CASE SNAPSHOT
Southern Nazarene University v. Burwell

Case Summary

Four Christian universities in Oklahoma have filed suit against the Obama administration's mandate that forces employers, regardless of their religious or moral convictions, to provide insurance coverage for abortion-inducing drugs, sterilization, and contraception under threat of heavy penalties. The Obama administration is currently losing the HHS abortion-pill mandate cases with a 72-16 record in courts.

Case Status

The Supreme Court granted the petition for certiorari of Southern Nazarene University and three other universities in Oklahoma, along with the petitions of Geneva College and five others on Nov. 6. All of the cases address the same issue: Should the government force religious non-profit organizations and institutions to provide access to abortion-inducing drugs, sterilization, and contraception in their employee and student health insurance plans in violation of the foundational religious convictions of their institutions and under threat of punitive fines? The Court is likely to hear arguments in Spring 2016, with a decision in June.

What Alliance Defending Freedom Is Arguing

In *Hobby Lobby/Conestoga Wood Specialties*, the Supreme Court affirmed that a for-profit, family business can operate its business in a way that is consistent with its beliefs; specifically, the Court ruled that these small, family businesses could not be forced by the government to include life-ending drugs and devices in their employee health coverage. The Court did not specifically resolve the same freedom issue for *non-profit* groups, including religious schools, ministries, and pro-life organizations.

As a tactic in the continuing non-profit litigation, the government came up with an alternative method of complying with the mandate, pretending to solve the problem it had created. At the time the Supreme Court decided *Hobby Lobby/Conestoga*, the Court noted the existence of this so-called "accommodation," but did not decide whether it eliminates the mandate's burden on religious exercise.

Under the alternative compliance method, the religious groups would be forced to: (1) sponsor a health plan through an insurer or third-party administrator (TPA) willing to provide abortifacients to their employees, (2) alter their health plan to ensure the provision of abortifacients, (3) notify or identify for the government their plan's insurer or TPA so that those entities would provide the objectionable abortifacients , and (4) officially authorize those entities as "mules," or carriers, responsible for providing the abortifacients to which the religious groups object.

Thus, the so-called accommodation involves far more than sending notification of these organizations' religious objections. It legally and practically serves to bring about the provision of those drugs and devices, because the government forces a religious group to contract for the services in their health plans. The punishment for not signing these permission slips is crippling fines that would likely and quickly drive many of these non-profits out of existence.

As the cert reply brief explains, "The government cannot answer one simple yet vital question: If it is true that religious nonprofits are totally removed from providing abortifacient contraceptives, why force them to participate in the accommodation scheme…? The answer is that the so-called accommodation does not isolate the Universities from the provision of abortifacients at all. Rather, as Petitioners have explained…, the accommodation is a 'long and winding extension cord the government uses to power its contraceptive mandate,'

which not only 'gets its power from…nonprofits' health plans,' but which the government forces 'nonprofits to plug in…themselves by signing the self-certification or providing the alternative notice.'"

Though there are seven petitions pending before the Court all addressing the same problem, *Southern Nazarene* is one of the few that provides a variety of health plans.

- Oklahoma Baptist University and Oklahoma Wesleyan University offer insured plans to employees.
- Southern Nazarene University provides a self-insured plan to its employees.
- Mid-America Christian University offers employee health benefits through a self-insured "church plan" as designated by federal employee benefits law.
- Southern Nazarene University and Oklahoma Baptist University offer student health plans.

All four of these universities object to facilitating access to drugs and devices that may prevent the implantation of a very early human embryo.

The Legal Effect of *Hobby Lobby*

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014), the Supreme Court held that the application of federal regulations implementing the Patient Protection and Affordable Care Act of 2010 ("ACA") to compel certain for-profit religious employers to provide health insurance coverage for all FDA-approved contraceptives violated the Religious Freedom Restoration Act (RFRA). Like the items objected to in *Hobby Lobby*, the universities' religious objection to the mandate is limited to facilitating or enabling access to Plan B (the "morning after pill"), ella (the "week after pill"), certain IUDs, and related counseling. *See Hobby Lobby*, 134 S. Ct. at 2766. Applying the Court's rationale in *Hobby Lobby*, the government can't apply the mandate to force nonprofit religious employers to cover religiously objectionable contraceptives in their health plans. *See* 134 S. Ct. at 2785 ("[U]nder the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful"). Thus, the government's only means of mandate enforcement against religious nonprofits is via the alternative method of compliance outlined above.

Bottom Line

Ultimately, in a free society like the United States, the government's solution to burdening the religious and moral convictions of its charities and universities should not be to force these institutions to sign a permission slip to be their drug carriers. In September, the U.S. Court of Appeals for the 8th Circuit agreed, and applied the rationale of *Hobby Lobby/Conestoga Wood Specialties* to the *Dordt College* case, ruling that faith-based colleges and universities should be free to operate their institutions in accordance with the faith they espouse and teach. In finding that the government's mandate and accommodation substantially burdened the college's ability to do so, the court's decision caused a circuit split, i.e., disagreement among the federal courts about the effect of the accommodation process. The Supreme Court should resolve this issue consistent with its decision in *Hobby Lobby* and again affirm the bedrock American principle that all people should be able to peacefully live and operate according to their beliefs.