Connecticut Debate Association
State Finals, March 28, 2015, Wilton High School

Resolved: Businesses should have the right to freely exercise their religious beliefs.

Can't Have Your Cake, Gays Are Told, and a Rights Battle Rises

The New York Times, December 16, 2014, Michael L. Paulson.

LAKEWOOD, Colo. — Jack Phillips is a baker whose evangelical Protestant faith informs his business. There are no Halloween treats in his bakery — he does not see devils and witches as a laughing matter. He will not make erotic-themed pastries — they offend his sense of morality. And he declines cake orders for same-sex weddings because he believes Christianity teaches that homosexuality is wrong.

Mr. Phillips, whose refusal two years ago to make a cake for a gay male couple has led to a court battle now getting underway, is one of a small number of wedding vendors across the country who are emerging as the unlikely face of faith-based resistance to same-sex marriage.

The refusals by the religious merchants — bakers, florists and photographers, for example — have been taking place for several years. But now local governments are taking an increasingly hard line on the issue, as legislative debates over whether to protect religious shop owners are overtaken by administrative efforts to punish them.

In Colorado, where Mr. Phillips, 58, owns and operates a small bakery called Masterpiece Cakeshop, the State Civil Rights Commission determined that Mr. Phillips had violated a state law banning discrimination on the basis of sexual orientation in places of public accommodation. The commission ordered Mr. Phillips to retrain all of his employees, who include his 87yearold mother, and to produce a quarterly report detailing any refusals to bake; in response, he has stopped accepting orders for any wedding cakes while he appeals the ruling to the state courts.

"I do like doing the wedding cakes," he said. "But I don't like having the government tell me which ones I can make and which ones I can't make, and trying to control that part of my life."

In New York, an administrative law judge fined Cynthia and Robert Gifford $13,000 for declining to rent their upstate farmhouse, which they often rent out for heterosexual weddings, for the wedding of two women. The couple paid the fine but, in an action similar to that taken by Mr. Phillips, has stopped accepting reservations for any weddings while appealing.

There have been more than a half-dozen other instances of business owners, most citing their understanding of Christian faith, declining to provide services for same-sex weddings. They include a photographer in New Mexico, a florist in Washington State, a bakery in Oregon, an inn in Vermont and wedding chapels in Idaho and in Nevada. And new cases continue to arise — over the last few weeks, a wedding planner in Arizona declined to work with a lesbian couple, and a business in California refused to photograph the wedding of a gay male couple (and then closed its doors after an outcry).

The cases are largely being fought, and some say fueled, by two legal advocacy organizations: the American Civil Liberties Union, which supports same-sex marriage, and the Alliance Defending Freedom, which opposes it. Each side cites bedrock American principles: First Amendment rights of religion and speech versus prohibitions in 21 states against discrimination in public accommodations on the basis of sexual orientation.

"It's a clear, wellsettled proposition that businesses who open the door to the public must serve the public," said Evan Wolfson, the president of Freedom to Marry, an organization advocating same-sex marriage. "We don't want Americans walking into businesses and being turned away because of who they are — that's what non-discrimination principles mean."

But the defenders of the shop owners argue that creating an artistically involved or personalized service for a same-sex wedding is a form of expression that should not be compelled by the government. They reject the discrimination charge, noting that many of the businesses have gay and lesbian customers, and, in some cases, employees.

"Anyone who would suggest this is not about freedom of religion doesn't know or understand what religious liberty is about, which is the freedom to do what your conscience directs," said Alan Sears, the president of the Alliance Defending Freedom. Mr. Sears says he has experienced his own form of bias: He says that a photographer in Southern California declined to shoot a portrait of his family for a Christmas card after discovering that Mr. Sears heads an organization that opposes same-sex marriage. Mr. Sears said he supported the photographer's right to refuse service, just as he would support a gay baker's right to refuse to make a cake with an antigay message.

Vendors thus far have accumulated a losing streak in wedding and similar cases. In Kentucky, for example, a hearing officer recently ruled against a print shop owner who refused to make Tshirts for a gay pride group.

Advocates for the vendors hope the court system will prove more sympathetic to their constitutional claims than civil rights agencies have been, even though the Supreme Court this year refused to hear an appeal from the New Mexico

photographer. They are also pursuing legislation; in Michigan, the State House this month approved a measure that would protect business owners, while in South Carolina and in North Carolina, lawmakers are proposing measures allowing local officials to opt out of issuing same-sex marriage licenses.

Like many of the religious business owners, Mr. Phillips, who attends a Southern Baptist church, says his faith guides not only his personal behavior, but also the way he runs his business. So while he says he welcomes all customers — and happily sells cookies and brownies to gays and lesbians — he says he is not comfortable pouring creative energy into confectionary centerpieces for celebrations he believes to be at odds with God's will.

But for Charlie Craig and David Mullins, the couple he turned away, the incident was a form of bias. They married in Massachusetts — same-sex marriage was not legal in Colorado at the time — but were holding their party in Denver, where they live.

