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GUEST COLUMN

ACA bout heads to round 4

By Jill E. Adams

Could filling out a form be both sinful and unconstitutional? We will find out this spring when the U.S. Supreme Court decides a set of seven cases brought by religious nonprofit corporations that oppose the contraceptive coverage provision of the Affordable Care Act. The cases have been consolidated as *Zubik v. Burwell*, 14-1418.

This is the fourth ACA challenge the court will decide and the second involving the requirement that group plans include Food and Drug Administration-approved forms of contraception without cost-sharing, as an essential part of preventative care. The Department of Health and Human Services exempts from this requirement all religious employers, such as houses of worship

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DAILY APPELLATE

Wes Marsh / Daily Journal

Adam Winkler, left, John Eastman and Erwin Chemerinsky

After shootings, experts discuss US gun law

Recent mass shootings in San Bernardino and Colorado Springs, Colo., have renewed the debate over efforts to limit or ban the sale of guns and ammunition. To better understand the legal framework governing firearms in the United States, Daily Journal Legal Editor Ben Armistead convened a panel of Constitution scholars to discuss the Second Amendment. Adam Winkler is professor of law at UCLA School of Law and author of "Gunfight: The Battle over the Right to Bear Arms in America." John Eastman is professor of law at Chapman University's Fowler School of Law and director of the Claremont Institute Center for Constitutional Jurisprudence. Erwin Chemerinsky is dean and professor of law at UC Irvine School of Law. Here is an edited transcript of their conversation. A video of the discussion is available at www.dailyjournal.com.

A well

Ben Armistead: What do those words mean to you?

Adam Winkler: That sentence has

amendments?

AW: The prefatory clause explains the reason why the Framers thought it

State Bar backs key executive

Chief Trial Counsel Jayne Kim endorsed for second term

By Lyle Moran
Daily Journal Staff Writer

LOS ANGELES — The State Bar's Board of Trustees gave controversial Chief Trial Counsel Jayne Kim a resounding vote of confidence Monday, voting 14-1 to reappoint her to a second term.

In approving Executive Director Elizabeth Rindskopf Parker's nomination of Kim to lead the attorney discipline unit for another four years, the bar's board bucked strong pressure from the employees' union to select a new leader.

Board members portrayed Kim, whose reappointment must now be confirmed by the state Senate, as someone who has ruffled feathers because she has pursued necessary change to improve the Office of Chief Trial Counsel.

"If we were not achieving change, we would not be hearing this unhappiness," said Trustee Michael Colantuono.

Parker and the board lauded Kim for her management of the backlog of attorney discipline cases, instituting quality control measures and establishing an appeals unit to ensure uniformity.

Her reform efforts have led to a sharp reduction in the number of complaints to the California Supreme Court by those challenging the State Bar's closing of a case, known as Walker petitions, Parker said.

Next round of ACA challenges focuses on contraception

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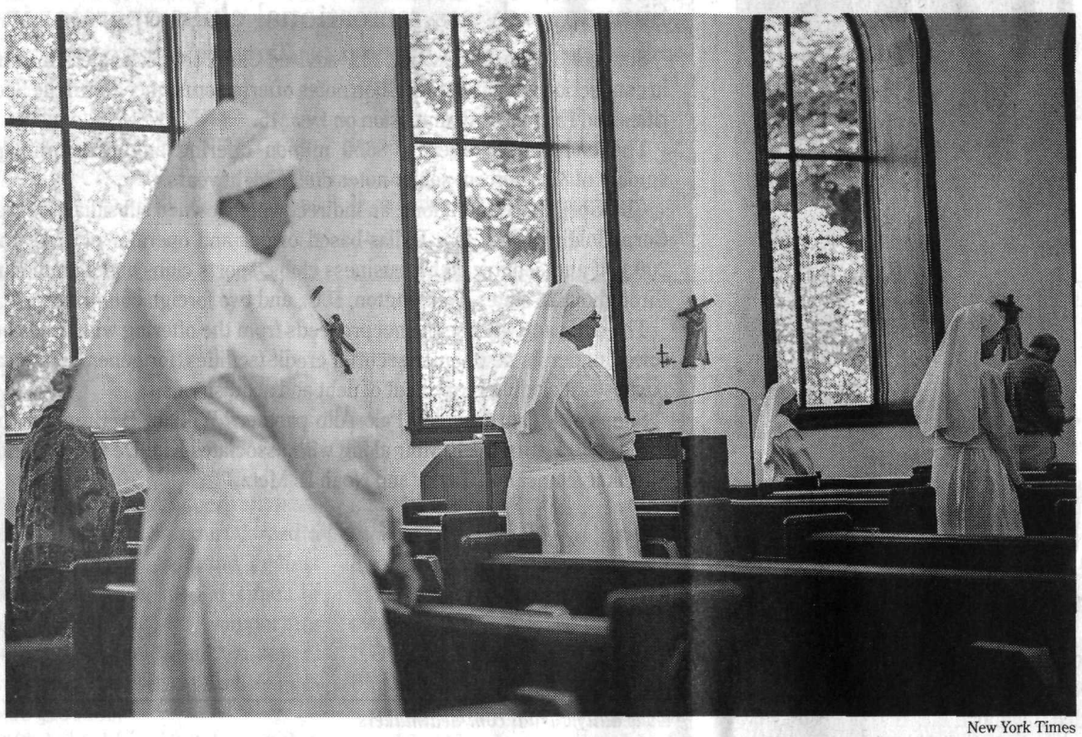
and sacred orders with exclusively religious activities. HHS also allows religious nonprofits, such as schools, hospitals and charities, whose employees and clients are not exclusively religious, to opt out by completing a brief form that notifies HHS of their religious objection to covering contraception. The plaintiffs in this septuple set, including Little Sisters of the Poor, an order of Catholic nuns who operate nursing homes, insist that the mere act of completing the form implicates them in their employees' sinful behavior — namely, the use of certain contraceptives they believe to be abortifacients. Further, they claim the opt-out accommodation is an undue burden under the Religious Freedom Restoration Act, which requires any federal law that imposes a substantial obstacle on religious exercise to serve a compelling government interest by the least restrictive means necessary.

