THE SUPREME COURT DECIDES THAT WHEN THE RELIGIOUS BELIEFS OF OWNERS OF PRIVATELY HELD BUSINESS CONFLICT WITH THE HEALTH CARE RIGHTS OF THEIR EMPLOYEES THE OWNERS’ RIGHTS PREVAIL (AT LEAST WHEN THE SUBJECT IS CONTRACEPTION)

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In its last decision issued this term, the Supreme Court, in a 5-4 vote, struck down the contraceptive care mandate in Health and Human Services (HSS) regulations issued under the Affordable Care Act (ACA) at least as applied to privately held for-profit corporations whose owners have religious objections to certain kinds of contraceptives. Burwell, Secretary of Health and Human Services, et al. v. Hobby Lobby Stores, Inc., ___ U.S. ___, 2014 WL 2921709 (June 30, 2014). The Court found that because the HSS regulations required employers’ group health plans to provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies’ owners, the regulations violated the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §2000bb.

The plaintiffs in the case challenged only the mandate to pay for four of the twenty FDA-approved methods of contraception which could have “the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus.” Nevertheless, the decision opens the door for any privately held employer to decline to provide coverage for any FDA-approved methods of contraception, if contraception offends the owners’ religious beliefs. Although the majority characterized the relief provided to the employers as limited, the case significantly expands the potential use of RFRA to strike down government programs and actions.

The Court had no problem finding that corporations are “persons” within the meaning of RFRA. RFRA used the term “persons.” The Dictionary Act provides that the word “persons” includes corporations, companies, associations, firms partnerships, societies and joint stock companies, as well as individuals” except to the extent that the legislation otherwise indicates. 1. U.S.C. §1. The Court rejected the argument that for profit corporations are not involved in the exercise of religion finding that protecting free exercise rights of these companies “protects the religious liberty of the humans who own and control those companies.”

The Court rejected a narrow reading of RFRA’s purpose. It cited Congressional language and found that RFRA was concerned not just with laws directly intended to interfere with religious exercise, but also with laws that are neutral toward religion but which may burden religious exercise as much as laws intended to interfere with religious exercise.

RFRA claims involve a three-part analysis: 1) The government action must be found to impose a substantial burden on religious exercise; 2) If the government action imposes a substantial burden or religious exercise, then the government action must be shown to serve a
compelling state interest; 3) If the governmental action serves a compelling state interest, it still must also be shown to constitute the least restrictive means for serving the governmental interest.

The Court easily concluded that the HHS contraceptive mandate substantially burdens the exercise of religion within the meaning of RFRA. HHS argued that the mandate did not impose a substantial burden on the exercise of religion because of the lack of a connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo). HHS argued that the destruction of an embryo does not result from the provision of health care coverage; it occurs only if an employee chooses to take advantage of the coverage and to use one of the four contraceptive methods at issue. That argument was rejected. Justice Alito wrote for the majority that the religiously motivated owner/objectors:

believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.

The majority determined that the HHS regulations, in essence, informed the religious objectors that their beliefs were flawed when the Court had no business under RFRA determining the plausibility of a religious claim. In addition, the costs were high to the religious objectors of not complying with the mandate because, under the HHS regulations, if a covered employer did not provide a plan with minimum essential coverage, including contraceptives, without any cost sharing requirements, the employer could be required to pay $100 per day for each affected individual. The religiously motivated employer/owners were financially coerced into giving up health care coverage for their employees or violating their own religious beliefs.

Without addressing what constitutes a compelling state interest, the Court “assumed” that the HHS regulations satisfied the compelling state interest requirement.

The Court then analyzed whether the HHS mandate constituted the least restrictive means of serving that interest and found that the mandate failed that test for a number of reasons. The Court was concerned that the contraceptive mandate was not universal. It did not apply to tens of millions of people including millions in grandfathered plans and millions who work in businesses with less than 40 employees.
“There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and …to all FDA-approved contraceptives. “ One possibility, and “[t]he most straightforward way of [not burdening the religious employer/owners’ objections] would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers’ religious objections.” The majority saw “nothing in RFRA” that would exclude from consideration the government being required to establish a new program or expending additional funds in order to accommodate its citizens’ religious beliefs.

The Court also pointed out HHS provided the employees of nonprofit employers with religious objections to the contraceptive mandate an accommodation whereby the employees were provided with access to FDA-approved contraceptives without cost sharing imposed on employers or the employees. The Court expressed its concern that HHS provided no reason why the same accommodation could not have been made available where the owners of a for-profit corporation have similar religious objections. The Court declined to decide whether the accommodation granted to non-profits with religious objections violated RFRA, a legal issue already pending before the federal courts.

