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EMPLOYMENT LAW—HOBBY LOBBY’S NARROW HOLDING GUARDS AGAINST DISCRIMINATION

*Cristina Squiers**

IN *Burwell v. Hobby Lobby Stores, Inc.*, the United States Supreme Court decided three issues: (1) whether the word “person,” as used in the Religious Freedom Restoration Act of 1993 (“RFRA”) included for-profit corporations; (2) whether the Department of Health and Human Services’ (“HHS”) contraceptives mandate (“mandate”) substantially burdened the exercise of religion under RFRA’s standards; and (3) whether HHS’ contraceptives mandate furthered a compelling governmental interest and satisfied RFRA’s least-restrictive-means requirement.¹ The Court found that closely held, for-profit corporations did fit within the definition of “person”; the mandate, applied to the plaintiffs’ closely held corporations, substantially burdened the exercise of religion; and the mandate, although it served a compelling governmental interest, did not meet the least-restrictive-means requirement.²

This holding resulted in the plaintiffs, two religious families and owners of three different for-profit corporations, receiving an exemption from paying for four types of contraceptives in their employees’ insurance plans, leaving the responsibility of providing these contraceptives to the Government or the insurance companies.³ While the dissent believes the majority’s decision will result in employers cloaking their discriminatory practices under the façade of religious exercise, this fear is unfounded because it is based on a misunderstanding of the Court’s narrow holding. The majority did not directly address the discrimination concern in their opinion, but the Court could have strengthened its reasoning by pointing out that its decision demonstrated the need to evaluate RFRA claims on a case by case basis, which will inevitably result in narrow holdings, in order to prevent both employment discrimination and religious discrimination.

* J.D. Candidate, SMU Dedman School of Law, May 2016; B.A. in Anthropology, Princeton University June 2012. I would like to thank Professor Butler for her helpful comments in writing this note. I would also like to thank my husband, Jack, for his comments, edits, and constant support.

1. 134 S. Ct. 2751, 2759 (2014).

2. *Id.* at 2759-60.

3. *Id.* at 2782.

I. BACKGROUND AND FACTS

In 1993, Congress enacted RFRA, which set out a test for the courts to use in evaluating federal laws that “substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”⁴ This law allows the Government to substantially burden a person’s exercise of religion only if the burden “is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.”⁵ In 2010, Congress enacted the Patient Protection and Affordable Care Act (“ACA”), which requires employers with fifty or more full-time employees to offer preventative care and screenings for women.⁶ This coverage includes “[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods,” and four of these contraceptives “may have the effect of preventing an already fertilized egg from developing any further.”⁷

It is these four contraceptives that the plaintiffs, the Hahn and Green families, objected to paying for in their employees’ health insurance plans because the families “believe that life begins at conception,” and providing these contraceptives would violate their religion as they would be aiding in the termination of human life.⁸ The Greens run two family businesses, Hobby Lobby and Mardel, and the Hahns run one, Conestoga.⁹ Both families exercise exclusive control and ownership of their businesses.¹⁰ Furthermore, all three businesses operate—according to their statements of purpose—under Christian principles, and Hobby Lobby and Mardel close on Sundays as a matter of religious conviction.¹¹

The Hahns and their business Conestoga sued HHS and other federal agencies under RFRA and the First Amendment’s Free Exercise Clause for an injunction of the contraceptive mandate only for the four “contraceptives that may operate after the fertilization of an egg.”¹² The district court denied the requested injunction, and the Third Circuit affirmed because it found for-profit, secular corporations could not exercise religion under the First Amendment or RFRA.¹³ The Greens, Hobby Lobby, and Mardel filed a similar lawsuit. The district court also denied a preliminary injunction, but the Tenth Circuit reversed, finding that the two businesses operated by the Greens were “persons” under RFRA who could exercise religion.¹⁴ The Supreme Court granted certiorari to both cases and decided the RFRA claims, finding it unnecessary to address the First

4. 42 U.S.C. § 2000bb-1(a) (2011).

5. *Id.*

6. *Hobby Lobby*, 134 S. Ct. at 2762.

7. *Id.* at 2762-63.

8. *Id.* at 2765-66.

9. *Id.* at 2764-65.

10. *Id.*

11. *Id.* at 2764-66.

12. *Id.* at 2765.

