## HHS Mandate and Related Litigation

On March 25, two important oral arguments were made to judges in Washington, DC, one in the Supreme Court and one in the DC Circuit Court of Appeals. One oral argument, in the case of *Sebelius v. Hobby Lobby Stores*, concerned the HHS mandate that requires coverage of contraceptives, sterilizations, and some abortifacients by insurance plans.[1] However, the second oral argument, in the case of *Halbig v. Sebelius*, may turn out be as significant in its ramifications as the first, perhaps more so.[2]

The first case, argued in the Supreme Court, is familiar, I am sure, to all readers (not least because the underlying regulations and the resultant litigation have been covered extensively in my "Washington Insider" columns since the passage of the Affordable Care Act in March 2010[3]). That case is actually the consolidation, for purposes of Court review, of two separate cases, *Sebelius v. Hobby Lobby* and *Conestoga Wood Specialties Corp. v. Sebelius*.[4] The cases originated in, and were decided by, different federal circuits (*Conestoga* by the Third Circuit Court of Appeals; *Hobby Lobby* by the Tenth). The government won one (*Conestoga Wood*) and lost one (*Hobby Lobby*). Since this created a "split" between circuit courts, providing evident confusion as to what the law requires, the Supreme Court consolidated the

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[1] *Sebelius v. Hobby Lobby Stores,* case 13–354, argued before the Supreme Court, March 25, 2014.

[2] *Halbig v. Sebelius*, case 14–5018, argued before the US Court of Appeals for the DC Circuit, March 25, 2014.

[3] The most recent "Washington Insider" columns are available on The National Catholic Bioethics Center website, at http://ncbcenter.org/page.aspx?pid=1268; earlier columns are available in the online archives of this Journal, at http://ncbcenter.metapress.com/link.asp?id=119988.

[4] *Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013); and *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3rd Cir. 2013).

appeal from each decision and heard argument on March 25. Because of its important implications for freedom of conscience and health care, the case has drawn great interest; for instance, over eighty organizations who were not parties to the case filed "friend-of-the-court" briefs on various aspects of the case.[5]

The "buzz" in Washington, following oral argument, was that the government had taken a fairly hard battering by the justices, with the result that the government's defense of the HHS mandate was in serious trouble.

The cases involve many legal issues, but the principal ones are (1) whether these businesses are protected under the Religious Freedom Restoration Act (RFRA);[6] (2) whether the HHS mandate imposes a "substantial burden" on their religious liberty; (3) if so, whether the government has a "compelling interest" in imposing that burden; and (4) if so, whether the government has used the "least restrictive means" in requiring these businesses to provide for the objectionable services in their health plans. The last three requirements are specified in RFRA and constitute the demanding "strict scrutiny" standard that the government must satisfy.[7]

All of these issues have been extensively analyzed in my prior columns, to which I refer the reader for more in-depth analysis. Here I note briefly my conclusions regarding these issues: (1) RFRA protects businesses such as Hobby Lobby and Conestoga Wood.[8] (2) The burden placed on these businesses is clearly "substantial,"

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[5] See a description of the briefs at http://www.becketfund.org/hobbylobbyamicus/. Americans United for Life filed one of the amicus briefs on behalf of Drury Development Corporation and other supporters of Hobby Lobby, including The National Catholic Bioethics Center. AUL's brief marshaled the evidence about the abortifacient effects of certain drugs and devices included within the HHS mandate—Plan B, Ella, and the IUD. The brief also addressed the deep roots of conscience protection in the views of the Founding Fathers. The brief is available at http://www.becketfund.org/wp-content/uploads/2014/01/13–354–13–356-bsac-Drury-Development-Corporation.pdf.

[6] Pub. L. 103–141, 107 Stat. 1488 (November 16, 1993), codified at 42 U.S.C. § 2000bb through bb-4.

[7] As noted, all of these issues have been extensively analyzed in my prior columns, to which I refer the reader for more in-depth analysis.

