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Hobby Lobby: It's not just about contraception.

The Affordable Care Act was passed in 2010 to overhaul the U.S. health care system. The goal was to increase quality and affordability of health insurance, lower the uninsured rate, and reduce the costs of healthcare for individuals and the government. Due to strong lobbying by women, the law mandates that health insurance cover women's health needs including preventive care (e.g. birth control) and screenings (e.g. mammograms). After the passage of the law, the Department of Health Services issued guidelines in 2011 that defined that mandate to include all Food and Drug Administration approved contraceptive methods. Religious organizations were exempted so that they did not have to provide coverage but the insurer directly did at no additional cost to the woman.

For-profit corporations then challenged the rule claiming that their rights under a federal statute, the Religious Freedom Restoration Act, were being violated because they had a strong religious belief against contraception as well and should not be forced to provide it. The *Hobby Lobby* case is what followed from that challenge.

The first thing to know about *Hobby Lobby* is what it said and who said it. Alito wrote the opinion for Roberts, Scalia, Thomas and Kennedy, four well-known right wing judges (three Catholics) and Kennedy, also a Catholic but often a swing vote.

The case was based on the Religious Freedom Restoration At of 1993 (RFRA) not the Constitution. The RFRA prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." In English, that means that a person can exercise their religious belief however they wish, even if it violates a law that applies to everyone, and the government cannot interfere unless the government can show that the law in question is motivated by a very important interest/reason, and is written so as to take care of the problem/interest with the least amount of interference into the religious person's rights. As amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), RFRA covers "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." In other words, the actions of the religious person don't even have to be a central belief or ritual of that religion.

The three plaintiffs Hobby Lobby, Conestoga (a Mennonite wagon company) and Mardel (Christian bookstores owned by a son of the Hobby Lobby owner) objected to four of the twenty types of contraception available under the Patient Protection and Affordable Care Act of 2010 (ACA) that requires specified employers' group health plans to furnish

"preventive care and screenings" for women without "any cost sharing requirements." Two of the four challenged methods are for emergency contraception primarily used by women who have been raped. The four methods were allegedly abortifacients i.e. preventing the implementation of a fertilized embryo. Medical doctors disagreed, but with this court, facts are irrelevant. The court did not rely on the facts (i.e. that it was not an abortifacient or that as artificial people there is no way for a corporation to actually exercise religion) but rather relied on their own theological beliefs thereby violating the First Amendment separation of church and state doctrine.

Under ACA, religious nonprofit organizations were already exempt from this requirement. However, the plaintiffs were for-profit corporations claiming a religious exemption. The court held that imposing the mandate to provide all contraceptive measures applies to for-profit corporations, that the corporations claim of a sincerely held religious belief will not be questioned, and that the mandate violated RFRA because it burdens the exercise of religion. The court assumed but did not rule that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is a compelling governmental interest, but that it is not the least restrictive means of furthering that interest. The law already provides a lesser restrictive means, i.e. the exemption for religious non-profits.

These five justices could see no difference between the for-profit and nonprofit corporations – in contrast to every other American who could articulate the differences in a heartbeat. That kind of stupidity harkens back to Justice Thomas' problem with his tax form when he said he didn't know that when it said to put the income of his spouse it meant his wife. Just as in *Citizens United*, corporations have more "rights" than do actual people although they do not have the attendant responsibilities.

The court attempted to limit the reach of the decision by saying it only applies to contraception not vaccinations or blood transfusions or illegal discrimination posing as a religious belief because these may have different underlying interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them. HHS asserted that the contraceptive mandate serves a variety of important interests, such as promoting "public health" and "gender equality." The court claimed these are not sufficient to establish a compelling state interest. So the court is plainly saying that women's health or gender equality is not a compelling state interest and not as important as for example combating the spread of infectious diseases. As explained above, the RFRA requires that to interfere with the practice of religion, the first test for the government is whether the interest is compelling i.e. important enough. For the decision, the court assumed that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA. In applying court precedents, the only part that is mandatory on lower courts is what the court "held". Assumptions a court makes or facts they accept without question or side comments that don't relate to the specific issue are "dicta" and not obligatory on lower courts. By "assuming" that providing contraceptives to women free of charge was compelling but not "holding" it, that statement is open to

attack by lower courts and the Supreme Court itself does not have to follow it in the next case.