13. *Id.*

14. *Id.* at 2766.

Amendment claims.¹⁵

II. THE SUPREME COURT'S DECISION

The Supreme Court first decided RFRA applies to laws or regulations governing the activities of closely held, for-profit corporations.¹⁶ The Court pointed out that when a right such as the Fourth Amendment protection of privacy is extended to corporations, the rights of people are protected (“the privacy interests of employees and others associated with the company”).¹⁷ Therefore, protecting the plaintiff corporations’ religious liberty rights “protects the religious liberty of the humans who own and control those companies.”¹⁸ RFRA does not define “person,” so the Court looked to the Dictionary Act, which includes corporations under the definition of “person.”¹⁹ The Court also noted that it has evaluated claims brought by nonprofit corporations under RFRA; consequently, it is not logical to define “person” as including some corporations and not others.²⁰

While the dissent and HHS argued a for-profit corporation could not “exercise religion,” the majority explained that corporations are formed “for any lawful purpose or business.”²¹ Business owners may start companies not only to make a profit, but also to further their religious beliefs and objectives, which both the Hahns and Greens claim to do as evidenced by their respective companies’ statements of purpose.²² Finally, the Court limited its holding to closely held, for-profit companies, like those of the plaintiffs, which are not publicly traded, but instead are controlled by the members of a single family, all of whom subscribe to the same religious beliefs.²³ The Court found that this negated the danger, cited by the dissent and HHS, that it would be difficult to ascertain the beliefs of a corporation.²⁴

The second issue the Court decided was that the HHS contraceptive mandate substantially burdened the plaintiffs’ exercise of religion.²⁵ Both the majority and dissent recognized that the Hahns and Greens sincerely believed being complicit in the provision of the four contraceptives violated their religious convictions.²⁶ However, the dissent argued that the connection between providing health insurance for all of the contracep-

15. *Id.* at 2785.

16. *Id.* at 2767.

17. *Id.* at 2768.

18. *Id.*

19. *Id.*

20. *Id.* at 2768-69.

21. *Id.* at 2770-71.

22. *See id.* at 2771 (“the laws of [the states in which the plaintiffs’ corporations reside] permit for-profit corporations to pursue ‘any lawful purpose’ or ‘act,’ including the pursuit of profit in conformity with the owners’ religious principles.”).

23. *See id.* at 2774.

24. *See id.*

25. *Id.* at 2775.

26. *Id.* at 2775, 2798.

tives and the company's religious objection, the destruction of an embryo, was too attenuated because the female employee, not the company, would purchase the contraceptive.²⁷ The Court disagreed and said this argument asked whether the religious belief was reasonable, instead of the proper question under RFRA, which is whether the mandate imposes a substantial burden on the plaintiffs' ability to run their businesses in accordance with their religious beliefs and convictions.²⁸ According to the majority, whether a religious belief is reasonable or not is irrelevant, and the Court must only decide whether the religious belief is sincerely held.²⁹

As the majority noted, the financial consequences for refusing to comply with the ACA contraceptives mandate were significant. Noncompliance would result in penalties of \$475 million per year for Hobby Lobby, \$33 million per year for Conestoga, and \$15 million per year for Mardel.³⁰ Because both sides agreed on the fact that the plaintiffs sincerely held their belief, and that they faced severe financial consequences for non-compliance, the Court concluded the mandate placed a substantial burden on the plaintiffs' religious exercise.

The final issue decided by the Court was whether HHS showed that the mandate was in furtherance of a compelling interest and was the least restrictive means of furthering that interest.³¹ The Court assumed the Government has a compelling "interest in guaranteeing cost-free access to the four challenged contraceptive methods," but found that the mandate failed the least-restrictive-means test.³² As the majority pointed out, there are several alternatives that would "be less restrictive of the plaintiffs' religious liberty."³³ For example, the Government could assume the cost or extend the same exemption of the mandate it already extended to non-profit corporations without any cost-sharing requirements.³⁴ The dissent argued that forcing the government to pay for these contraceptives would impede women's access to them and give employers the ability to cite any religious objection for discriminating against its employees.³⁵ The Court ultimately found this reasoning unpersuasive because a workable exemption for non-profits already existed and that exemption could easily be extended to the plaintiffs who demonstrated a sincerely held belief.³⁶

27. *Id.* at 2799.