[8] The RFRA statute speaks of "persons" but does not define the term. Does it apply to businesses? The ordinary rule of construction of a statute is that "person" does apply to corporations as well as individuals, unless the context indicates the contrary. See the Dictionary Act, 1 U.S.C. § 1. There is nothing in the context—whether one defines "context" as the surrounding language of the statute or as the decisions of federal courts—that would indicate that Congress did not intend to include corporations as "persons." First, Congress's intent to broadly protect religious freedom (and thus presumably to extend protection to a broad range of "persons," i.e., including corporations) is clear in the statute itself. Remember that the statute was passed by Congress to "remedy" an opinion of the Supreme Court—*Employment Division v. Smith*—that dropped the long-standing "strict scrutiny" standard for reviewing governmental infringement on religious freedom. With RFRA, Congress in effect said its will was to extend the broadest possible protection to religious freedom, whether that was required by the Constitution or not. Second, the courts have recognized corporations as having other First Amendment rights; for instance, "political speech" rights for corporations were affirmed by the Supreme Court as recently as the *Citizens United* case in 2010. For a fuller

given the magnitude of the fines that will be imposed if they provide insurance that does not cover the objectionable services. (3) The government cannot demonstrate a "compelling" justification for infringing religious liberty in this way. The huge number of exemptions for grandfathered plans and the huge number of accommodations for religious nonprofit corporations, for instance, show that the interest is not "compelling"; if it were, the government would insist that *every* employer provide insurance for the objectionable services. (4) The government cannot show that it is using the least restrictive means to ensure that people get such services. For instance, though I am not suggesting that this would be good public policy, the government could provide a tax credit to everyone who buys contraception, sterilization, or abortifacients, or it could give them away free to anyone who wants them, without forcing businesses who object on religious and moral grounds to cover them in their insurance policies.

During oral argument, the justices seemed to divide along familiar liberal and conservative lines. While this ordinarily is reckoned as four liberals (Justices Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor), four conservatives (Justices Antonin Scalia, Clarence Thomas, John Roberts, and Samuel Alito), and Justice Anthony Kennedy as the deciding vote in the middle, that calculation seems unlikely to work this time. Kennedy was anything but undecided and was, in fact, distinctly hostile to the government's position during oral argument. Thus, it seems the case is very likely to be, at minimum, a 5-to-4 decision in favor of Hobby Lobby and Conestoga Wood.

It could be a bigger majority than that. Because of his concern for the institutional prestige of the Court in the eyes of the public, Chief Justice Roberts is known to prefer both narrow opinions (i.e., limited to the fewest number of legal issues) and large majorities (rather than narrowly decided opinions). In all likelihood, these two facts will work together to produce a narrow opinion. In fact, the very narrowness of the opinion could attract one or more of the Court's liberals to join in the majority opinion. In other words, the narrower the opinion, the more likely it is to be carried on a vote greater than 5 to 4.

How might the opinion be crafted by Roberts to be "narrow enough" to attract one or more of the liberal justices? One possibility would be to limit the decision to the rights of "closely held" corporations, that is, corporations owned by a family or a small group of friends. Since both Hobby Lobby and Conestoga are literally such corporations,[9] the Supreme Court does not "need" to decide anything broader (i.e., it need not go beyond the law as it applies to the facts of the case). Deciding the case in this narrow way would avoid holding that large corporations—whose shares are publicly traded—have religious freedom rights. It is commonly assumed that liberal justices would not wish to go so far as to extend religious liberty protections

discussion of these points, see my Winter 2013 "Washington Insider" column (online pp. 6–7), at http://ncbcenter.org/document.doc?id=569.

[9] In other ways, the two businesses are vastly different. Hobby Lobby is a chain of six hundred stores with thirteen thousand employees, while Conestoga Wood employs about nine hundred fifty people.

to them. So a narrow opinion on this point might attract one or more of the liberal members of the Court.

Another possibility is to limit the decision to whether RFRA shields a business that objects to providing only abortifacients rather than abortifacients *and* contraceptives. Again, since this is, literally, the extent of the objection of Hobby Lobby and Conestoga Wood, the Court need go no further. However, it seems unlikely that the Court will rule narrowly on this point because, so far as businesses are concerned, the religious freedom issues are the same regarding the provision of contraceptives as they are for the provision of abortifacients.[10] In other words, essentially the same issue will certainly be raised in litigation by essentially identical plaintiffs.

