The court after *Hobby Lobby*: Religious freedom expert Brent Walker

by David Heim in the November 26, 2014 issue

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The contraceptive mandate in the Affordable Care Act and the Supreme Court's ruling last summer in *Burwell v. Hobby Lobby* seem to have opened up a new stream of religious liberty cases. Do you expect to see a variety of cases making their way to the Supreme Court in which a for-profit employer claims an exemption on religious freedom grounds to an otherwise neutral law? Or will Justice Samuel Alito's dictum that *Hobby Lobby* is just about the contraceptive mandate prove correct?

By holding that corporations are within the statute's coverage of "person," the *Hobby Lobby* decision does open the door for additional claims to be brought by for-profit employers. However, in no way does that mean that the claims will be successful.

The court's opinion purports to be, and was, specific to the claim of Hobby Lobby, a "closely held" corporation, and its objection to the contraceptive mandate under the Affordable Care Act. Of course, religious freedom claims involving blood transfusions and vaccinations have been brought in the past, but by individuals and religious organizations. The court's opinion applies only to a "closely held corporation," a term which will have to be further defined in the future.

Justice Anthony Kennedy's concurring opinion is critical here. His was the vote that turned a potential plurality of four into a majority of five. He took the time to write separately, emphasizing the narrow nature of the court's opinion. The need for Justice Kennedy's fifth vote for any viable court majority in the future would likely temper extensions of the *Hobby Lobby* holding beyond the context of its own limited terms.

How does this legal discussion of religious exemptions affect cases involving LGBT people? Will religious liberty be invoked in order to accommodate religious objections to gay marriage, for example?

First, it is clear that churches and houses of worship, and perhaps other pervasively religious organizations, will not have to condone or participate in same-sex marriages to the extent they violate their sincerely held religious beliefs.

However, there have been and will continue to be religious liberty claims made by individuals in businesses, sometimes incorporated, who are involved in the periphery of the marriage ceremony. These would include, for example, the baker who makes the wedding cake, florists who supply flowers, photographers who take pictures of the ceremony and the reception, and clothiers who rent tuxedos.

Some argue that these folks, already engaged in the stream of commerce, should not be able to decline to provide these goods and services based on religious objections. Others say that, particularly after *Hobby Lobby*, there can be a burden on the exercise of religion even in businesses operating in the corporate form in the marketplace. Others have suggested a more moderated approach in which these businesses should be afforded religious liberty protection to the extent they are arguably being required to somehow participate in the ceremony (e.g., photographer, musicians), but those that are primarily selling or renting goods in the marketplace (e.g., baker, clothier) should not be able to make such a claim.

So yes, religious liberty claims will continue to be asserted in connection with same-sex marriages. It's important to note that religious liberty claims are being asserted on behalf of churches and religious organizations that *desire* to solemnize same-sex marriages and have them be sanctioned by the state.

For example, earlier this year, the United Church of Christ—accompanied by the Alliance of Baptists and several ministers from various faith traditions—filed a lawsuit against the state of North Carolina, challenging the constitutionality of a state law prohibiting same-sex marriage with the allegation that it violates their religious freedom.

How plausible is the UCC argument in that case?

So far, successful challenges to bans on same-sex marriage have been brought under the 14th Amendment's equal protection clause and analogous state provisions. Challenges based on religious liberty claims are unusual.

If the rather ambiguous North Carolina law is interpreted to criminalize acts of religious worship that simply sanctify same-sex marriage in the churches' eyes, the law is clearly unconstitutional. If it is interpreted just to forbid the churches from purporting to perform a civil same-sex ceremony, the claim is still plausible but the outcome less certain.

Right now, a religious institution that receives federal funds cannot discriminate on the basis of race. Can it discriminate on the basis of sexual orientation or practice? Will the courts be compelled to address the question of whether sexual orientation is a protected class?

Federal contractors who receive federal funds cannot discriminate on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. Many individuals and organizations, including the Baptist Joint Committee, have argued that while religious organizations are perfectly free to discriminate on the basis of religion in hiring when using their own funds, they should not be able to do so when receiving government funds.

In 2002, President George W. Bush issued an executive order permitting religious organizations to use religious criteria to discriminate in federally funded programs and positions. Although Barack Obama promised to reverse the Bush executive order during his 2008 campaign and ban religious discrimination in hiring in

federally funded positions and programs, he has not done so. While the executive order that President Obama signed in July added “sexual orientation” and “gender identity” to the list of protected categories for federal contractors, he did not reverse the Bush policy on religious organizations discriminating on the basis of religion.

The Supreme Court said that a closely held company like Hobby Lobby does have religious standing and religious rights. Is that definition workable? At what point does a for-profit company lose its religious identity? Is it a question of company size or mode of ownership?

The phrase “closely held company” does not have a uniform—or sometimes even precise—legal meaning. Generally, it is thought to include companies that are not publicly traded and which are owned exclusively or primarily by one family or a small group of like-minded persons. The Obama administration has proposed a rule to provide a definition for for-profit entities that qualify for closely held status, and it is soliciting comments from the public to help it make that decision.

Certainly, the *Hobby Lobby* decision contemplates “closely held” going beyond what are traditionally thought of as mom- and-pop operations. These are usually small family businesses that, although incorporated, are run more like sole proprietorships and hire few if any additional employees. The court regards the idea of “closely held” to be far more expansive when it applied the term to Hobby Lobby, which has more than 550 stores nationwide.

