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## Limits Of Hobby Lobby - Priests For Life Denied Rehearing On Contraception Mandate

MAY 27, 2015 @ 4:49 PM

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when it comes to divisive issues of sexual morality don't pull the IRS into the mix.

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Another Obamacare challenge stalled last week. The Court of the

Appeals for the DC Circuit [issued a ruling](#) refusing a rehearing en banc on [Priests for Life's](#) challenge to the accommodation that the ACA makes for religious organizations in the matter of contraception coverage under the ACA. According to its [Form 990](#), [Priests For Life](#) was:

“ Formed to identify, educate and support Roman Catholic clergy, from whom the intrinsic value of each human life is the focus of their pastoral ministry and to assist the role of teaching and preaching of the defense of human life from abortion and euthanasia in the context of a consistent ethic of life.

By their lights some forms of birth control are abortifacients and they don't approve of artificial birth control. Requiring them to provide their employees with birth control infringes religious liberty in their view and the accommodation granted religious organizations does not solve the problem.

### **Accommodation Not Accommodating Enough**

The accommodation that religious not for profits were allowed struck me as inspired. They could notify their insurance company that they had a conscientious objection to providing contraception and did not want it covered by a plan they were

providing. Then the insurance company would separately deal with the beneficiaries. To Priests For Life the accommodation was not accommodating enough. That notification to the insurance company is enough to implicate them in condoning behavior, they believe is sinful.

— **Forbes*BrandVoice*** ? —

The hope was that the Hobby Lobby decision, which concerns how the mandate affects private business employers, would give the Circuit the motivation to relook at the issue. Oddly the Hobby Lobby decision might be viewed as supportive of the government's position. The Supremes suggested that the government might have offered private employers the same deal that religious organizations like Priests for Life had.

“ Or it could extend the accommodation that HHS has already established for religious nonprofit organizations to non-profit employers with religious objections to the contraceptive mandate. That accommodation does not impinge on the plaintiffs' religious beliefs that providing insurance coverage for the contraceptives at issue here violates their religion and it still serves HHS's stated interests.

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## Hobby Lobby Does Not Go That Far

The majority of the DC district held that the Religious Freedom Restoration Act provides robust protection for religious liberty, regardless of how irrational, trivial or wrong others might view particular religious beliefs. The step that the Court will not take is to credit a religious groups sincerely held misunderstanding of how federal law works.

“ RFRA protects religious exercise. In no respect do we, nor could we, question Plaintiffs’ sincere beliefs about what their faith permits and forbids of them. But we can and must decide which party is right about how the law works. We concluded that the regulation

challenged in this case does not, as a matter of law or fact, give Plaintiffs' conduct the contraception-facilitating effect of which they complain. Indeed, it bears emphasis that the whole point of the challenged regulation is to scrupulously shield objecting religious nonprofits from any role in making contraception available to women. The accommodation is itself evidence of the fundamental commitment of this Nation to religious freedom that RFRA embodies. The regulation is, of course, properly subject to judicial scrutiny to verify that it comports with governing law, including Hobby Lobby. Because we conclude that it does, we believe that en banc review is not warranted in this case.

## **Dissent**

There were two dissents so this argument may not be over.


“ Nevertheless, though the government acknowledges that a primary goal of such organizations is to oppose the government's mission of increasing access to and use of contraception, it places them outside its grudging religious exemption and offers only one real choice—they can renounce their religious scruples overtly or in practical effect. If the government coopts their contractors and administrative structures to dispense advice, drugs, and services that contravene their religious

views, in effect, it has written contraceptive care, including access to abortifacients, into Plaintiffs' employment contracts and student health care agreements.

Commandeering is not accommodation, and, in this context, "seamlessness" is just shorthand for surrender.

Father Frank Pavone has indicated that they are [planning on going to the Supremes](#).

## **Is The Game Worth The Candle?**

I recently started compiling the [various "laws of tax planning"](#) that I have formulated over the years and then decided to expand to "laws of tax practice". Reilly's First Law of Tax Practice, by the way, inspired by Herb Cohan is "Bring back a check". (The corollary laid down by Bruce Carlin, God rest his soul, was "Receiveables do not improve with age"). I realized that I also have at least one "law of tax policy", so I have decided to commence that compilation also. Here is Reilly's [First Law of Tax Policy](#) – "Make tax policy the Switzerland of the culture war." In other words when it comes to divisive issues of sexual morality don't pull the IRS into the mix. 

Now, of course, both sides of this dispute have broken that rule. Birth control is not that expensive that

there is a burning need to make sure that somebody who goes to work for Father Pavone have it covered by her insurance. Realistically if I was a total cheapskate and had to provide health care coverage, I would probably want to charge people extra for not using birth control. The insistence that it be included in ACA is largely ideological. Likewise Father Pavone could just tell his insurance company he ain't gonna pay for no stinking birth control and the government is letting him do that. So why do we need this litigation? I don't think we do, but sometimes I am overly pragmatic.

## **Note**

There seems to be a problem with the [Priests For Life Form 990](#) on [guidestar.org](#). Page 1 is wildly different from the supporting schedules. It was driving me crazy until I realized that apparently somebody scrambled the pages and the page 1 belongs to a different group. A conspiratorial mind would look to get excited about this. I only mention it, because I gave you the link and would hate for another tax geek to think that I am not paying attention.

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