A similar analysis could be applied to another potential "narrowing" ground—whether the corporation is for-profit or nonprofit. But in my judgment, it is more likely the Court (per Roberts) would narrow its opinion on *this* ground than on the contraception/abortifacient point. Let me explain.

Following the initial promulgation of the HHS mandate, religious nonprofits (such as Catholic colleges) were the first to sue. However, their suits were dismissed as not being "ripe" for decision, because the government was stating publicly at the same time that it would be granting an "accommodation" for them that would protect their religious freedom. In the interim between that promise and the promulgation of the formal, final accommodation last summer,[11] for-profit corporations (businesses) filed suits. And it is suits by for-profits that are now before the Supreme Court for decision. The Court could decide the Hobby Lobby/Conestoga Wood case without deciding what the outcome will be in the cases involving religious *nonprofits*.

Why might the Roberts Court do this? Because the two sets of cases are *different* in this respect: the government never promised, or provided, an "accommodation" to protect the religious liberty rights of for-profit businesses. Indeed, the government's claim is that for-profit corporations can never have religious liberty rights.

But the government did provide just such an accommodation to religious organizations. In brief, the health insurance policy provided by a religious nonprofit need not cover the objectionable services, but the religious organization must notify its insurer that it objects to the coverage of those services, at which point the insurer is required to provide them. Those religious nonprofit organizations, then, had to consider whether the accommodation was adequate or whether it still required them to violate their religious beliefs (by making them complicit in the moral wrong of providing insurance for immoral acts, for instance). In the event, many religious nonprofit organizations *did* decide that the accommodation was not sufficient, and

[10] During oral argument, several justices pressed the point that if these businesses can be forced to cover abortifacients, they can be forced to cover abortions. Thus, the Court did not seem inclined to view the coverage issue as narrowly limited to the precise contours of Hobby Lobby and Conestoga Wood's specific objections.

[11] See my two previous "Washington Insider" columns for discussion of the content and extent of the accommodation.

have filed suits challenging it.[12] The Supreme Court might decide that this issue—whether the accommodation for religious nonprofits suffices to satisfy RFRA—is different enough from that concerning businesses to warrant permitting the issue to "mature" (i.e., for the issues to be explored, defined, and focused) through trials in the lower courts before inevitably coming to the Supreme Court.

Of course, the Supreme Court might decide the case broadly by striking down the HHS mandate in its entirety as a violation of RFRA,[13] that is, by deciding that forcing *anyone*—for-profit, nonprofit, or church—to provide specified insurance coverage in violation of its religious beliefs is a violation of RFRA and cannot be remedied by providing "exemptions" and "accommodations" for some organizations but not others.[14] Let us hope that it will. We should know the decision by the time the Supreme Court's 2014 term ends in late June.

By that time, we might also have a decision in the other case mentioned above, *Halbig v. Sebelius*. As noted, the outcome of this case might have even bigger ramifications than the decision in *Hobby Lobby/Conestoga Wood*. How so? *Halbig* places the continuing viability of the Affordable Care Act itself at risk. And the ACA has more anti-life provisions than just the HHS mandate.[15]

The ACA authorizes tax credits and cost-sharing subsidies for the purpose of purchasing insurance in health exchanges "established by states." Since the availability of these credits and subsidies creates an incentive for a state to set up and operate an exchange by reducing the cost of doing so, supporters of ACA thought every state would establish an exchange. However, more than thirty states have not done so. For those states, the federal government is required under the ACA to establish exchanges. The question is whether tax credits and cost-sharing subsidies are available for the purchase of insurance in those (federally established) exchanges.

By the plain words of the ACA, they are not. For tax credits and cost-sharing subsidies to be available, the ACA requires that the exchange be "established by a

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[12] Two examples are the Little Sisters of the Poor and the University of Notre Dame. The Little Sisters were granted injunctive protection by courts while their case proceeds to trial, but Notre Dame was not. "Little Sisters of the Poor Granted Temporary Injunction by Supreme Court," Becket Fund news release, December 31, 2013, http://www.becketfund.org/scotusgrantsrelief/; and Associated Press, "Court Rules against Notre Dame over Birth Control," *USA Today*, February 22, 2014, http://www.usatoday.com/story/news/politics/2014/02/22/notre-dame-birth-control-health-care/5721623/.