The contraception cases are striking in that third parties—those receiving insurance—are so closely involved. These cases seem to pit one person’s religious freedom against another’s freedom from religion. Is that a fair way to state it?

Yes, the effect on third parties must be part of the religious liberty calculus. Many religious liberty exemptions and accommodations will benefit the religious practitioner but have absolutely no effect at all on the rights or well-being of third parties. Those are easier cases. Where the rights and well-being of third parties are involved, the court must balance those rights in the equation.

The court, for example, struck down a state law in the case of *Estate of Thornton v. Caldor, Inc.* (1985) that gave workers an absolute right to have their sabbath accommodated in the workplace, because the law would effectively require other workers to bear the burden covering the accommodated workers’ shifts. In *Cutter v.*

Wilkinson (2005), the court reaffirmed this prohibition of forcing third parties to share the burden of cost of someone else's religious choices.

In *Hobby Lobby*, the court's majority, instead of balancing the interest of workers in having contraception coverage, assumed there was a compelling governmental interest in the government providing coverage but ruled that it could be done a less restrictive way. The court held that the accommodation the federal government had already provided for religiously affiliated nonprofits could be provided here to both protect the conscience of the for-profit owners and extend the protection of the Affordable Care Act to third-party employees.

Moreover, Justice Kennedy in his concurring opinion was more attentive than the majority opinion to the need to protect the rights of third parties. After noting the importance of the accommodation of religion in our religiously plural culture, he stated firmly that the accommodation may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling."

The court said that it decided *Hobby Lobby* on the assumption that the government has a compelling interest in public health. That would seem like an important claim. Is that how you read it?

For the purposes of the *Hobby Lobby* decision, the court's majority "assumed"—but *explicitly did not hold*—that the government has a compelling interest in providing the contraceptive services to women at no cost. So, in later cases—which could include other challenges to the contraceptive mandate—the court may deny the compelling interest it "assumes" in this case.

Precedent says that laws can be challenged if they impose a "substantial burden" on religious practice. What constitutes "substantial" according to precedent? Did *Hobby Lobby* declare that paying indirectly for insurance that includes contraception is indeed a substantial burden on religious practice? Is a burden judged substantial simply because the plaintiff says it is?

There is no precise definition of *substantial*. That word was inserted into the Religious Freedom Restoration Act to intensify the burden requirement. A burden might be regarded as the government somehow pressuring religious choices one way or another. The degree of pressure and consequent substantiality depends upon

the facts and circumstances of the case as interpreted by the court on a case-by-case basis.

Courts will usually defer to the claimant and take the claimant's word for the question of whether there is a burden. Certainly we don't want courts making hard and fast decisions about theology and dogma. However, courts must draw lines when it comes to gauging substantiality.

Here, even assuming that the Affordable Care Act's contraceptive mandate burdened the Hobby Lobby owners' religious beliefs and practices, the argument is that there are so many intervening acts that the employee's ultimate decision about whether to use contraception services is too far removed from the religious objection to make the burden substantial. In other words, a corporation's payment of premiums (which is not a payment by the religious shareholders themselves) to an insurance company that will then cover a full range of medical services while the employee makes her own independent determination about whether to use contraception has too attenuated a connection to religious belief and practice to "substantially burden" an owner's exercise of religion.

The court's decision in *Hobby Lobby* was somewhat confused by its ruling regarding Wheaton College. In the latter case, the court said that the college, as a religious entity, was not compelled even to apply for an exemption from the ACA mandate, whereas in *Hobby Lobby* the Court said that applying for an exemption was the preferred solution for those who object. What is going on?

Yes, this is somewhat confusing. From the very beginning, explicitly religious organizations, such as churches, were exempted entirely from the contraceptive mandate. Later on, religiously affiliated nonprofits, such as hospitals, charities, and schools, were given an accommodation that would allow them to opt out of providing contraception coverage they find objectionable by signing a form and providing it to the insurer or their third-party administrator. After receiving the notification, the insurer or third-party administrator would provide the contraception coverage to employees. Up until the *Hobby Lobby* decision, for-profit businesses were neither exempted from nor accommodated by the mandate.

The court in *Hobby Lobby* suggested this accommodation, previously given to religiously affiliated nonprofits, is a less restrictive alternative that would both

protect the conscience of the Hobby Lobby owners and extend the protection of the Affordable Care Act to the third-party employees at no cost to the employer.

Then, a few days after the *Hobby Lobby* decision, the Supreme Court temporarily granted Wheaton College the ability to opt out of providing insurance coverage for contraception it finds objectionable without signing the form to do so. (The college claimed that even signing the form and submitting it to Wheaton's third-party administrator, which then must provide the services at no cost to its employees, would make Wheaton complicit in the transaction.)

But it's important to note that the court's order was only provisional, not a final decision on the merits. It strains credulity to believe that a majority of the justices would say that the existing nonprofit accommodation is a linchpin in its decision in *Hobby Lobby* and then turn around and deny its constitutionality as applied to Wheaton College and other religiously affiliated nonprofits. I think it would be extremely unlikely that Justice Kennedy would go along with that.

In the aftermath of the court's temporary injunction for Wheaton, the administration has proposed regulations with an alternative opt-out method for religious nonprofits: they must notify the Department of Health and Human Services of their religious objection, and the government will then notify the insurer or third-party administrator who will be responsible for providing the coverage at no cost to employees.