The attempt to limit the decision will not succeed as 122 organizations have already sued over this issue and more are sure to follow. Atlas Machine & Supply, Hastings Automotive and Eden Foods have already cut off contraception access for their employees. Since 90% of all businesses in the U.S. are closely held corporations, the ruling applies to millions of women. Numerous studies for dozens of years in many countries have shown that women who have access to safe and legal birth control have fewer children. Families with fewer children have higher education and income and women who have higher education and income are more able to escape domestic violence.

The Satanists have issued a letter for all women to give to their doctor to say they "sincerely believe" they cannot watch the legally mandated "abortion video" because it relays false medical information. They or the Wiccans need to issue a "sincere belief" letter for women to refuse the ultrasound tests required in some states. It's easy enough to sincerely believe that the government has no business sticking an ultrasound wand up your vagina.

A scathing dissent followed written by Ginsburg and signed by Sotomayor, Kagan, (all three female justices) and Breyer. In writing the ACA, the independent Institute of Medicine (IOM) had provided recommendations to the Department of Health and Human Services (HHS) regarding which preventive services help keep women healthy. The IOM recommended covering all FDA-approved contraceptive services for women with childbearing capacity, as prescribed by a provider, because there are tremendous health benefits for women that come from using contraception. In fact, nearly 99 percent of women in the United States have relied on contraceptive services at some point in their lives, but more than half, between the ages of 18 and 34, have struggled to afford it.

As Ginsburg reminded us in her dissent, "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." That was the reason for the rule in the first place; so striking the rule is striking the principle. Some pundits have argued that this attack on ACA is motivated by an attempt to destroy ACA, but it's a continuation of the attack on women's control of their reproductive lives. International comparisons show that the more equality in the society, the less the incidence of domestic violence. Access to safe and legal birth control is also central to equality because it allows women to control their reproductive lives. If men can control women's reproductive lives, they can control women.

Ginsburg made clear the political aspect of the decision. "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" and leave the government, i.e., the general public to subsidize profit-making corporations. The majority's decision gave deference to the RFRA and its legislative history passed twenty years ago rather

than to the ACA and its legislative history that states Congress' intent today. During passage of the ACA, a so-called "conscience amendment," which would have enabled any employer or insurance provider to deny coverage based on its asserted "religious beliefs or moral convictions" was defeated. Therefore, the decision of the Court's majority is directly contrary to what Congress passed. Rather than interpreting laws, they are making new ones – the definition of a politically activist court.

The dissent argued that the plaintiffs fail each of the tests required. For-profit corporations are not among those covered by RFRA because they do not exercise religion. In fact, Justice Stevens said in *Citizens United* that corporations "have no consciences, no beliefs, no feelings, no thoughts, no desires." So then how can they exercise religious beliefs?

The dissent had no difficulty in seeing the difference between for-profit and nonprofit corporations. Nonprofit, at least in theory, operate for the public good – education, research, or charitable work. None of that applies to for-profits whose goal is only money making.

While the dissent agreed that a person's religious belief is not to be questioned, the test still remains as to whether the law substantially burdens religious exercise. As the dissent points out, no individual medical decision is the business of your employer. This was already determined in *Griswold v. Connecticut* where the court ruled in 1965 that access to contraceptives is within the zone of privacy surrounding the First and other Amendments. Likewise, *Roe v. Wade* in 1973 said the decision was between the woman and her doctor, not the state, not the church, not the employer. If you don't agree with contraception, don't use it; if you don't agree with abortion, don't have one. But your belief should have no impact on my ability to do either.

The next test is whether the requirement is "in furtherance of a compelling government interest." As Ginsburg pointed out, the "ACA provides furthers compelling interests in public health and women's well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence. To recapitulate, the mandated contraception coverage enables women to avoid the health problems unintended pregnancies may visit on them and their children. … The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening. … And the mandate secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders, and pelvic pain." Yet again, facts are irrelevant to the current Supreme Court majority, because women's lives and their health don't matter. The dissent pointed out, "No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect." Corporations' religious rights trump women's health rights. Anytime religious rights are allowed to trump women's rights, we are in for trouble.

