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## Supreme Court Rules in Favor of Hobby Lobby, Opens Door to Religious Objections to Statutes Covering Employers

By Denise M. Visconti, Jane Ann Himsel, Darren E. Nadel, and William E. Trachman

On June 30, 2014, the U.S. Supreme Court ruled that closely held, for-profit entities with religious objections to certain aspects of the birth control mandate imposed by the Patient Protection and Affordable Care Act (“the ACA”) could avoid the mandate by invoking the Religious Freedom Restoration Act (RFRA).<sup>1</sup> While the majority expressed intent to limit its holding to the facts of the cases before it, the decision’s language may open the door for a variety of religious objections to generally applicable federal laws. Whether employers should actually raise those objections is discussed later in this article.

### Summary of Supreme Court’s Conclusion

Seeking exemption from the birth control mandate were three closely held entities: Hobby Lobby Stores, Inc., Mardel, Inc., and Conestoga Wood Specialties Corporation. Last year, the U.S. Court of Appeals for the Tenth Circuit ruled in favor of Hobby Lobby and Mardel, while the Third Circuit held that Conestoga did not have standing to challenge the birth control mandate.<sup>2</sup>

The Supreme Court’s majority opinion closely tracks the Tenth Circuit’s logic in the *Hobby Lobby* case,<sup>3</sup> holding that (1) for-profit, closely held corporate entities are “persons” entitled to bring claims under RFRA; (2) the ACA’s coverage mandate with respect to four forms of birth control placed a substantial burden on the religious beliefs of the entities seeking the exemption; and (3) while giving corporate employees free access to these four forms of birth control was a matter of compelling interest to the federal government, the ACA’s coverage mandate was not the least restrictive means of achieving that goal.

1 *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. \_\_\_ (2014); 2014 U.S. LEXIS 4505 (June 30, 2014). Note that because Secretary of Health and Human Services Kathleen Sebelius resigned her position between the issuance of the lower court opinions and the Supreme Court’s decision, the *ex officio* government party in the case was replaced by Secretary Sylvia Burwell, who was confirmed on June 5, 2014.

2 For a discussion of Hobby Lobby and Mardel’s successful action in the U.S. Court of Appeals for the Tenth Circuit, see Darren Nadel and William E. Trachman, [Tenth Circuit Rules in Favor of Religious For-Profit Corporations in Birth Control Litigation under the Affordable Care Act](#), Littler ASAP (July 5, 2013). For a discussion on Conestoga’s unsuccessful litigation in the Third Circuit, see William E. Trachman and Darren E. Nadel, [Five Appellate Court Decisions Regarding The ACA Birth Control Mandates Have Created A Deep Circuit Split, Increasing the Odds for Supreme Court Review](#), Littler’s Employment Benefits Counsel (Nov. 14, 2013).

3 *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 1013) (en banc).

In a strongly worded dissent, Justice Ginsburg disagreed with all three of these holdings. Justice Sotomayor joined Justice Ginsburg's dissent in full. Justices Breyer and Kagan dissented from the majority decision, refused to express an opinion on whether for-profit corporate entities could bring claims under RFRA, and joined in the remainder of Justice Ginsburg's dissent.

## Birth Control Mandates Under the Affordable Care Act

The ACA mandates that employment-based group health plans covered by the Employee Retirement Income Security Act (ERISA) provide certain types of preventive health services at no cost to the participant. One provision requires these plans to include all preventive care and screenings recommended for women, as promulgated by the Health Resources and Services Administration (HRSA).<sup>4</sup> Therefore, these health care plans must offer all FDA-approved contraceptive methods as preventive care.<sup>5</sup>

The ACA contains a number of exemptions to this requirement. Health plans that are "grandfathered" under the ACA are exempt from the preventive services requirements, but this exception applies only if the group health plans have not been significantly modified since March 23, 2010. Another exemption covers plans sponsored by churches, and a third covers plans sponsored by non-profit, religious-affiliated institutions. If such institutions certify they have faith-based objections to providing the contraceptive coverage, either the private insurers that provide the institutions' health insurance will provide the contraceptive coverage directly to the employees, thereby bypassing the employers, or the federal government will provide the coverage through the third-party administrators of self-funded plans.<sup>6</sup>

