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All Eyes on the Supreme Court: More than Birth Control at Stake

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Among the most polarizing elements of the Affordable Care Act (ACA) has been the requirement that plans include coverage for all prescribed FDA-approved contraceptives. This debate will culminate, but perhaps not end, when the Supreme Court rules on the cases of two for-profit corporations, Hobby Lobby and Conestoga Wood Specialties, that are claiming that this requirement violates their religious rights. While on its face, this case is about the ACA and birth control, the scope is potentially far broader than coverage and contraception. These cases raise fundamental issues of religious rights for employers and workers, as well as constitutional and corporate law. Scores of interested parties have filed briefs in support of either the government or the plaintiffs. In this brief we highlight three questions raised by some of the friend of the court briefs that have been submitted to the Supreme Court.

BACKGROUND

When the Affordable Care Act was passed, it included considerable attention to preventive care, for the first time stipulating that new private plans cover a wide range of recommended clinical preventive services without cost-sharing. These services now include all prescribed FDA approved contraceptives and services (including barrier methods, hormonal methods, emergency contraceptives, implants, and sterilizations for women) as well as education and counseling. There is an exemption to this rule for houses of worship[1] that object to the contraceptive coverage requirement, and their workers and their dependents will not have contraceptive coverage included in their plans. The Obama Administration has also crafted an accommodation relieving nonprofit religiously affiliated employers such as faith-based hospitals and universities from providing contraceptive coverage if they have religious objections. The accommodation is intended to release nonprofit religiously-affiliated employers that oppose birth control from the requirement of paying for contraceptive coverage, and assure that the employees and their dependents are still able to obtain full coverage for contraceptives directly from the insurer as they are entitled to under the law. Some of these non-profits[2], however, argue that the accommodation is not adequate to address their religious objections to contraception.

No exemption or accommodation, however, is available to for-profit employers. In most cases, *for-profit corporations* are required to provide their workers with insurance plans that cover all prescribed FDA approved contraceptives without a copayment or face paying a hefty fine. All for-profit employers who provide insurance to their workers must provide the contraceptive coverage unless they offering coverage through a grandfathered plan.

On March 25th, the Supreme Court will hear two cases brought by for-profit corporations challenging the ACA's contraceptive coverage rule. These two corporations are Hobby Lobby, a national chain of craft stores owned by a Christian family and Conestoga Wood Specialties, a cabinet manufacturer, owned by a Mennonite family. In

their complaints, both corporations and owners state they object on religious grounds to including coverage for Ella, Plan B, (emergency contraceptives) and related counseling and education in their plans. Hobby Lobby's owners also object to insurance coverage for IUDs and related counseling and education.

Hobby Lobby and Conestoga Woods are claiming a violation of the Religious Freedom Restoration Act of 1993 (RFRA). They are claiming that a corporation should have same religious protections as a "person." Under RFRA, the federal government may not substantially burden a person's free exercise of religion unless the government has used the least restrictive means to further a compelling interest. For the first time, the Supreme Court will be considering whether for-profit corporations can exercise religion with the same protections that are given to individuals.[3]

The response by the legal community to these cases has been notable. Eighty-four *amicus* (friend of the court) briefs have been filed by a diverse group of advocacy groups, legislators, states, corporate and constitutional law scholars, religious leaders, and women health experts. While most of the *amicus* briefs reinforce either the government's position or the corporations' position within the context of RFRA, some of the *amicus* briefs present new legal arguments, provide a broader context for the case, or raise questions that may shape corporate law, civil rights and religious protections for years to come.

CAN A FOR-PROFIT CORPORATION BE CONSIDERED A "PERSON" CAPABLE OF EXERCISING RELIGION?

The first threshold question that must be met in these cases is: Can a for-profit corporation be defined as a "person" capable of religious expression under RFRA? The government's position is that a for-profit corporation is not protected by RFRA. The plaintiff corporations offer a "pass through" theory – asserting that the religious views of the owners *pass through* to the corporation. Numerous groups, many relying on state corporate law, weighed in on the question of whether a for-profit corporation can be considered a "person" under the law and capable of exercising religion.

CORPORATE PERSPECTIVES: Historians and Legal Scholars write in an *amicus* brief that "corporations have always been treated as artificial entities under U.S. Law, and that it would be inconsistent with historical practice to extend the same liberty interests to for-profit business corporations as natural persons enjoy."[4] Some corporate law scholars also urge the court to respect the legal distinction between shareholders and the corporation. They state that shareholders rely on the corporation's separate existence to shield them from personal liability and that this separation is essential to promote investment, innovation, job generation and the orderly conduct of business. This position is also supported by the U.S. Women's Chamber of Commerce and the National Gay and Lesbian Chamber of Commerce whose founding corporate partners include Wells Fargo, IBM, Aetna and J.P. Morgan Chase.[5]