"We were really shocked, because neither of us had ever been denied service before, and it was mortifying and embarrassing," Mr. Mullins said. "I believe everyone has the right to believe whatever they want in their own heart and practice what they want in their own church, but in the '60s, people used religious arguments to argue against interracial marriage, and I don't think there's any difference."

On a recent day, as Mr. Phillips decorated what he expected would be his final wedding cake until the issue was resolved — an elegant assemblage of gray and white tiers decorated with hydrangea, calla lilies and gerbera daisies — he reflected on his unexpected role in the debate. He has been baking for a living since he got a job in a doughnut shop after high school.

Mr. Phillips said he had politely declined to bake five or six same-sex wedding cakes before the dispute with Mr. Mullin and Mr. Craig. Since then, he has received thousands of emails, some threatening and some supportive. Protesters showed up, but so did a busload of tourists who purchased pastries as a sign of support and two young women from Kansas who asked if they could pray for him.

Of course, many religious business owners are serving same-sex weddings without incident. But there are also refusals that go unreported because the couples turned away by vendors simply move on.

"It really ticked me off," said Natalie Watson, a New Jersey lawyer who chose not to file a complaint in that state after the florist she first selected for her same-sex civil union voiced opposition to the event. "But at the end of the day, I wanted the focus to be on us, and not to go down some side street, so I didn't do anything."

Using Religion to Discriminate

American Civil Liberties Union, https://www.aclu.org/using-religion-discriminate

With increasing frequency, we are seeing individuals and institutions claiming a right to discriminate – by refusing to provide services to women and LGBT people – based on religious objections. The discrimination takes many forms, including:

- Religiously affiliated schools firing women because they became pregnant while not married;
- Business owners refusing to provide insurance coverage for contraception for their employees;
- Graduate students, training to be social workers, refusing to counsel gay people;
- Pharmacies turning away women seeking to fill birth control prescriptions;

Bridal salons, photo studios, and reception halls closing their doors to same-sex couples planning their weddings.

While the situations may differ, one thing remains the same: religion is being used as an excuse to discriminate against and harm others.

Instances of institutions and individuals claiming a right to discriminate in the name of religion aren't new. In the 1960s, we saw institutions object to laws requiring integration in restaurants because of sincerely held beliefs that God wanted the races to be separate. We saw religiously affiliated universities refuse to admit students who engaged in interracial dating. In those cases, we recognized that requiring integration was not about violating religious liberty; it was about ensuring fairness. It is no different today.

Religious freedom in America means that we all have a right to our religious beliefs, but this does not give us the right to use our religion to discriminate against and impose those beliefs on others who do not share them.

Through litigation, advocacy and public education, the ACLU works to defend religious liberty and to ensure that no one is either discriminated against nor denied services because of someone else's religious beliefs.

Using Religion to Discriminate Against Women

In medical care

Across the country, we are seeing hospitals, insurance companies, pharmacies, and other health care entities discriminate against women by denying basic care – like birth control, emergency contraception, and abortion – in the name of religion.

Many of these institutions receive taxpayer funding. The ACLU works to ensure that women are not denied information and the health care they need because of the religious views of their health care providers.

In employment

We have seen a recent spate of cases in which religiously affiliated schools have fired women for getting pregnant while single or for using IVF. These cases are suggestive of a past when women were routinely pushed out of the workplace because of pregnancy. Such discrimination is now illegal, even if religiously motivated.

Using Religion to Discriminate Against LGBT people

In services

In many states, businesses are barred by law from discriminating against customers based on their sexual orientation, as well as based on race, religion, or other legally protected categories. Increasingly, we see business owners claiming that they do not have to follow these laws but can instead refuse to provide services – including lodging, wedding dresses, and photography services – because the owners object to same-sex relationships. In addition, we see social service organizations that receive government funding deny services to same-sex couples. Everyone is entitled to their own religious beliefs, but when you operate a business or run a publicly funded social service agency open to the public, those beliefs do not give you a right to discriminate.

In medical care

The ACLU has seen instances of students training to become mental health professionals and medical practices that have refused to treat lesbian, gay, bisexual and transgender students. While we're all entitled to our own religious beliefs, licensed medical providers should adhere to professional standards and not use their religion to discriminate against clients who come to them for help.

Mormons Seek Golden Mean Between Gay Rights and Religious Beliefs

The New York Times, by Laurie Goodstein, Jan. 27, 2015

Mormon leaders tried to stake out a middle ground in the escalating battle between gay rights and religious freedom on Tuesday, demanding that both ideas, together, be treated as a national priority.

At a rare news conference at church headquarters in Salt Lake City, leaders of the Church of Jesus Christ of Latter-day Saints forcefully condemned discrimination against gays and vowed to support non-discrimination laws — like one proposed in Utah — to protect people from being denied jobs or housing because of their sexual orientation.

But they also called for these same laws, or others, to protect the rights of people who say their beliefs compel them to oppose homosexuality or to refuse service to gay couples. They cited examples of religious opponents of same-sex marriage who have been sanctioned or sued or have lost their jobs.