The Court recognized that HHS authorized HRSA to establish exemptions from the contraceptive mandate for religious employers including churches, their integrated auxiliaries, and conventions or associations of churches as well as the exclusively religious activities of any religious order. The opinion suggests that HHS could have exempted religiously based objections by for-profit employers as well.

The Court cautioned that its decision “should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer’s religious beliefs.” The Court failed to provide meaningful guidance on how to reconcile other religious beliefs with governmentally imposed health coverage mandates.

“Under RFRA, when followers of a particular religion choose to enter into commercial activity, the Government does not have a free hand in imposing obligations that substantially burden their exercise of religion. Rather, the Government can impose such a burden only if the strict RFRA test is met.”

Justice Kennedy wrote a separate concurrence in which he specifically recognized that the government’s interest was compelling, but opined that the government had failed to show that the mandate was the least restrictive means of protecting its interest. Justice Kennedy suggested that HHS could provide to these employer/owners with religious objections to contraceptives the same accommodation provided to non-profits with religious objections to contraception.
Kennedy opined that the Court had not required that under RFRA the government could be compelled to create a whole new program to accommodate a religious exercise claimant.

Justice Ginsburg wrote a lengthy dissent in which she opined that the exercise of religion had traditionally been recognized as a personal right and not one in which for profit corporations engage. Ginsburg did not agree that the burden on the for-profit employers was substantial. Rather, she felt that their religious beliefs were attenuated from the decision by their employees as to the nature of contraceptive care, if any, the employees selected. Justice Ginsburg was particularly concerned at the suggestion that any time the government can pick up the tab, the compelling governmental interests in uniform compliance with the law must give way to sincerely held religious beliefs of individual owners of commercial enterprises.

Ginsburg criticized the suggestion of a tax credit for women whose employers decline to fund contraception on religious grounds inadequate since it “would require a woman to reach into her own pocket in the first instance, and it would do nothing for the woman too poor to be aided by a tax credit.”

Justice Sotomayor joined fully in Justice Ginsburg’s dissent. Justices Breyer and Kagan agreed with Justice Ginsburg “that the plaintiffs’ challenge to the contraceptive coverage requirement fails on the merits.” But Justices Breyer and Kagan opined that the Court “need not and do not decide whether either for-profit corporations or their owners may bring claims” under RFRA so they did not join Part III-C-1 of Justice Ginsburg’s dissenting opinion.

The same day that the Supreme Court issued its opinion in Hobby Lobby, the Eleventh Circuit issued an injunction pending appeal in favor of Eternal Word Television Network against the Secretary of HHS, Eternal Word Television Network, Inc., ___ F.3d ___, 2014 WL 2931940 (11th Cir., June 30, 2014). Judge Pryor specially concurred in the grant of the motion, and wrote a separate opinion that the certification requirement involved in filing the EBSA Form 700 was a substantial burden on religion, specifically disagreeing with the decisions of the Sixth and Seventh Circuits.

On July 3, 2014, the Court granted an emergency injunction against the certification requirement against a religious non-profit in Wheaton College v. Burwell, 573 U.S. ___ No. 13A1284 (July 3, 2014). While the order stated it “should not be construed as an expression of the Court’s views on the merits,” the dissent noted an emergency injunction is normally not issued unless, among other things, the legal rights at issue are “indisputably clear.” Thus, the Supreme Court is likely to have to resolve in the near future a conflict among the Circuits as to the question which it failed to address in Hobby Lobby, that is, whether the accommodation provided under the HHS regulations to non-profits with religious objections to contraceptive care survives a challenge under RFRA applying the standards set forth in Hobby Lobby.
In University of Notre Dame v. Sebelius, 743 F.3d 547 (7th Cir., 2014), the Seventh Circuit found that the burden placed by HHS non-profit employers with religious objections, seeking to opt out of contraceptive coverage by filing a short form for self-certification (EBSA Form 700), which then imposed a burden on their insurer to provide contraceptive coverage, was not a substantial burden on the exercise of religion. Prior to the issuance of the Court’s decision in Hobby Lobby, Justice Sotomayor issued an order in Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius, 134 S.Ct. 1022 (Jan. 24, 2014) relieving the Little Sisters of the Poor from using the form prescribed by the Government or sending copies to third party administrators, pending the final disposition by the Tenth Circuit of their challenge to the HHS regulations regarding the non-profit accommodation.