The penalties to employers for offering non-compliant plans are steep: \$100 per day for each individual employee not covered. If an employer drops health care coverage altogether, the penalty is \$2,000 per year per affected employee. For Hobby Lobby alone, that would mean \$473 million annually for failing to provide the four methods of contraception it finds objectionable, or \$26 million to drop coverage entirely.<sup>7</sup>

## Factual and Procedural Background

Hobby Lobby Stores, a craft store chain, and Mardel, a Christian bookstore chain, are for-profit, closely held family businesses that "operat[e] ... in a manner consistent with Biblical principles."<sup>8</sup> The Green family owns both entities and manages both through a trust of which each Green family member is a trustee. Each member of the Green family has pledged, in writing, to "run the businesses in accord with the family's religious beliefs and use the family assets to support Christian ministries."<sup>9</sup> The stores are not open on Sundays. Hobby Lobby does not engage in activities that promote alcohol use, contributes financially to Christian missionary activities, and regularly buys newspaper ads promoting evangelical Christian beliefs.

The Hahn family, who are Mennonites, are the only owners of Conestoga, a closely held, for-profit corporation. The company's mission includes the goal of operating the business consistent with Christian principles. Its "Vision and Values" statement provides the company strives to earn a "reasonable profit" while acting consistent with the family's Christian heritage. Its Board of Directors has adopted documents stating "human life begins at conception."<sup>10</sup>

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4 The HRSA is an agency of the U.S. Department of Health and Human Services (HHS).

5 The FDA has approved 20 contraceptive methods. The religious objectors consider four of these methods "abortifacients," arguing they function to prevent the implantation—as opposed to the fertilization—of an egg. These four methods of birth control are two intrauterine devices, and contraceptives commonly known as Plan B and Ella. The Court noted there was disagreement as to whether human life begins at the time of fertilization or implantation. 2014 U.S. LEXIS 4505, at \*24 (the birth control methods at issue "may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus."). But it did not address whether this disagreement was material or whether it was assuming the correctness of the religious objectors' position.

6 For a discussion of this exemption, see William E. Trachman and Darren E. Nadel, *Supreme Court Enjoins Federal Government From Enforcing Birth Control Mandate As to Religious Institutions*, Littler's Employment Benefits Counsel (Jan. 31, 2014).

7 The Court rejected the argument that the objectors were not burdened because they might save money overall by dropping healthcare coverage, since (1) that argument was not raised by the government below; (2) that result would nevertheless burden the entities by making them less competitive in the marketplace; and (3) the Court found the entities had religious reasons for providing health-insurance coverage for their employees. 2014 U.S. LEXIS 4505, at \*\*64-67.

8 *Id.* at \*33 (quoting Hobby Lobby's statement of purpose).

9 *Id.* at \*33.

10 *Id.* at \*29-30.

Both the Hahns and the Greens object to birth control methods they believe prevent the implantation of a fertilized egg. They also believe it is immoral to be complicit in providing such methods for others. Therefore, they decline to cover such methods within their employee healthcare plans. The government did not contest the sincerity of either the Greens' or the Hahns' beliefs.

## The Religious Freedom Restoration Act and its Effect on Federal Statutes

In 1993, Congress enacted RFRA<sup>11</sup> in response to the Supreme Court's decision in *Employment Division v. Smith*,<sup>12</sup> which involved the use of peyote by Native Americans in religious rituals. Prior to *Smith*, courts evaluated whether the government had violated a person's rights under the Free Exercise Clause of the First Amendment to the U.S. Constitution by first asking whether government action placed a substantial burden on conduct motivated by a sincerely held religious belief. If so, then the government action could be sustained as constitutional only if the government proved it acted to further a "compelling state interest" and pursued that interest in the manner that least restricted the exercise of religion.<sup>13</sup> *Smith* eviscerated the "compelling state interest test" by determining the government does not burden an individual's right to exercise his or her religion freely when it imposes a neutral law of general applicability. A person's rights under the Free Exercise Clause may be burdened only if government action targets religious beliefs. Congress enacted RFRA to restore statutorily the compelling state interest test. Although the Supreme Court in *City of Boerne v. Flores*<sup>14</sup> struck down RFRA as applied to state laws, it continues to apply to federal statutes such as the ACA.