"Such tactics are every bit as wrong as denying access to employment, housing or public services because of race or gender," said Elder Dallin H. Oaks, a member of a group of church leaders known as the Quorum of the Twelve Apostles. "It is one of today's great ironies that some people who have fought so hard for L.G.B.T. rights now try to deny the rights of others to disagree with their public policy proposals."

The church's announcement, an attempt to placate all sides of a divisive issue, astonished some lawmakers in the halls of Utah's Capitol, who called it a watershed moment that could reconfigure the debate over gay rights in their socially conservative state. With the church now backing non-discrimination laws, a bill offering such protections to those who are lesbian, gay, bisexual and transgender now appears more likely to pass after years of being stalled in the Legislature.

The church had already supported such legislation in Salt Lake City and other local Utah jurisdictions, but had held off endorsing it statewide.

"This was a major event for the Mormon Church, a major event for Utah and the L.G.B.T. community," said State Senator Stephen H. Urquhart, a Republican who has tried unsuccessfully to pass an anti-discrimination law. "This changes the dynamic."

The Mormon leaders at the news conference, three of the church's male apostles and one woman, made it clear that their church does not intend to change its doctrine, which says that marriage can be only between a man and a woman, and that gay sexual relationships are prohibited.

This doctrine "comes from sacred Scripture, and we are not at liberty to change it," said Sister Neill Marriott, a leader in church women's organizations.

The church is now trying to position itself as a champion of both gay rights and the conservative religious opposition to gay rights. But the approach announced on Tuesday by Mormon leaders is unlikely to do much to help calm this front in the culture wars. Gay rights advocates have long maintained that denying service to gays on the basis of religious belief is no different from the discrimination against blacks that was outlawed during the civil rights movement.

The Human Rights Campaign, a leading gay rights organization, said the Mormon leaders' endorsement of non-discrimination laws may be "deeply meaningful" to gay Mormons and their families, but is "deeply flawed" as a matter of public policy.

"Doctors would still be allowed to deny medical care. Pharmacists would still be allowed to refuse to fill valid prescriptions. And landlords, as well as business operators, would still be allowed to reject L.G.B.T. people. All in the name of religion," the Human Rights Campaign said in a statement.

Russell Moore, president of the Southern Baptist Convention's ethics and religious liberty commission, called the move "well intentioned but naïve." Proposals to address discrimination against gay people in employment or housing "inevitably lead to targeted assaults on religious liberty," he said.

Mormon leaders have in recent years joined Roman Catholic bishops, Southern Baptist pastors and other conservative evangelicals in what they have framed as a "religious liberty" campaign to defend their freedom of conscience.

But Tuesday's announcement again shows that the Mormon Church has been trying to change its tone on homosexuality since 2008, when it faced widespread condemnation for mobilizing members and raising money to help pass Proposition 8 in California, which outlawed same-sex marriage.

In 2009, the church threw its support behind a local law in Salt Lake City protecting gay and transgender people from job and housing discrimination. But it remained largely silent on efforts to pass statewide anti-discrimination laws.

With the Legislature back in session, Mr. Urquhart is again trying pass a law that would ban housing and employment discrimination based on someone's sexuality or gender identity.

"I think the bill, now, will pass," he said.

But conservative lawmakers were still skeptical. Representative Jacob Anderegg, a Republican from Lehi, Utah, said the church's change in position cleared some "potential stumbling blocks," but he said he still had fundamental concerns.

"I can't say definitively right now that I'm on board," he said. "The devil's in the details."

Faith Groups Seek Exclusion From Bias Rule

The New York Times, By JULIE HIRSCHFELD DAVIS and ERIK ECKHOLM, JULY 8, 2014

WASHINGTON — After a setback in the Supreme Court in the Hobby Lobby case, President Obama is facing mounting pressure from religious groups demanding to be excluded from his long-promised executive order that would bar discrimination against gay men and lesbians by companies that do government work.

The president has yet to sign the executive order, but last week a group of major faith organizations, including some of Mr. Obama's allies, said he should consider adding an exemption for groups whose religious beliefs oppose homosexuality. In Burwell v. Hobby Lobby Stores, the court ruled that family-run corporations with religious objections could be exempted from providing employees with insurance coverage for contraception.

The demands of the faith organizations pose a dilemma for Mr. Obama, who has struggled to preserve freedom of expression among religious groups while supporting the rights of gay men and lesbians. Mr. Obama could unleash a conservative uproar if he is seen as intruding on religious beliefs, but many of his strongest supporters would be bitterly disappointed if he appeared to grant any leeway to anti-gay discrimination.

The White House has given no reason for the executive order's delay.

In a July 1 letter to Mr. Obama sent the day after the Hobby Lobby case was decided, leaders of religious groups wrote that "we are asking that an extension of protection for one group not come at the expense of faith communities whose religious identity and beliefs motivate them to serve those in need."