Lastly, the dissent argued that the least restrictive requirement cannot mean that the benefits given to women by federal law can be denied by employers because of their

alleged religious beliefs. The goal of the ACA was to give employees health care through the existing system not have employers shift the cost to the government. Allowing a corporation to escape governmental regulation because of an alleged religious belief is a recipe for disaster. Religious institutions have often been the last bastion of support for violence against women (along with sports teams). In the U.S. religious orders were the last to get on the "end domestic violence" bandwagon – and some still haven't. Rather preachers counseled that a woman was to submit to her husband, be silent at home, forgive him and seek to do better, ask for help from the male lord and not break up the home. In Russia when we sought to use an abandoned nunnery for a battered women's shelter, the Orthodox church refused because that would break up the family. Religion has often been an excuse to continue despotic and violent behavior toward women.

The dissent illustrated the danger of the decision e.g. if the employer claims that their sincerely held religious belief is offended paying the minimum wage or according women equal pay for substantially similar work. Perhaps they have religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others). Businesses have already sued claiming religious objections to serving African Americans and the LGBT population, to hiring people living together and not married, to hiring a single female working without her fathers consent or a married woman working without her husbands consent.

While the majority said they did not intend for their holding to apply to tax cases, already religions who have a sincerely held belief opposed to war (Quakers, Amish, etc.) are gearing up for a challenge, as well they should. An earlier case (*Lee*) said the religious objection did not apply to taxes, but *Hobby Lobby* overthrew that case because *Lee* also said that when a commercial activity has entered into the public market, they couldn't then use their religion to avoid the laws that affect the public arena. Also in *Lee* the court said that to allow the sole proprietorship (a much closer question than a corporation, even closely-held) to avoid following the law due to his religion would impose his religion on his employees – precisely what *Hobby Lobby* did.

Within days after the *Hobby Lobby* decision, the court turned tail on its own decision and issued an injunction in the *Wheaton College* case on July 3, 2014. Wheaton College was admittedly a religious institution and therefore did not have to comply with the contraceptive mandate but only had to fill out a form and send it to its insurer and DHHS. Unbelievably, they claimed that this alone interfered with their religious rights. The boys on the court granted an injunction.

The three women went ballistic. The court had just said in *Hobby Lobby* that the accommodation given to non-profit religious institutions was reasonable so why would they give Wheaton an injunction at all? Rather than filling in the form Wheaton had sent a letter to DHHS saying they were eligible for the exemption. How does filling in a form

and using two stamps (DHHS and insurer) burden their religious rights when writing a letter and using one stamp (DHHS) does not?

Since the holding makes absolutely no sense on its face, one has to look for the reason behind it. For one, Wheaton objects to all contraception coverage not just the four in *Hobby Lobby* so perhaps the court is looking to extend the ruling to all contraception. Further, the dissent in *Wheaton* states that, "The contraceptive coverage requirement plainly furthers compelling interests in public health and women's well-being. See *Hobby Lobby*, ante, at 2 (KENNEDY, J. concurring)." But Kennedy's words were written in the concurrence i.e. not part of the majority opinion; in the majority opinion, the court said they would "assume" public health and women's well-being was a compelling purpose which means they could decide that it is not. Given the make up of this court that may be exactly what they are looking for.

In response to these decisions, the various federal departments affected issued rules on August 20, 2014. In response to the *Wheaton* decision, the regulations have immediate effect so that college students will not lack coverage. That regulation outlines what must be in the letter written by religious institutions if they refuse to use the existing form that requires the same information. The insanity of the decision is boldly illustrated by the rule.

On the same day, the same federal departments issued a rule based on *Hobby Lobby* i.e. how to identify a "closely-held corporation." The proposed draft includes a provision that the company is not publicly traded and has a maximum number of shareholders though that number is not yet specified.

In contrast, California recently issued direction to two Catholic universities that they must include abortion coverage in their health insurance plans citing a 1975 state law requiring group health plans to cover all basic services because abortion is a basic health care service. The California Constitution prohibits discrimination against women. Thus all health plans must treat maternity services and legal abortion neutrally. Of course the U.S. Constitution does not prohibit discrimination against women, which is one reason we need the Equal Rights Amendment. Women are not even a "suspect class" when determining which standard will be used by a court to evaluate a discriminatory law.

The Supreme Court has made it clear that women's health and women's lives are not important – or compelling. When the California case arrives at the Supreme Court, we will see a contest between women's equal rights under a state Constitution versus corporations "religious rights" under a federal statute. States rights and the Commerce Clause will be front and central – women's lives may not be.

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