RFRA provides, as a general rule, that the federal government "shall not substantially burden a person's exercise of religion."<sup>15</sup> If a person demonstrates that government action has substantially burdened the exercise of religion, then the government must show the action is "(1) in furtherance of a compelling governmental interest; and (2) the least restrictive means of furthering that compelling governmental interest."<sup>16</sup> But whether a corporation can be considered a "person" under RFRA is a complicated question the Supreme Court had never directly addressed before *Hobby Lobby*.

## The Religious Objectors Win Their Claims Under RFRA

The five-justice majority first held that RFRA's definition of "person" included for-profit, closely held corporations. It found no reason why the word "person" would include non-profit religious corporations—who all parties agreed could bring RFRA claims—but exclude for-profit entities.<sup>17</sup> Only two Justices, Ginsburg and Sotomayor, explicitly disagreed with this first holding. Justices Breyer and Kagan declined to express an opinion on the question.<sup>18</sup>

Second, the Court noted the severe financial penalties in the case constituted a substantial burden on the religious objectors, thereby implicating RFRA. In dissenting, Justice Ginsburg responded that an individual employee's decision about whether to use one of the four objectionable contraceptives was too attenuated from the religious beliefs of the corporate entities to *substantially* burden those beliefs. The law requires the corporations to direct money into "undifferentiated funds" from which individual employees, in connection with their physicians, could choose to draw to pay for contraceptives (including one of the four types of birth control to which the corporations objected). The decision to use the contraceptives would neither be that of the corporation nor of the federal government, so religious exercise was not substantially burdened.<sup>19</sup> In Justice Ginsburg's view, while the courts cannot question the reasonableness of a religious person's beliefs, the courts must independently evaluate whether the regulation in question substantially burdens those beliefs from the point of view of a reasonable person. The Court rejected this argument, asserting that the dissent's analysis improperly questioned the reasonableness of the corporations' beliefs, and measuring the "substantial burden" by the size of the penalty rather than the impact on the employers' religious practices.<sup>20</sup>

11 42 U.S.C. § 2000bb.

12 494 U.S. 872 (1990).

13 See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

14 521 U.S. 507 (1997).

15 42 U.S.C. § 2000bb-1(a).

16 42 U.S.C. § 2000bb-1(b).

17 2014 U.S. LEXIS 4505, at \*41-42.

18 2014 U.S. LEXIS 4505, at \* 155 (Breyer, J. and Kagan, J. dissenting).

19 2014 U.S. LEXIS 4505, at \*131-33 (Ginsburg, J., dissenting).

20 *Id.* at \*63-65, 70-71.

Third, the Court addressed whether the birth control mandate satisfied a compelling state interest through the least restrictive means. In contrast to the Tenth Circuit, the Supreme Court declined to address whether the provision of the specific birth control methods at issue constituted a compelling state interest. Instead, the Court assumed that “guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA.”<sup>21</sup> It thus proceeded to the question of whether a lesser restrictive means was available to the government.

In rejecting the government’s arguments, the Court relied heavily on the fact that a less restrictive option for religious non-profits already had been developed: they need only fill out a form certifying they have religious objections to providing birth control. Simply filling out the form triggers payment for the contraceptives in question from either the private insurer through which the employer purchases insurance or directly from the government itself. “HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs.”<sup>22</sup> This, without more, was sufficient to establish the government had failed to meet its burden under RFRA.<sup>23</sup>

Because the closely held for-profit entities were persons for RFRA purposes and demonstrated the birth control mandate placed a substantial burden on their exercise of religion, and because the government failed to show the mandate was the least restrictive means of pursuing a compelling government interest, the Court held the mandate violated RFRA with respect to these entities.