The effort behind the letter was organized by Michael Wear, who worked in the White House faith-based initiative during Mr. Obama's first term and directed the president's faith outreach in the 2012 campaign. The letter, which called for a "robust religious exemption" in the planned executive order, was also signed by the Rev. Larry Snyder, the chief executive of Catholic Charities U.S.A.; Rick Warren, the pastor of Saddleback Church, who delivered the invocation at Mr. Obama's first inauguration; and Stephan Bauman, president of World Relief, an aid group affiliated with the National Association of Evangelicals.

Mr. Wear, who calls himself an "ardent supporter" of the president and a backer of gay rights, said in an interview on Tuesday that the rationale of the organizations was to maintain the rights they have. "We're not trying to support crazy claims of religious privilege," he said.

He described the letter as a request from "friends of the administration" to ensure that the executive order provides "robust" protection of religious service organizations that uphold religious-based moral standards for their staff members, whether Catholic, Jewish or Muslim.

To give an example, faith leaders said a Catholic charity group that believes sex outside heterosexual marriage is a sin

should not be denied government funding because it refused to employ a leader who was openly gay. Gay-rights groups countered that it would be unacceptable to allow religious organizations receiving taxpayer money to refuse to hire employees simply because they were gay, and said they did not expect the White House to provide such an exclusion. On Tuesday they stepped up their calls for Mr. Obama to quickly complete and sign the order.

"Activists have every expectation that this executive order will be issued without any further religious exemption," Fred Sainz, vice president for communications and marketing at the Human Rights Campaign, said in an interview.

The July 1 letter followed one on June 25 that was signed by more than 150 conservative religious groups and leaders, including many major evangelical associations. That letter warned the president that "any executive order that does not fully protect religious freedom will face widespread opposition and will further fragment our nation."

The groups said many organizations doing vital work for the federal government in overseas relief, prisons and technical aid maintained religious-based "employee moral conduct standards" that could be affected by the order.

Last month, Mr. Obama promised he would soon sign the executive order, which would bar federal contractors from job discrimination based on sexual orientation and gender identity. He said he was acting on his own because a drive in Congress for a national anti-bias law to cover nearly all employers, the Employment Non-discrimination Act, had stalled.

Many states already have non-discrimination laws protecting gay, lesbian, bisexual and transgender workers, but the presidential order would extend anti-bias rules to companies and service agencies that receive federal contracts in the 29 states that do not have such laws. The order would protect an additional 14 million workers, according to an analysis by the Williams Institute at the School of Law of the University of California, Los Angeles. It would apply to companies that do business with the federal government, including large American employers like Exxon Mobil and Dell, as well as religious universities and charities with federal contracts.

Federal employees already have the protections under an executive order issued in 1998 by President Bill Clinton.

Gay-rights advocates argue that religious groups already enjoy a broad exemption under a 2002 executive order signed by President George W. Bush that allows faith-based organizations to consider religion in hiring decisions without jeopardizing federal grants or contracts.

"There's no reason to add additional language to further allow discrimination," said Winnie Stachelberg of the Center for American Progress, a liberal policy group.

In the continuing battle for opinion, on Tuesday 100 liberal faith leaders released a letter to the president urging him to issue the anti-bias order without any new religious exemption.

Also on Tuesday, a group of gay-rights and civil-rights groups withdrew their support for the Employment Non-discrimination Act, which includes a religious exemption. The groups, which had never liked the religious provision in the proposed legislation but accepted it as a way to attract Republican support, said the Hobby Lobby decision had "made it all the more important that we not accept this inappropriate provision."

Women's Health Care at Risk

The New York Times, February 28, 2012, Editorial

A wave of mergers between Roman Catholic and secular hospitals is threatening to deprive women in many areas of the country of ready access to important reproductive services. Catholic hospitals that merge or form partnerships with secular hospitals often try to impose religious restrictions against abortions, contraception and sterilization on the whole system.

This can put an unacceptable burden on women, especially low-income women and those who live in smaller communities where there are fewer health care options. State regulators should closely examine such mergers and use whatever powers they have to block those that diminish women's access to medical care.

Gov. Steve Beshear of Kentucky, for example, recently turned down a bid by a Catholic health system to merge with a public hospital that is the chief provider of indigent care in Louisville. He cited concerns about loss of control of a public asset and restrictions on reproductive services.

The nation's 600 Catholic hospitals are an important part of the health care system. They treat one-sixth of all hospital patients, and are sometimes the only hospital in a small community. They receive most of their operating income from public insurance programs like Medicare and Medicaid and from private insurers, not from the Catholic Church. They are free to deliver care in accord with their religious principles, but states and communities have an obligation to make sure that reproductive care remains available. This should be a central goal for government officials who have a role in approving such consolidations.

As Reed Abelson wrote in a recent report in The Times, these mergers are driven by shifts in health care economics. Some secular hospitals are struggling to survive and eager to be rescued by financially stronger institutions, which in many cases may be Catholic-affiliated. By one estimate, 20 mergers between Catholic and non-Catholic hospitals have been announced over the past three years and more can be expected.