[13] The possibility of just such a broad ruling is a further incentive for the liberal justices to offer to join a majority opinion in return for a narrower decision, i.e., one that only decides the rights of closely held businesses.

[14] During oral argument, some justices wondered whether provision by the government of the same accommodation to for-profit organizations as it provides to nonprofits would be the solution. It is possible that the Obama administration would decide to do just that (amending the regulations to provide the accommodation to anyone who has religious objections) if it loses this case.

[15] See AUL's analysis of the ACA at http://www.aul.org/2013/09/aul-says-the-anti-life-policies-intertwined-throughout-obamacare-require-its-repeal/ and http://www.aul.org/aul-analysis-on-the-affordable-care-act/.

State." However, the Internal Revenue Service issued a rule saying that such a federally established exchange in a state was essentially "state-established" for purposes of qualifying for tax credits and cost-sharing subsidies to purchase insurance.

Plaintiffs, who are small business owners in some of the states that chose not to establish exchanges, challenged the IRS rule in federal district court in Washington, DC (where, of course, federal agencies have their headquarters). Plaintiffs argued that the IRS was rewriting the statute. Their argument is as follows: (1) If Congress wanted to provide the credits and subsidies to all exchanges regardless of whether the state or federal government set them up, it could have said so expressly. (2) If Congress now believes it is important to do so, it can amend the ACA to so provide. (3) But an administrative agency does not have the authority to rewrite the plain words of a statute passed by Congress. Surprisingly—to me at least—the district court ruled against them on January 15. (The judge's legal argument is much too complicated to unravel in detail in this article. But essentially, the judge accepted the IRS's construction of the ACA that an exchange set up by the federal government in a state that refused to set up its own exchange is a "state-established" exchange and qualifies for tax credits and cost subsidies.)

However, as noted, the decision has been appealed and was argued in the court of appeals on March 25. There could be a decision at any time. Whether the appellate court affirms the lower court's judgment or reverses it, the case is almost certainly headed to the Supreme Court.

## Twenty-Week Abortion Bans

One case the Supreme Court refused to review concerns bans on abortion at twenty weeks and beyond. The case was *Horne v. Isaacson*, and it concerned a challenge to a twenty-week ban in Arizona.[16]

Several states have enacted bans on abortions from the twentieth week of pregnancy forward.[17] Most of the bans have been based on the fact that a fetus feels pain by twenty weeks. The ban in Arizona, however, had the additional ground that the risk to women from abortion increases greatly from twenty weeks onward.[18] The stated purpose of the bill was to "prohibit abortions at or after twenty weeks of gestation, except in cases of a medical emergency, based on the documented risks to women's health and the strong medial evidence that unborn children feel pain during an abortion at that gestational age."[19]

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[16] Technically, such laws regulate the timing of the abortion decision by the woman. They do not preclude a decision during the second trimester, but they require it to take place before the twentieth week. The original complaint against the Arizona ban was *Isaacson v. Horne*, 884 F. Supp. 2d 961 (D. Ariz. 2012).

[17] The states with such bans are Alabama, Arizona, Arkansas, Delaware, Georgia, Idaho, Indiana, Kansas, Louisiana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, and Texas.

[18] The state's interest in maternal health during the second and third trimesters has been deemed "compelling" ever since *Roe*. See *Roe v. Wade*, 410 U.S. 113 (1973), at 163.

[19] Arizona H.B. 2036, sec. 9(B)(1).

Following enactment of the statute in Arizona, the statute was challenged in court as inconsistent with the Supreme Court's abortion jurisprudence, especially *Planned Parenthood v. Casey* in 1992. The federal district court refused to enjoin the statute, but that decision was appealed to the Ninth Circuit, which reversed the decision and entered an injunction against the statute.[20] The Ninth Circuit noted that "*Casey* reaffirmed … *Roe*'s central holding: 'Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.'"[21]

Thus, on the appeal to the Supreme Court, a central issue was whether "viability"[22] is an absolute, bright-line bar, before which no state interest, or combination of interests (in, for example, maternal health, the integrity of the medical profession, and unborn human life), is strong enough to permit the state to preclude abortions (other than those necessary in medical emergencies).[23] In other words, is viability a point before which abortions cannot be banned?

