actually work. But in the meantime, it's important to note that the reasoning in Alito's decision invites family-held corporations to bring other religious claims that might not be so easily resolved.

For-profit corporations can now bring religious objections to all manner of federal regulation: Jehovah's Witnesses to providing health insurance coverage for blood transfusions; Christian Scientists for vaccinations; Jews and Muslims for pig-derived medications.

And if Congress ever had the moral fortitude to outlaw discrimination based on sexual orientation, you could imagine the raft of RFRA claims brought by photographers, florists and caterers claiming that their religion forbids them from serving same-sex marriages.

To be fair, Alito emphasized his holding was "very specific" and did not imply that for-profit corporations were free to opt out of any law that was incompatible with their owners' religious beliefs. But there is reason to fear that more and more for-profit companies will try to use religious objections to gain exemptions from laws aimed at fighting discrimination and protecting employee rights.

Yesterday's decision was just the first shot across the bow.

Alan Garfield is a professor at Widener University School of Law.

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