The 2009 “Ethical and Religious Directives” issued by the United States Conference of Catholic Bishops warns that Catholic institutions should avoid entering into partnerships “that would involve them in cooperation with the wrongdoing of other providers.” Catholic hospitals have refused to terminate pregnancies, provide contraceptive services, offer a standard treatment for ectopic pregnancies, or allow sterilization after caesarean sections (women seeking tubal ligations are then forced to have a second operation elsewhere, exposing them to additional risks).

In one case, the sole hospital in a rural area in southeastern Arizona announced in 2010 that it would partner with an out-of-state Catholic health system, and would immediately adhere to Catholic directives that forbid certain reproductive health services. As a result, a woman whose doctors wanted to terminate a pregnancy to save her life had to be sent 80 miles away for treatment. A coalition of residents, physicians and activists campaigned against the merger and it was called off before it was finalized.

Over the past 15 years, MergerWatch, an advocacy group based in New York City, has helped block or reverse 37 mergers and reached compromises in 22 others that saved at least some reproductive services. As mergers become more common, state and local leaders would be wise to block proposals that restrict health services.

Washington, Gay Marriage and the Catholic Church

The Wall Street Journal, January 9, 2010, By EMILY ESFAHANI SMITH

The push to legalize gay marriage is often billed as a civil-rights struggle—a successor to the movement that ended legalized racial discrimination decades ago. But there is another component to the fight that is now on display in the nation's capital: The drive for gay marriage is also forcing unwanted change within the Catholic Church.

Last month, Washington D.C.'s City Council passed legislation legalizing gay marriage. Mayor Adrian Fenty, a Democrat, quickly signed the bill. To become law—which could happen as early as March—the legislation must undergo a congressional review period.

By passing gay marriage, the City Council has put the Catholic Church, or more accurately, the Archdiocese of Washington, in an awkward position. Either the church will have to recognize gay marriage or it will be forced to abandon a large portion of its charitable programs.

That's because the District outsources many of its social services to Catholic Charities, which runs the charitable services of the archdiocese. These charities provide a variety of services—including shelters for the homeless and food for the hungry—to about 124,000 needy residents in the region (which also includes a portion of Maryland). The archdiocese also oversees St. Ann's Infant and Maternity Home, a care center for foster children, and it administers adoptions for the District. For this work, Catholic Charities receives approximately $20 million in contracts, grants and licenses from the city. It bolsters these funds with $10 million of its own money and a network of 3,000 volunteers.

If same-sex marriages are legalized, which seems inevitable, Archbishop Donald Wuerl of Washington points out that the church will find itself in violation of the new law if it continues its city-sponsored social services programs. Why? Because city contractors are required to abide by all of the District's laws and there are provisions in the bill requiring the church to acknowledge gay marriage by offering employment benefits to same-sex couples and by placing children with gay adoptive couples.

The archdiocese was not a particularly strong advocate against gay marriage in the District, but it did press for a religious exemption to be added to the same-sex marriage bill. Connecticut, New Hampshire and Vermont all have broad religious protections in their gay marriage laws, which allow gay couples to marry but do not require religious organizations to recognize those marriages.

But the City Council refused to add a religious exemption to its bill. According to Patrick Deneen, a professor of government at Georgetown University, the City Council "is being uniquely recalcitrant," especially when you "consider existing precedent elsewhere in the country that shows sensitivity to, and respect for, religious liberty." Without the religious exemption, the archdiocese has said publicly that it will have no choice but to abandon its publicly sponsored charitable works.

Phil Mendelsohn, a city councilman who voted for the bill, told me that the gay-marriage legislation that is about to become law actually expands religious freedom. "This bill doesn't require any church or faith to solemnize a marriage contrary to [their] beliefs," he said. "It does, however, allow many churches who wish to solemnize same-sex marriage to do so."

This claim is a smoke screen. The City Council's bill only reiterates religious protections already guaranteed under the First Amendment. It doesn't extend other protections to religious organizations that take money from the government, as the religious exemption the archdiocese sought would have. It would have been a small concession to grant such an exemption. But in the conflict between gay rights and religious rights, the city favors gay rights. It argues that the church should not discriminate while it receives public funds.

Framed in this way, it is hard to disagree. If the church receives public money, it should have to live by the public's rules. But Mr. Deneen makes the argument that it's actually the city that is dependent on the church. The archdiocese receives

public funds because it provides important social services in a way that is both cheaper and likely more effective than if the city itself provided those services. At the very least, while still spending the $20 million it already gives the archdiocese, the city would have to live without the $10 million the archdiocese spends on its charities if the church dropped its charitable programs altogether.

But the archdiocese isn't willing to play hardball with the city. Susan Gibbs, a spokeswoman for the archdiocese, told me that her organization is committed to serving the poor, regardless of what the laws are in the District, and that it is now looking "to find a way to enable Catholic Charities to keep working in partnership with the city."