The Christian Legal Society has a different perspective and contends that, "Protecting for-profit corporations is consistent with larger traditions of religious liberty. State and federal conscience legislation has often protected for-profit businesses. The most relevant example here is the widely enacted conscience legislation with respect to abortion."[6] The corporations that have weighed in this case are similar to Hobby Lobby and Conestoga Wood Specialties in that they are privately held and controlled by people with strong religious convictions. National

Religious Broadcasters, representing the interests of Christian broadcasters, contend, "The corporate status of a closely-held business, as a legal fiction, should not eclipse the seminal fact here: closely held, for-profit employers that are faith-based can be, and often are, the instruments for, and conduits of the religious mission and beliefs of the owners, and as such, are entitled to free exercise protection." In their brief, the Ethics and Public Policy Center, argues that allowing for-profit corporations to exercise religion will not open the flood gate to publicly traded for-profit corporations claiming a religion, because the corporation itself would need to demonstrate its sincerely held religious beliefs through action or inaction, a standard, they posit, not easily met by publicly traded companies.

Many commentators are comparing this case to the Supreme Court's decision in *Citizens United v. Fed. Election Comm'n*, ruling that corporations have protections for political speech under the First Amendment that are similar to those provided to individuals. While both cases involve attributing personhood to corporations, the question now is whether for-profit corporation also have religious liberty. The Supreme Court has not previously addressed the religious rights of for-profit corporations.

ENFORCEMENT OF STATE LAW: Many states and attorneys general have also weighed in regarding the implications of allowing corporations to exercise religious rights and they are divided on their issue. CA, MA, and 14 other states are concerned that allowing a for-profit corporation to assert religious rights would override settled principles of state corporate law, and could interfere with enforcement of state and federal laws that provide important rights and protections for all state residents. But in their brief, MI, OH and 18 other states contend that the corporate form is not inconsistent with exercising religion; nonprofit corporations can exercise religion, and it is untenable to conclude that for-profit corporations do not have the same religious rights.[7] These states "seek to foster a robust business climate in which diverse employers can succeed to the benefit of all: the States have a very real interest in the businesses and jobs that the harsh penalties of the HHS mandate threaten to eradicate."[8] The effects of the decision in this case on enforcement of state law and the ability of states to attract of a variety of businesses may play out for a long time to come.

HOW CAN FREEDOM OF RELIGION BE BALANCED WITH WORKPLACE AND CIVIL RIGHTS PROTECTIONS?

At the heart of this case is a fundamental question of whether it is possible to resolve the tensions between recognizing the religious beliefs of the corporations' *owners* while not imposing their religious beliefs on third parties – the *employees and their dependents*. Some religious leaders submitted briefs contending that corporate leaders must fully integrate their religious views into their businesses. A brief signed by the Southeastern Baptist Theological Seminary, and other Protestant pastors and theologians, argues: "The Christian doctrine of vocation teaches that all work—whether overtly sacred or ostensibly secular—is spiritual activity, that Christians are called by God to specific occupations and businesses, and that Christians must conduct themselves in their vocations in accordance with their Christian beliefs."[9] Other faith-based organizations representing a variety of religious traditions however, submitted a brief supporting the Government's position and the religious rights of workers contending: "RFRA should be interpreted in a manner that respects religious diversity, including the religious diversity of the nation's workforce. The United States is a pluralistic society with an "increasingly diverse religious landscape."[10]

The ACLU, NAACP Legal Defense and Educational Fund, Inc. and the National Coalition of Black Civic Participation *amicus* brief provides a historical lens through which to view this tension. The brief has a yet a different perspective, documenting how religion has been historically used in our country to justify discrimination including: slavery, Jim Crow laws, and bans on interracial marriage. Eventually our laws changed, and religion could not be used as a legal basis to opt out of anti-discrimination laws. They also find that religion has similarly been used to thwart gender equality for women in the public debates on a women's role in society, access to birth control, and employment discrimination. There is well established legal precedent to protect individuals from workplace discrimination. The challenge for the Court is to balance the rights of deeply religious business owners while protecting civil rights of all people.

HOW DOES THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE AFFECT THE APPLICATION OF THE RELIGIOUS FREEDOM AND RESTORATION ACT?

While not raised by the parties in the case, several of the *amicus* briefs discuss the constitutionality of RFRA under the First Amendment's Establishment Clause. The Establishment Clause comes from the sentence in the U.S. Constitution that reads: "Congress shall make no law respecting an *establishment of religion,*" and has been interpreted to prohibit the government from favoring one religion over another or over nonbelievers. An *amicus* brief from the Freedom From Religion Foundation and other organizations, calls on the Supreme Court to declare RFRA unconstitutional, as it allows religious entities to be favored over nonbelievers, giving them political advantage and financial benefits. Other scholars have posited related arguments but do not go as far as arguing that RFRA is always unconstitutional, but the Establishment Clause takes precedent over RFRA. They argue that the Establishment Clause prevents employers from claiming a RFRA violation that results in the employers imposing their beliefs on their workers.[11]