## The Implications for Employers and Other Statutes

While the Court’s decision, read strictly, applies only to closely-held corporations, and only to the four methods of birth control at issue in the case, for-profit employers that operate their businesses according to religious principles may attempt to use the decision to question other coverage issues. As noted by the dissent, for-profit companies are now in a much stronger position to object to a wide number of medical treatments that are counter to their owners’ religious beliefs.<sup>24</sup> Employers, however, should consider at least two major factors to determine whether the Court’s decision affects them.

First, to the extent employers want to raise religious objections to federal statutes, they should consider whether their corporate documents and other business practices demonstrate their religiosity. As noted above, each of the three family-owned entities in *Hobby Lobby* expressed its religion in a variety of tangible ways. The Court relied on these expressions of faith and religious purpose for the proposition that the corporations at issue were genuinely “exercising” religion under RFRA.<sup>25</sup> It is clear from the Court’s majority opinion that it is not expecting the shareholders of any publically traded entity to speak with the same sort of unanimity of belief as the owners of these closely held businesses, but it remains to be seen whether other types of entities, closely held or otherwise, can establish a claim under RFRA by showing it exercises religion through religious expressions contained in its corporate documents.<sup>26</sup> It also is unclear exactly how, and to what degree, future courts will inquire into whether corporate documents (and what types of documents) are “sincere” expressions of faith.<sup>27</sup> While Title VII cases teach us that courts do not relish discussing the sincerity of a religious belief, they also demonstrate courts will not hesitate to call out fraud.<sup>28</sup>

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21 *Id.* at \*76-77.

22 *Id.* at \*82.

23 Notably, the Court reached this conclusion while declining to “decide today whether an approach of this type complies with RFRA for purposes of all religious claims.” *Id.* But on the same day, the Court issued a temporary injunction against the mandated use of the opt-out form, pending further briefing (over a vigorous dissent by Justice Sotomayor, joined by the other two female Justices, filed on July 3). *Wheaton College v. Burwell*, No. 13A1284 (Order issued June 30, 2014).

24 2014 U.S. LEXIS 4505, at \*152-53 (Ginsburg, J., dissenting) (noting that Jehovah’s witnesses object to blood transfusions, Scientologists to antidepressants, and Christian Scientists to vaccinations, etc.).

25 2014 U.S. LEXIS 4505, at \*45 n.2.

26 2014 U.S. LEXIS 4505, \*128 (Ginsburg, J., dissenting) (“Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private.”). Justice Ginsburg further notes that “closely held” does not mean “small,” since entities like Mars, Inc., Cargill, Inc., and Hobby Lobby itself are all large companies with billions in revenue. *Id.* at n.19.

27 2014 U.S. LEXIS 4505, at \*58 n. 28.

28 See, e.g., *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49 (1st Cir. 2002) (union raised issues about sincerity of plaintiff’s beliefs by pointing out seriously inconsistent behavior).

Second, employers should be mindful that the Court rejected any analogy between the objections to the ACA's birth control mandate raised in *Hobby Lobby* and religious objections to anti-discrimination laws that cover employers:

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.<sup>29</sup>

We acknowledge this language can be construed narrowly as relating solely to laws prohibiting discrimination on the basis of race. However, many will interpret the language as (1) broadly validating laws restricting "discrimination in hiring," and (2) indicating that statutory prohibitions on discrimination in the workplace are considered "precisely tailored" to eliminate such conduct. In his concurrence, Justice Kennedy noted it was easier to find for the entities making the religious objection in this case because the government already had established a less restrictive means of achieving the government's interest vis-à-vis the non-profit religious entities' model.<sup>30</sup> For anti-discrimination statutes, however, there likely are no other less restrictive means. Accordingly, it will be extremely difficult, and in the vast majority of cases impossible, for employers to use RFRA as a claim or defense in the employment discrimination context. It also is important for employers to remember that RFRA may only be used as a claim or defense in situations involving matters of federal law. It cannot be used to challenge a state statute or local ordinance.