So either the archdiocese will drop benefits for all employees—if it doesn't provide benefits to married couples, it won't have to offer them to same-sex couples—or it will follow in the footsteps of Georgetown University, the District's largest Catholic organization. There, an employee, whether gay or straight, married or not, receives full benefits for himself plus one legally domiciled member of his or her household. This would allow the archdiocese to save face by pretending it isn't knowingly recognizing gay marriages.

Either accommodation would allow the archdiocese to continue to run its charities. Yet both require a change within the archdiocese. The first would force the archdiocese to drop benefits it had provided in support of traditionally married couples, while the latter would entail a dishonest dodge from an institution built on sincere faith.

Ms. Smith, a former Bartley fellow at the Journal, is a Collegiate Network Journalism fellow at the Weekly Standard.

Justices Rule in Favor of Hobby Lobby

The New York Times, Adam Liptak, June 30, 2014

U.S. Supreme Court Reject's Contraceptive Mandate for Some Corporations

WASHINGTON — The Supreme Court ruled on Monday that requiring family-owned corporations to pay for insurance coverage for contraception under the Affordable Care Act violated a federal law protecting religious freedom. It was, a dissent said, "a decision of startling breadth."

The 5to4 ruling, which applied to two companies owned by Christian families, opened the door to many challenges from corporations over laws that they claim violate their religious liberty. The decision, issued on the last day of the term, reflected what appears to be a key characteristic of the court under Chief Justice John G. Roberts Jr. —an inclination toward nominally incremental rulings with vast potential for great change.

Justice Samuel A. Alito Jr., writing for the majority, emphasized the ruling's limited scope. For starters, he said, the court ruled only that a federal religious freedom law applied to "closely held" for profit corporations run on religious principles. Even those corporations, he said, were unlikely to prevail if they objected to complying with other laws on religious grounds.

But Justice Ruth Bader Ginsburg's dissent sounded an alarm. She attacked the majority opinion as a radical overhaul of corporate rights, one she said could apply to all corporations and to countless laws.

The contraceptive coverage requirement was challenged by two corporations whose owners say they try to run their businesses on Christian principles: Hobby Lobby, a chain of craft stores, and Conestoga Wood Specialties, which makes wood cabinets. The requirement has also been challenged in 50 other cases, according to the Becket Fund for Religious Liberty, which represented Hobby Lobby.

Justice Alito said the requirement that the two companies provide contraception coverage imposed a substantial burden on their religious liberty. Hobby Lobby, he said, could face annual fines of $475 million if it failed to comply.

Justice Alito said he accepted for the sake of argument that the government had a compelling interest in making sure women have access to contraception. But he said there were ways of doing that without violating the companies' religious rights.

The government could pay for the coverage, he said. Or it could employ the accommodation already in use for certain non-profit religious organizations, one requiring insurance companies to provide the coverage. The majority did not go so far as to endorse the accommodation.

Chief Justice Roberts and Justices Antonin Scalia, Anthony M. Kennedy and Clarence Thomas joined the majority opinion.

Justice Ginsburg, joined on this point by Justice Sonia Sotomayor, said the court had for the first time extended religious freedom protections to "the commercial, profitmaking world."

"The court's expansive notion of corporate personhood," Justice Ginsburg wrote, "invites for profit entities to seek religion-based exemptions from regulations they deem offensive to their faiths." She added that the contraception coverage requirement was vital to women's health and reproductive freedom. Justices Stephen G. Breyer and Elena Kagan joined almost all of her dissent, but they said there was no need to take a position on whether corporations may bring claims under the religious liberty law.

The two sides differed on the sweep of the ruling. “Although the court attempts to cabin its language to closely held corporations,” Justice Ginsburg wrote, “its logic extends to corporations of any size, public or private.” She added that corporations could now object to “health coverage of vaccines, or paying the minimum wage, or according women equal pay for substantially similar work.”

But Justice Alito said that “it seems unlikely” that publicly held “corporate giants” would make religious liberty claims. He added that he did not expect to see “a flood of religious objections regarding a wide variety of medical procedures and drugs, such as vaccinations and blood transfusions.” Racial discrimination, he said, could not “be cloaked as religious practice to escape legal sanction.”

Justice Alito did not mention laws barring discrimination based on sexual orientation. Justice Ginsburg said all sorts of antidiscrimination laws may be at risk.…

The decision’s acknowledgment of corporations’ religious liberty rights was reminiscent of Citizens United v. Federal Election Commission, a 2010 ruling that affirmed the free speech rights of corporations. Justice Alito explained why corporations should sometimes be regarded as persons. “A corporation is simply a form of organization used by human beings to achieve desired ends,” he wrote. “When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.”

Justice Ginsburg said the commercial nature of for profit corporations made a difference. “The court forgets that religious organizations exist to serve a community of believers,” she wrote. “For profit corporations do not fit that bill.”

Wikipedia, the free Encyclopedia

Burwell v. Hobby Lobby, 573 U.S. ___ (2014), is a landmark decision[1][2] by the United States Supreme Court allowing closely held for-profit corporations to be exempt from a law its owners religiously object to if there is a less restrictive means of furthering the law's interest. It is the first time that the court has recognized a for-profit corporation's claim of religious belief,[3] but it is limited to closely held corporations.[a] The decision is an interpretation of the Religious Freedom Restoration Act (RFRA) and does not address whether such corporations are protected by the free-exercise of religion clause of the First Amendment of the Constitution.