28. *Id.* at 2778.

29. *Id.* at 2778-79.

30. *Id.* at 2775-76.

31. *Id.* at 2779; *See* 42 U.S.C. § 2000bb-1(b) (2011).

32. *Hobby Lobby*, 134 S. Ct. at 2780.

33. *Id.*

34. *Id.* at 2780, 2782.

35. *Id.* at 2802 (Ginsburg, J., dissenting).

36. *Id.* at 2782 (majority opinion).

III. ANALYSIS

While the majority made many compelling and logical arguments for the three issues it addressed, it failed to engage seriously with the dissent's concern that the case's holding would allow employers to discriminate against their employees under the guise of religious convictions.³⁷ However, the Court simply applied the applicable statute, a statute that actually avoids the discrimination about which the dissent worries, making the dissent's primary flaw its misinterpretation of the holding's ramifications. If the majority had critically assessed the discrimination concern, it would have reached the same holding, but with a more robust discussion of the consequences, or lack thereof, of this case in the field of employment discrimination.

The majority should have pointed out RFRA's ability to address the dissent's fears, but instead the Court quickly discarded any discrimination concerns. Taking racial discrimination as an example, and promptly dismissing the point, the majority only says that already existing "prohibitions on racial discrimination are precisely tailored" to achieve the Government's compelling interest in "providing equal opportunity in the workforce without regard to race."³⁸ The Court, at least explicitly, offers no further reasoning as to why this fear of future racial discrimination masked as religious belief is unwarranted.³⁹ The majority does at one point address HHS and the dissent's concern of the possible flood of litigation by employers seeking exemptions after this case, but simply says HHS points to no evidence that would substantiate this claim.⁴⁰ The Court had a better answer to the dissent's criticism, and much of it is buried within other sections of the majority's opinion, mainly its application of RFRA, which shows the Court applied the statute's framework to the case at hand, resulting in the interests of both the employers and employees being met without discrimination against either party.

The availability of the RFRA test convinced the Court of the unremarkable nature of its decision, a decision they viewed as a simple application of the statute. "The wisdom of Congress's judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful."⁴¹ The dissent appeared not just to reject the application of RFRA's framework, but "its fundamental objection to the claims of the plaintiffs [was] an objection to RFRA itself."⁴² The majority only saw itself applying RFRA's test to the particular question before the Court, leaving the employees with viable alternatives to achieve their interests without having to assess the employers' abstract religious objec-

37. *Id.* at 2804 (Ginsburg, J., dissenting).

38. *Id.* at 2783 (majority opinion).

39. *Id.*

40. *Id.*

41. *Id.* at 2785.

42. *Id.* at 2784.

tion, and therefore not opening the door to future claims that would result in discrimination.

One reason the application of RFRA is an effective means of avoiding discrimination is because the law does not require courts to assess religious beliefs; if it did, courts would be the agents of discrimination against plaintiffs in deciding whose beliefs were valid and whose were unreasonable. The majority points out this weakness in the dissent's argument: "HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed."⁴³ The Court then claims it is not the business of the courts to assess "the plausibility of a religious claim."⁴⁴ While the dissent's concern for future litigation arises, in part, from the difficulty of assessing religious objections, the majority explains courts have no need to do so because RFRA only requires the court to evaluate whether the belief is sincerely held and substantially burdened, a much easier and less philosophical determination.⁴⁵ The dissent's claim that any far-fetched religious objection could serve as a pretext for discrimination is unsupported because the means for weeding out these claims are not the evaluation of their reasonableness or pretextual nature, but the use of RFRA's compelling interest and least-restrictive-means tests.⁴⁶

Not only does RFRA parse out possible discriminatory claims, it aims to avoid discrimination by critically analyzing both parties' interests to see if they are mutually exclusive or not. As the concurring opinion by Justice Kennedy articulates, the American community is "a rich mosaic of religious faiths," but the exercise of religious beliefs may not "unduly restrict other persons, such as employees, in protecting their own interests."⁴⁷ The majority is not saying religion will always win, but instead when religious objections and employee interests can co-exist under RFRA, they must. RFRA provides a comprehensible framework, using the least-restrictive-means-test, for evaluating these interests to assure there is no undue discrimination against either the employer for holding religious beliefs or against the employee who may not have a benefit paid for by the employer who refuses to violate his or her faith.⁴⁸

Although the majority did not articulate their analysis of the "least-restrictive-means test" in future employment discrimination terms, their conclusion as to that issue directly addresses the dissent's fears.⁴⁹ It appears the Court did not worry about implicitly approving discrimination because no discrimination would actually occur in this case, nor would it occur in future cases for the same reasons.⁵⁰ The Court decided the

43. *Id.* at 2778.