It is certainly true that there is language in Supreme Court decisions such as *Casey* that, if taken at face value, amount to such a bright-line bar. However, as appellants argued in the petition to the Supreme Court, a great deal of new evidence has emerged since the decisions in *Roe* (1973) and *Casey* (1992) about the effects of abortion on women and about the pain felt by a fetus.[24] There is reason to believe that, in light of this new evidence, the Supreme Court would not adhere to an absolute bright-line bar at viability. For instance, in *Gonzales v. Carhart*, the most recent Supreme Court case dealing with abortion (2007), the Court upheld the federal partial-birth abortion ban *even though it applied before viability*.[25]

Many pro-life Americans believe litigation over twenty-week bans provides the best opportunity to begin reversing the abortion license granted in *Roe*. Twenty-week bans are based on state interests that have been recognized as legitimate by the Supreme Court in prior abortion cases, and they are strengthened by the evidence on fetal pain and women's health that has emerged since *Casey*. Litigation over such statutes provides the opportunity for the Supreme Court to reject an absolute bright-line bar at viability.

Thus, the Supreme Court's decision not to review the case is disappointing but not really surprising, because there is currently no split among the circuits on this

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[20] *Isaacson v. Horne*, case 12–16670 (9th Cir. May 21, 2013), http://cdn.ca9.uscourts.gov/datastore/opinions/2013/05/21/12–16670.pdf.

[21] Ibid., 18.

[22] As the Ninth Circuit noted, "The parties to this suit agree that no fetus is viable at twenty weeks gestational age and that a healthy fetus typically attains viability at twenty-three or twenty-four weeks, at the earliest." *Isaacson*, 9 note 4.

[23] A bright-line bar is an unambiguous legal standard that leaves no room for varying interpretations.

[24] See *Horne v. Isaacson*, case 13–402, petition for writ of certiorari (September 27, 2013), 21–31, http://sblog.s3.amazonaws.com/wp-content/uploads/2013/10/Horne-v-Isaacson-cert-petition-Final.pdf.

[25] *Gonzales v. Carhart*, 550 U.S. 124 (2007).

issue. As noted above, the Supreme Court is more likely to review an issue if the circuit courts are split pro and con on it.

It is important to point out that the Supreme Court's decision not to review the case does *not* amount to a rejection by the Court of such bans across the land. The Court did *not* endorse the Ninth Circuit's interpretation as the right one (the one required by the Constitution). Rather, the denial of review merely means that the Court declined to review *this case*. It does not mean the Court would decline to review a future case based on a twenty-week ban from a different state.

As matters stand, twenty-week bans are legally ineffective *only* in those states that make up the Ninth Circuit (Arizona, California, Idaho, Nevada, Washington, Oregon, Alaska, Montana, and Hawaii). Decisions by the Ninth Circuit are not binding in other states, all of which are members of different circuits. Any of those other states are free to enact such bans. Indeed, Mississippi recently did just that.[26] If any of these state bans are challenged and upheld by circuit courts, there would be the requisite split between that circuit and the Ninth, thereby providing a likely ground for Supreme Court review.

## Other State Law Restrictions on Abortion

On March 27, the Fifth Circuit upheld limitations recently passed in Texas that require (1) that a physician performing an abortion have admitting privileges at a hospital no more than thirty miles from the location of the abortion and (2) that the administration of chemical (medical) abortions follow Food and Drug Administration protocols.[27]

Both limitations protect the health of women and make common sense.[28] They also do not appear to create a "substantial obstacle" under *Casey*. Indeed, for these reasons, the Fifth Circuit upheld them. Will the issue go to the Supreme Court? As discussed above, it well may, if there is a circuit split.

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[26] Mississippi H. B. 1400, signed into law on April 23, 2014. See "Mississippi Women Better Protected as Governor Signs Historic Legislation," Americans United for Life news release, April 23, 2014, http://www.aul.org/2014/04/mississippi-women-better-protected-as-governor-signs-historic-legislation/.

[27] *Planned Parenthood of Texas v. Abbott*, case 13–51008, doc. 00512576152 (5th Cir. rev. March 28, 2014).

[28] They also affect the "bottom line" of the business of abortion, a business which maximizes profits through the use of shoddy practices.