Opinion of the Court

Majority opinion

On June 30, 2014, Associate Justice Samuel Alito delivered the judgment of the court. Four justices (Roberts, Scalia, Kennedy, and Thomas) joined him to strike down the HHS mandate, as applied to closely held corporations with religious objections, and to prevent the plaintiffs from being compelled to provide contraception under their healthcare plans. The ruling was reached on statutory grounds, citing the RFRA, because the mandate was not the "least restrictive" method of implementing the government's interest. The ruling did not address Hobby Lobby's claims under the Free Exercise Clause of the First Amendment.[34]

The court argued that the purpose of extending rights to corporations is to protect the rights of shareholders, officers, and employees.[35] It said that "allowing Hobby Lobby, Conestoga, and Mardel to assert RFRA claims protects the religious liberty of the Greens and the Hahns."[36] The court found that for-profit corporations could be considered persons under the RFRA. It noted that the HHS treats non-profit corporations as persons within the meaning of RFRA. The court stated, "no conceivable definition of the term includes natural persons and non-profit corporations, but not for-profit corporations."[37] Responding to lower court judges' suggestion that the purpose of for-profit corporations "is simply to make money", the court said, "For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives."[38] The court rejected the contention that "the Nation lacks a tradition of exempting for-profit corporations from generally applicable laws," pointing to a federal statute from 1993 that exempted any covered health care entity from engaging in "certain activities related to abortion".[39]

The court held that the HHS contraception mandate substantially burdens the exercise of religion, rejecting an argument that the $2,000-per-employee penalty for dropping insurance coverage is less than the average cost of health insurance. The court argued that "companies would face a competitive disadvantage in retaining and attracting skilled workers," that increased wages for employees to buy individual coverage would be more costly than group health insurance, that any raise in wages would have to take income taxes into account, and that employers cannot deduct the penalty.[40]

The court found it unnecessary to adjudicate on whether the HHS contraceptive mandate furthers a compelling government interest and held that HHS has not shown that the mandate is "the least restrictive means of furthering that compelling interest".[41] The court argued that the most straightforward alternative would be "for the Government to assume the cost..." and that HHS has not shown that it is not "a viable alternative".[42] The court said that the RFRA can "require creation of entirely new programs".[43] The court also pointed out that HHS already exempts any non-profit organization from paying for any required contraception by allowing it to certify its religious objection to its insurance issuer, which

must "[p]rovide separate payments for any contraceptive services required to be covered".[44] However, the court said the approach might not necessarily be the least restrictive alternative for all religious claims.[45]

The court concluded by addressing "the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction". The court said that their decision "provides no such shield", and that "prohibitions on racial discrimination are precisely tailored to achieve that critical goal."[46] The court also said that the requirement to pay taxes despite any religious objection is different from the contraceptive mandate because "there simply is no less restrictive alternative to the categorical requirement to pay taxes."[47] The court acknowledged the dissent's "worries about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally applicable laws...", noting that this point was "made forcefully by the Court in Smith". The court responded by saying, "Congress, in enacting RFRA, took the position that 'the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests'...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."[48]

Concurring opinion

Justice Anthony Kennedy wrote a concurring opinion, responding to the "respectful and powerful dissent", by emphasizing the limited nature of the ruling and saying that the government "makes the case that the mandate serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees", but that the RFRA's least-restrictive way requirement is not met because "there is an existing, recognized, workable, and already-implemented framework to provide coverage," the one that HHS has devised for non-profit corporations with religious objections. "RFRA requires the Government to use this less restrictive means. As the Court explains, this existing model, designed precisely for this problem, might well suffice to distinguish the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise." (Kennedy, J., concurring, p. 3, 4)

Dissenting opinions

Justice Ruth Bader Ginsburg delivered the primary dissent, which was joined by Justice Sotomayor in full and by Justices Breyer and Kagan as to all but Part III–C–1[49] on "whether a corporation qualifies as a 'person' capable of exercising religion".[50] Ginsburg began, "In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. ... Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others, hold no sway, the Court decides, at least when there is a 'less restrictive alternative.' And such an alternative, the Court suggests, there always will be whenever, in lieu of tolling an enterprise claiming a religion-based exemption, the government, i.e., the general public, can pick up the tab."[51]

She challenged the majority's unprecedented view of for-profit religion saying "Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA. The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities[52]...Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community."[53] Responding to the majority's argument that the government should "assume the cost" of contraceptives, Ginsburg said that "the nation's only dedicated source of federal funding for safety net family planning services..." is not designed to absorb the unmet needs of those already insured. She noted that "a less restrictive alternative" has not been written into law by Congress.[54] Ginsburg warns, "The Court, I fear, has ventured into a minefield..."[55]