## Implications for Non-Profit Religious Entities

The Supreme Court relied on the fact that non-profit religious charities were less burdened than for-profit entities that operate in accord with religious principles in resolving the question of "least restrictive means." Consequently, there is some speculation non-profit charities will lose their impending challenges to ACA regulations under RFRA. In other words, the Supreme Court would not rely on a procedure in drafting its opinion in *Hobby Lobby* and then find the same procedure unconstitutional in a subsequent case.

But the *Hobby Lobby* Court expressly reserved this option for itself, noting while the procedure for non-profit religious charities (completing a form and submitting it to the insurance carrier) was less restrictive than the mandate placed on for-profit entities, it was not making any conclusions about the procedure for all circumstances: "We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims."<sup>31</sup> And, on the same June 30 (in an opinion issued July 3, 2014), in *Wheaton College v. Burwell*,<sup>32</sup> the Court granted Wheaton College an injunction, allowing it to refrain from submitting the form to its insurer until the Court has a chance to consider more fully whether submitting the form is the least restrictive alternative for not-for-profit religious entities. Thus, the speculation about the potential failure of the non-profit religious entities' challenge to the procedure is just that: speculation.

## Practical Considerations

In light of the Supreme Court's ruling, many employers may wonder whether they must comply with other federal laws that contravene their owners' strongly held religious beliefs. While *Hobby Lobby* appears to open the door to religious exemptions from certain ACA mandates for employers providing healthcare coverage, it most likely will not extend the use of RFRA to other employment-related circumstances unless those other laws also provide exemptions that could be easily extended to the for-profit employer, particularly given the Court's comments relating to the fact that the employer's exercise of its religious beliefs cannot unreasonably burden its employees' rights.<sup>33</sup>

An employer that believes its religious convictions may, at some point, give it reason to consider using RFRA as interpreted in the *Hobby Lobby* decision as a claim or defense should:

- Continue to comply with federal, state and local laws prohibiting discrimination in employment;

<sup>29</sup> 2014 U.S. LEXIS 4505, at \*87 (internal citations omitted).

<sup>30</sup> 2014 U.S. LEXIS 4505, at \*97 (Kennedy, J., concurring).

<sup>31</sup> 2014 U.S. LEXIS 4505, at \*83 (citing *Little Sisters of the Poor v. Sebelius*, 571 U. S. \_\_\_ (2014)).

<sup>32</sup> 673 U.S. \_\_\_\_ (2014); 2014 U.S. LEXIS 4706 (July 3, 2014).

<sup>33</sup> 2014 U.S. LEXIS 4505, n. 37.

- Understand the grave risks that exist from public backlash to policies that may be characterized as running afoul of existing laws against discrimination;
- Carefully consider whether its corporate documents and practices actually make it a closely held entity with sincerely held religious beliefs akin to the plaintiffs in *Hobby Lobby*;
- Understand the state of the law remains ambiguous for religious objections to ACA mandates other than those involving birth control coverage, and there is no clear indication the decision can be used to stretch RFRA for use as claim or defense in other employment-related federal actions;
- Continue monitoring post-*Hobby Lobby* legal developments; and
- Consult counsel regarding any EEOC, state, or local agency charges of religious discrimination or failure to accommodate employees may file.

[Denise M. Visconti](#) is a Shareholder in Littler Mendelson's San Diego office. [Jane Ann Himsel](#) is a Shareholder in Littler Mendelson's Indianapolis office. [Darren E. Nadel](#) is a Shareholder and [William E. Trachman](#) is an Associate in Littler Mendelson's Denver office. If you would like further information, please contact your Littler attorney at 1.888.Littler, [info@littler.com](mailto:info@littler.com), Ms. Visconti at [dvisconti@littler.com](mailto:dvisconti@littler.com), Ms. Himsel at [jhimsel@littler.com](mailto:jhimsel@littler.com), Mr. Nadel at [dnadel@littler.com](mailto:dnadel@littler.com), or Mr. Trachman at [wtrachman@littler.com](mailto:wtrachman@littler.com).