Exploring RFRA in light of Hobby Lobby's narrow victory

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The U.S. Supreme Court's 5-4 decision in the consolidated cases of *Burwell v. Hobby Lobby Stores, Inc.* and *Conestoga Wood Specialties Corp. v. Burwell* has generated more interest in religious liberty law than any other decision in decades. As is typical of cases with lengthy opinions by a closely divided Court, it is subject to narrow and broad interpretations.

A narrow reading holds, first, that for-profit corporations are within the statutory definition of "person" and thus able to assert a Religious Freedom Restoration Act (RFRA) claim; and secondly, that an accommodation provided to objecting religious entities could also be provided to Hobby Lobby, a closely held for-profit corporation.

In short, RFRA provides that the government cannot substantially burden the exercise of religion without a compelling reason and by using the least restrictive means. As the leader of the coalition that pushed for RFRA's passage 20 years ago and a continuing proponent of its standard, the Baptist Joint Committee has a significant stake in its interpretation and application. For us, the measure of RFRA's protection of religious freedom is in its broad coverage and a workable standard that balances interests, an approach that was more common for deciding free exercise cases prior to the 1990 decision of *Employment Division v. Smith*. While the standard does not guarantee religious claimants will win (and indeed they often lose), it gives them a chance and cuts down on government actions that unnecessarily interfere with religious practices.

Much of the attention on the case focused on whether RFRA applies to for-profit corporations. The majority held that it does. RFRA applies to any "person," and the Court found that in RFRA, as in other laws, the term "person" includes "corporations." Religious liberty principles are applied routinely to houses of worship and other religiously affiliated organizations that are often incorporated. The majority opinion states that "no conceivable [legal] definition of the term ["person"] includes natural persons and nonprofit corporations, but not for-profit corporations."

Applying RFRA broadly, it is unsurprising the Court declined to summarily disqualify the secular marketplace in general — or for-profit corporations in particular – from the statute. In fact, even two of the dissenting justices did not object to doing so. Though there are foreseeable limits, we should be sensitive to religious liberty issues in the secular marketplace.

The fact that a corporation may assert a RFRA claim is only the first step in the analysis. How a corporation's claim ultimately fares depends on the application of RFRA's balancing test. A narrow reading of Hobby Lobby's victory, reflected in Justice Anthony Kennedy's concurrence, is based on the existence of an alternative means for meeting the governmental interest without harm to Hobby Lobby. Kennedy emphasized the government's interest at stake, holding up the importance of the Court's

assumption that the Affordable Care Act "furthers a legitimate and compelling interest in the health of female employees," an interest covered extensively in the dissent. He then explained that the interest could be met through an existing accommodation the government provides to other entities.

Kennedy's concurrence also 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 accommodation may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." Thus, it appears, the need for Kennedy's joinder as a fifth vote on any viable Court majority would likely temper extensions of the holding in *Hobby Lobby* beyond the confines of its own terms.

Kennedy's concurrence suggests an answer to the employers' religious liberty concern without depriving employees of health care benefits. This is the kind of win-win solution RFRA should provide, though admittedly in this case it requires additional political action — from the executive or legislative branch — to implement and avoid further delay and denial of benefits.

While the Kennedy concurrence suggests a narrow impact, there is ample room for concern in aspects of Justice Samuel Alito's 41-page opinion. The Court's decision threatens to stretch RFRA's terms beyond "restorative" purpose and in ways so detached from context that it may undermine the balancing standard it was intended to ensure.

Strong protection for religious liberty requires attention to context, whether interpreting constitutional or statutory provisions. Ignoring context inevitably leads to decisions that undermine support for religious liberty. This concern is evident in the dissent, written by Justice Ruth Bader Ginsburg, warning of the "startling breadth" of the majority opinion. Neither the context of restoring a standard nor applying RFRA in the employer-employee relationship where a religious claim has a significant impact on others seemed to matter.

The Court was properly deferential when recognizing the sincerely held religious belief and practice to avoid facilitating certain contraceptive methods. The Court was too quick, however, to find a "substantial" burden on religion that only occurs by virtue of an employee's health care choices. As the dissent states, the majority opinion "elides" the distinction between the sincerity of religious belief and substantiality of religious burden. If the meaning of "substantial burden" is based largely on the religious claimant's subjective view without regard to intervening causes (such as an employee's health needs and choices), the government will have to meet the highest standard of scrutiny in virtually every case.

Next, the majority "assumed" for purposes of the decision, *but explicitly did not hold*, that the government had a compelling interest in providing the contraceptive services to women at no cost. While "assuming" compelling interest for the purpose of this case – and, presumably, for Kennedy's vote – the majority listed factors that could undercut that assumption. That means in later cases, including other challenges to the contraceptive mandate, the Court may deny the compelling interest it "assumes" in *Hobby Lobby*. If it denies that compelling interest, the contraceptive services at issue would not be provided through an accommodation.

When fighting for RFRA's passage, no one had the religious interests of large, for-profit corporations in mind. Legislative debates did not anticipate the Affordable Care Act and the potential conflict between religious objections to certain birth control methods held by the owner of a business and the medical importance of those methods to some employees. Balancing interests under RFRA, one would not assume an employer's religious objection would override an employee's health care benefits provided by law. While the Hobby Lobby scenario — and countless others — were not specifically anticipated, the statute's broad terms were designed to offer strong protection for religious liberty in a variety of settings. Its design was based upon case law that recognized the importance of balancing interests. For our part, the BJC will look askance at attempts to amend RFRA. We have too much invested in it to allow one Court decision, for better or worse, to prompt an emasculation of that very important statutory protection for religious liberty.

It is unclear how quickly the contraceptive mandate can be altered to ensure its proper effect where for-profit employers object, but at least the Court points to (if not fully endorses) a reasonable solution. The extreme deference to what amounts to a "substantial burden" in a context where a religious objection conflicts with the rights and independent choices of third parties, however, justifies worries about a slippery slope. While the majority took pains to say its holding "is very specific," it left too much room and not enough guidance for lower courts to reach reasonable decisions like the one it claims in *Hobby Lobby*.

For more on the Religious Freedom Restoration Act, visit:
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