44. *Id.*

45. *Id.* at 2805 (Ginsburg, J., dissenting); *See id.* at 2774-75 (majority opinion).

46. *See id.* at 2774 (majority opinion) (speaking of the Religious Land Use and Institutionalized Persons Act of 2000, RFRA's "sister statute," the majority says "Congress was confident of the ability of the federal courts to weed out insincere claims").

47. *Id.* at 2786-87 (Kennedy, J., concurring).

48. *See* 42 U.S.C. § 2000bb-1(b) (2011).

49. *See Hobby Lobby*, 134 S. Ct. at 2781-82.

50. *See id.* at 2783.

Hahns and the Greens were not compelled to pay for the four contraceptives in question, in part, because their female employees would still have access to these contraceptives through the available alternatives.⁵¹ In future cases, the presence of readily available alternatives will similarly cause the Government to lose its case under the least-restrictive-means test and also ensure there is no discrimination as the employees will have their interests met by the alternative options.

Furthermore, the dissent's trepidation over employment discrimination appears to stem from the uncertainty of the Court's holding as precedent for future cases because of its narrow scope.⁵² The dissent makes a slippery slope argument, asking whether the Court's ruling would extend to Jehovah's Witnesses who did not want to cover blood transfusions or Scientologists who did not want to pay for antidepressants.⁵³ After listing other possible religious objections to medications, the dissent states that simply evaluating these situations on a case by case basis in the future offers little help "for the lower courts bound by today's decision."⁵⁴ This argument is neither logical nor persuasive because the lack of an easily followed precedent does not give rise to a legitimate concern that other religious employers will use the very narrow holding to discriminate against their employees. In fact, the narrowness does just the opposite—it bars future employers, particularly those who do not have closely held corporations, from making broad religious objections. The dissent seems unwilling to take future RFRA claims with their own facts and do the difficult task of balancing the two interests at stake, which is what RFRA requires.

At the same time, the dissent is in essence criticizing the Court for not going far enough with its narrow holding while also accusing the Court of going too far in its "decision of startling breadth [where] the Court holds that . . . corporations . . . can opt out of any law. . . they judge incompatible with their sincerely held religious beliefs."⁵⁵ The dissent says the majority's holding implies "RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith."⁵⁶ The majority itself claims "[o]ur decision should not be understood to hold that an insurance-coverage mandate must necessarily fail if it conflicts with an employer's religious beliefs."⁵⁷ The Court's deci-

51. *See id.* at 2782 ("The principal dissent identifies no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate, and there is none. Under the accommodation, the plaintiffs' female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives").

52. *Id.* at 2805 (Ginsburg, J., dissenting).

53. *Id.*

54. *Id.*

55. *See id.* at 2787.

56. *Id.*

57. *Id.* at 2783 (majority opinion).

sion leaves room for a different outcome given different facts.⁵⁸ The major flaw in the dissent is its contradictory complaints of the narrow and broad holding, both of which cannot be true.

IV. CONCLUSION

Overall, the dissent's concern that the "extraordinary religion-based exemptions [the] decision endorses" is a false premise upon which the concern for future employment discrimination emerges.⁵⁹ The majority should have addressed the fact that because the dissent's premise is untenable, so is its conclusion. Perhaps because there was a legal framework passed by Congress and the majority's opinion led to both the employers' ability to exercise their religious beliefs and the employees' ability to access the four contraceptives in question, the Court found it unnecessary to address the dissent's concern of future employment discrimination. The mere fact of a slippery slope does not negate the limited nature of the Court's holding or seriously call into question another court's ability to repeat the same RFRA analysis and come out with a different conclusion where the employer does not receive such an exemption. Only engaging in this difficult task over and over again can ensure that both an employer's religious rights and the employees' rights are both taken seriously and protected.

58. *Id.*

59. *Id.* at 2787 (Ginsburg, J., dissenting).