Without taking a position on whether RFRA protects for-profit corporations or whether either corporation in this case has a valid RFRA claim, other constitutional law scholars contend that RFRA, when properly applied, does comply with the Establishment Clause. RFRA allows the government to substantially burden a person's religion only if the government is using the least restrictive means to further a compelling interest. This brief states that "precedent strongly supports the constitutionality of statutory religious accommodations, like RFRA, that allow courts to weigh the government's "compelling" interests against claimant's interest in religious exercise."[12] Therefore, they conclude, the Court will need to consider the resulting burden on the employees and their dependents as a part of the balancing test between serving the government's "compelling interest" while doing it the 'least restrictive" manner under RFRA.[13]

In 1997, the Supreme Court struck down RFRA as it applied to state laws in *City of Boerne v. Flores*, but it was responding to a different legal question. That decision was not based on the Establishment Clause, rather upon Congress's limited authority to pass laws regulating the states under the Fourteenth Amendment. RFRA's constitutionality as applied to federal laws was not at issue in that case. While the Supreme Court may not address the constitutionality of RFRA as applied to federal laws in these cases, it will have to decide whether for-profit corporations can make a claim under RFRA, and how a burden shifted onto third parties, in this case paying for contraceptives, impacts an employer's claim to exercise religious rights.

WHAT'S AT STAKE?

While the focus of most of the *amici* briefs have been on religious rights, whether those of the owners or of the workers, one of the challenges facing the court will be how to rule on this case without disrupting a long history of precedent in civil rights and protections against workplace discrimination. The 84 *amicus* briefs submitted make it clear that many people are watching this case and have much at stake in its outcome. These cases have broad implications for not only health insurance coverage of contraceptives --but for civil rights protections, religious rights, and corporate law.

It is difficult to overstate the impact of the Court's decision on the religious protections offered to corporations. In February 2014, the Arizona state legislature passed a bill allowing corporations to refuse service to people who are gay and others if the owner believes doing so violates the practice and observance of his or her religion. While the governor vetoed this legislation in Arizona, fourteen other states[14] have recently considered similar legislation. The Court's decision in *Hobby Lobby* will likely also influence the fate of state laws such as those. At the end of the day, the Court will need to speak to the intersection of two fundamental legal protections, those that honor religious beliefs and freedom and those that protect civil rights.

ENDNOTES

1 26 CFR 54.9815–2713A, 29 CFR 2590.715– 2713A, 45 CFR 147.131

2 Over forty religiously affiliated nonprofit corporations are also challenging the contraceptive coverage requirement claiming that the accommodation for religiously affiliated nonprofits is insufficient and still burdens their religious rights. It is likely that some of these nonprofit cases will request the Supreme Court to review these cases in future sessions.

3 For an explanation of the legal analysis under RFRA please see Kaiser Family Foundation, *A Guide to the Supreme Court's Review of the Contraceptive Coverage Requirement*, Dec. 2013.

4 Brief of *Amici Curiae* Historians and Legal Scholars Supporting Neither Party, January 28, 2014, page 7

5 National Gay and Lesbian Chamber of Commerce Corporate Partners

6 Brief of Christian Legal Society, American Bible Society, Anglican Church in North America, Association of Christian Schools International, Association of Gospel Rescue Missions, The Church of Jesus Christ of Latter-Day Saints, The Ethics & Religious Liberty Commission of The Southern Baptist Convention, The Lutheran Church – Missouri Synod, Prison Fellowship Ministries, and World Vision, Inc. as *Amici Curiae* Supporting Hobby Lobby and Conestoga Wood, et al., January 28, 2014, page 3

7 Brief of *Amici Curiae* States of Michigan, Ohio, and 18 Other States for Conestoga, Hobby Lobby, Mardel, January 2014, page 3

8 Brief of *Amici Curiae* States of Michigan, Ohio, and 18 Other States for Conestoga, Hobby Lobby, Mardel, January 2014, page 2

9 Brief for National Religious Broadcasters as *Amicus Curiae* in Support of the Respondents, January 27, 2014, page 4

10 Brief of Religious Organizations as *Amici Curiae* Supporting the Government, January 28, 2014, page 12 citing Pew Forum on Religion and Public Life, U.S. Religious Landscape Survey 2 (2008)

11 The Center for Inquiry and the Brenan Center for Justice also contend that allowing a RFRA exemption in this case would violate the Establishment Clause.

12 Brief of Constitutional Law Scholars as *Amici Curiae* in Support of Hobby Lobby and Conestoga, et al, January 28 2014, page 2

13 Brief of Constitutional Law Scholars as *Amici Curiae* in Support of Hobby Lobby and Conestoga, et al, January 28 2014, page 10

14 The other states that have considered similar bills are: Kansas, Idaho, Utah, Oregon, Tennessee, South Dakota, Ohio, Hawaii, Oklahoma, Maine, Mississippi, Georgia, Indiana and Missouri. Lawmakers in all of these states except Oregon, Oklahoma and Missouri have recently voted down the legislation or blocked further consideration of the legislation.