Op-Ed

When Religion Meets Workers' Rights: Hobby Lobby and Conestoga Wood Specialties

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ON MARCH 25, 2014, THE UNITED STATES SUPREME COURT heard oral arguments in *Hobby Lobby Corp v Sebelius* and *Conestoga Wood Specialties Corp v Secretary of US Department of Health and Human Services*. At stake is the question of whether, for reasons of religion, the Religious Freedom Restoration Act (RFRA)¹ allows for-profit corporations to deny employees benefits (in this case, coverage, without charge, of contraceptive methods approved by the US Food and Drug Administration [FDA]) to which they are legally entitled under federal law. Hobby Lobby won in the United States Court of Appeals for the Tenth Circuit, and Conestoga Wood Specialties lost in the Third Circuit,² setting up precisely the type of split in the appellate courts that so often is a precursor to Supreme Court review.

Two big questions loom before the Court: whether the RFRA applies to corporations controlled by private owners and, if so, whether the government has a compelling interest for overriding corporate religious objections and enforcing a health benefit guarantee. With *Citizens United v Federal Election Commission*³ as a backdrop, the Court may well hold that just as corporations have constitutionally protected First Amendment free speech rights, they also enjoy religious protections under the RFRA. This brings a vital health policy question sharply into view: Should a corporation's religious beliefs be allowed to trump workers' rights, effectively requiring employees to pay the cost of their employer's religious practice?⁴

Two laws form the backdrop for this latest legal battle in the Affordable Care Act (ACA) wars. The first is the ACA itself, which, among its market reforms, includes a provision guaranteeing private insurance coverage for certain preventive services without cost sharing.⁵ The law

provides that the specific preventive services covered by the guarantee are to be identified by certain authoritative bodies: the Advisory Committee on Immunization Practice (immunizations), the US Preventive Services Task Force (clinical preventive screening services), and the Health Resources and Services Administration (HRSA) (preventive services for women's and children's health). Following a 2011 report from the Institute of Medicine (IOM),⁶ the HRSA defined women's preventive health services to include all FDA-approved contraceptive methods.⁷

The preventive services guarantee applies to virtually all privately insured people in the United States unless the plan is "grandfathered"⁸ (ie, permitted by law to continue, even though it does not meet ACA regulatory requirements, an exception that will disappear as plans are modified). The entitlement extends to all forms of coverage, regardless of whether people obtain their coverage through an individual policy or a group plan, both fully insured and self-insured.⁹ Final implementing regulations exempt church plans and also accommodate religiously affiliated, nonprofit employers such as hospitals and universities that certify their opposition to contraception, by ensuring coverage directly through the plan's insurer or third-party administrator.¹⁰

The RFRA predates the ACA by some 17 years, and Congress did not question its application to the ACA. Enacted in 1993 during the Clinton administration, the RFRA was a response to the US Supreme Court's decision in *Employment Division v Smith*,¹¹ which held that the First Amendment's establishment clause does not prevent the federal government from enforcing a neutral law of general applicability even if the law burdens religious beliefs. Through the RFRA, Congress voiced its desire to adhere to a stricter judicial review standard, which would prohibit the government¹² from enforcing any law that "substantially burdens" a "person's" religious beliefs unless it can demonstrate that the law in question is designed to "further a compelling governmental interest" and offers "the least restrictive means of furthering that compelling governmental interest."¹³ In short, the RFRA raises the bar for government by imposing a significantly higher burden of proof. But the RFRA does not explicitly address the question of whether owner-controlled corporations are persons.

The stage is set for a major debate over how far into a pluralistic society religious beliefs can extend. Can corporations practice religion? And if so, can they do so at the expense of third parties, depriving employees

of workplace benefits to which they are entitled under law? The issue before the Court is contraceptives, but its holding might indeed extend to other workplace benefits and protections, although under the RFRA's balancing test, the legal outcome could vary depending on the benefit or protection at stake.

Hobby Lobby and Conestoga Wood Specialties argue that under the RFRA, the term "person" encompasses corporations and that as corporate owners, they have the right to run their corporations in accordance with their religious beliefs. The government argues that religious practice does not equal speech and that *Citizens United* should not be extended.

If the Court extends the RFRA's protections to corporations, it then must decide whether the government has made a compelling case to set aside religious freedom in these circumstances. The government's arguments can be expected to focus on the nation's dependence on insurance to finance health care, the nexus between health insurance and health, the guarantee's applicability to nearly the entire insurance market, and the public interest in ensuring affordable access to the most effective forms of contraception in order to avert the health, economic, and social consequences of unintended pregnancy, a problem experienced by half of all American women.¹⁴

Opponents will point to the widespread exemptions for grandfathered plans, church plans, and plans extended as a result of the Obama administration's recent policies allowing insurers to continue to offer obsolete health plans at odds with the ACA's legal protections rather than cancel them. Opponents also will argue that there is little evidence that universal contraceptive access will decrease unintended pregnancy, a problem associated with poor women, or that cost is a factor.¹⁵

Whoever wins may come down to the question of whether third parties (in this case, employees) should pay for a company's religious exercise. The Court previously has held that religious pluralism must give way when accommodating the religion burdens of third parties.¹⁶ But should the Court find in favor of the companies, the ultimate question may be whether the government will extend the accommodation fashioned for religious nonprofits to for-profit employers as well. Since this accommodation is being challenged under an entirely separate line of cases,¹⁷ the answer requires us to stay tuned to judicial developments in the coming months.

References

1. 42 USC §2000-bb(1) et seq.
2. *Hobby Lobby Corp v Sebelius* 723 F 3d 1114 (10th Cir, 2013); *Conestoga Wood Specialties v Secretary, US Department of Health and Human Services* 724 F 3d 377 (3d Cir, 2013).
3. 558 US 310.
4. Gedicks FM. Exemptions from the contraceptive mandate threaten religious liberty. *Washington Post*. January 15, 2014. http://www.washingtonpost.com/opinions/exemptions-from-the-contraception-mandate-threaten-religious-liberty/2014/01/15/f5cb9bd0-7d79-11e3-93c1-0e888170b723_story.html. Accessed February 23, 2014.
5. PPACA §1201 adding §2713 to the Public Health Service Act.
6. Institute of Medicine. Clinical preventive services for women: closing the gaps. 2011. <http://www.iom.edu/Reports/2011/Clinical-Preventive-services-for-Women-Closing-the-Gaps.aspx>. Accessed February 23, 2014.
7. HRSA. Women's preventive services guidelines. <http://www.hrsa.gov/womensguidelines/>. Accessed February 23, 2014.
8. PPACA §1251.
9. PPACA §1563, extending the preventive services requirement to all ERISA-governed health plans.
10. 45 CFR §147.131(b).
11. 494 US 872 (1990).
12. The United States Supreme Court held in *City of Boerne v Flores* 521 US 507 (1997) that the RFRA is unconstitutional as applied to the states.
13. 42 USC §2000bb-1(b).
14. Brief of the Guttmacher Institute and Professor Sara Rosenbaum as amici curiae in support of the government. http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_amcu_gi-psr.authcheckdam.pdf. Accessed February 23, 2014.
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2014/02/symposium-religious-questions-and-saving-constructions/. Accessed February 22, 2014.

17. See, for example, *University of Notre Dame v Sebelius* No. 13-3853 (7th Cir, February 22, 2014); *East Texas Baptist University v Sebelius*, 2013 WL 6838893 (SD Tex December 27, 2013).

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