Justices Breyer and Kagan wrote a one-paragraph dissenting opinion, saying that "the plaintiffs' challenge to the contraceptive coverage requirement fails on the merits" and that they "need not and do not decide whether either for-profit corporations or their owners may bring claims under the Religious Freedom Restoration Act of 1993."[56]

The Free Exercise Clause (Wikipedia, the free encyclopedia)

The Free Exercise Clause is the accompanying clause with the Establishment Clause of the First Amendment to the United States Constitution. The Establishment Clause and the Free Exercise Clause together read:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof... "

Free exercise of religion

"Freedom of religion means freedom to hold an opinion or belief, but not to take action in violation of social duties or subversive to good order," In Reynolds v. United States (1878), the Supreme Court found that while laws cannot interfere with religious belief and opinions, laws can be made to regulate some religious practices (e.g., human sacrifices, and the Hindu practice of suttee). The Court stated that to rule otherwise, "would be to make the professed doctrines of religious

belief superior to the law of the land, and in effect permit every citizen to become a law unto himself. Government would exist only in name under such circumstances."[27] In Cantwell v. Connecticut (1940), the Court held that the Due Process Clause of the Fourteenth Amendment applied the Free Exercise Clause to the states. While the right to have religious beliefs is absolute, the freedom to act on such beliefs is not absolute.[28]…

Compelling interest

The Supreme Court under Earl Warren adopted an expansive view of the Free Exercise Clause. In, Sherbert v. Verner (1963) the Court held that states must have a "compelling interest" to refuse to accommodate religiously motivated conduct. The case involved Adele Sherbert, who was denied unemployment benefits by South Carolina because she refused to work on Saturdays, something forbidden by her Seventh-day Adventist faith. In Wisconsin v. Yoder (1972), the Court ruled that a law that "unduly burdens the practice of religion" without a compelling interest, even though it might be "neutral on its face," would be unconstitutional.

The "compelling interest" doctrine became much narrower in 1990, when the Supreme Court held in Employment Division v. Smith that, as long as a law does not target a particular religious practice, it does not violate the Free Exercise Clause. In 1993, the Supreme Court revisited the Free Exercise Clause in Church of Lukumi Babalu Aye v. City of Hialeah. Hialeah had passed an ordinance banning ritual slaughter, a practice central to the Santería religion, while providing exceptions for some practices such as the kosher slaughter of Judaism. Since the ordinance was not "generally applicable," the Court ruled that it was subject to the compelling interest test, which it failed to meet, and was therefore declared unconstitutional.

Also in 1993, Congress passed the Religious Freedom Restoration Act (RFRA), which sought to restore the "compelling interest" standard. In City of Boerne v. Flores (1997) the Court struck down as exceeding Congress's powers those provisions of the Act that forced state and local governments to provide protections exceeding those required by the First Amendment. According to the court's ruling in Gonzales v. UDV (2006), RFRA remains applicable to federal statutes, which must therefore still meet the "compelling interest" standard in free exercise cases.

The Fourteenth Amendment (Wikipedia, the free encyclopedia)

The Fourteenth Amendment to the United States Constitution guarantees the religious civil rights.[17] Whereas the First Amendment secures the free exercise of religion, section one of the Fourteenth Amendment prohibits discrimination, including on the basis of religion, by securing "the equal protection of the laws" for every person:

" *All persons born or naturalized in the United States, and subject to the jurisdiction there of, are citizens of the United States and of the State where in they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.* "

Religious Freedom Restoration Act (Wikipedia, the free encyclopedia)

The Religious Freedom Restoration Act of 1993, (also known as RFRA), is a 1993 United States federal law aimed at preventing laws that substantially burden a person's free exercise of religion...

It was held unconstitutional as applied to the states in the City of Boerne v. Flores decision in 1997, which ruled that the RFRA is not a proper exercise of Congress's enforcement power. However, it continues to be applied to the federal government - for instance, in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal - because Congress has broad authority to carve out exemptions from federal laws and regulations that it itself has authorized. In response to City of Boerne v. Flores, some individual states passed State Religious Freedom Restoration Acts that apply to state governments and local municipalities.

Provisions

This law reinstated the Sherbert Test, which was set forth by Sherbert v. Verner, and Wisconsin v. Yoder, mandating that strict scrutiny be used when determining whether the Free Exercise Clause of the First Amendment to the United States Constitution, guaranteeing religious freedom, has been violated. In the Religious Freedom Restoration Act, Congress states in its findings that a religiously neutral law can burden a religion just as much as one that was intended to interfere with religion;[2] therefore the Act states that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[3]

The law provided an exception if two conditions are both met. First, the burden must be necessary for the "furtherance of a compelling government interest."[3] Under strict scrutiny, a government interest is compelling when it is more than routine and does more than simply improve government efficiency. A compelling interest relates directly with core constitutional issues.[4] The second condition is that the rule must be the least restrictive way in which to further the government interest. The law, in conjunction with President Bill Clinton's Executive Order in 1996, provided more security for sacred sites for Native American religious rites.[3]