The challengers have not fared well in the lower courts; seven of the eight circuits to have heard these cases have upheld the accommodation as constitutional. They aren't likely to fare better before Supreme Court, as the justices parse through the four-part test to examine a potential RFRA violation. The threshold RFRA questions of whether religious nonprofit corporations are persons able to claim protection under the statute and whether the government has a compelling interest have been asked and answered affirmatively in previous jurisprudence. The real work will be in determining whether the contraceptive coverage provision imposes a substantial obstacle on the institutions' exercise of religion and whether the accommodation is the least restrictive means possible for the government to advance its interest.



New York Times

Nuns and residents at the Little Sisters of the Poor Jeanne Jugan Residence, July 10, 2015, in Washington.

The challengers have not fared well in the lower courts; seven of the eight circuits to have heard these cases have upheld the accommodation as constitutional.

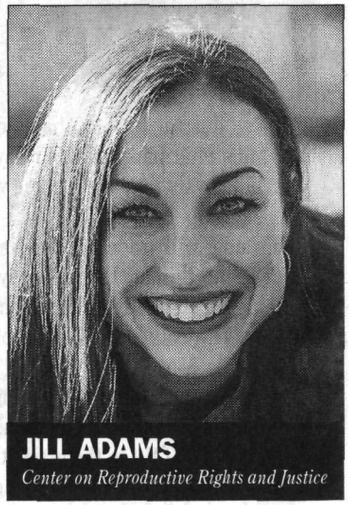
The plaintiffs claim they are made complicit in the commission of a grave sin by completing the first page of a two-page form that declares their religious objection and frees them from any involvement in the sinful act to which they object. Many hands make light complicity with this degree of attenuation. Upon submitting the form, the employer is finished with the process and not obligated to "contract, arrange, pay, or refer for contraceptive coverage." They don't even have to tell their employees that the insurer will provide coverage separately. HHS receives the form and contacts a third-party insurance company, which independently covers the contraception for an employee, who may or may not use contraception and may or may not select one of the methods the employers find morally offensive.

Most of the religious employers' objections are to intra-uterine devices and emergency contraception, which challengers believe to be abortifacients— medical evidence notwithstanding. To be clear, these, like all contraceptive methods, prevent (rather than end) pregnancy — in these cases by stopping ovulation or fertilization. Such facts were not examined in consideration of religious nonprofits' beliefs to the contrary by the 8th U.S. Circuit Court panel in *Sharpe Holdings, Inc. v. HHS*, 2015 WL 5449491 (8th Cir., 2015), one of the seven cases up for review. Nor were they taken into account by the majority of the Supreme Court in *Burwell v. Hobby Lobby*, 134S. Ct. 2751 (2014), where closely held for-profit corporations opposed the ACA contraceptive coverage provision claiming the same sincerely held — though factually erroneous belief about certain contraceptives causing abortions. Unexamined sincerity eclipsed science in both cases.

Even assuming the court will give the "sincerely held beliefs" of Little Sisters and the other plaintiffs the same short shrift, it's difficult to believe the court will determine that completing a form imposes such a substantial obstacle that it unduly burdens their religious freedom. It further taxes the mind to imagine this ruling by the same legal system that has applied the same undue burden standard to restrictions on abortion access and determined it is *not* a substantial obstacle for women seeking abortion care to be forced to travel hundreds of miles, pay out of pocket for services, secure lodging and child care due to mandatory waiting periods, be read a script riddled with medical inaccuracies, and undergo medically unnecessary ultrasounds. And, this is precisely the grim fate of many an employee of religious nonprofits, who will not be able to afford birth control without third-party coverage, should the court decide the form presents a substantial obstacle and identify a less restrictive alternative.

One would think the opt-out form would pass muster as the least restrictive means, given Justice Samuel Alito's nod to it as a reasonable workaround for closely-held religious for-profit corporations in the *Hobby Lobby* majority opinion. And, what could be less restrictive than filling out a single page? A hand signal? Perhaps a wink? Is that the point we've come to, where any slight effort or minor inconvenience claimed to be a substantial obstacle to religious exercise will be avoided no matter what the cost to non-adherents? We will know by the end of the next Supreme Court term whether sparing a few flicks of the pious pen is worth depriving multitudes of access to basic healthcare necessary for self-determined participation in family, economic, and civic life.

Jill E. Adams *is founding executive director of the Center on Reproductive Rights and Justice at the University of California, Berkeley School of Law.*



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