Religious Liberty in the Marketplace: A Tale of Two Families and Two Courts

Consider the Hahns and the Greens. For decades, these two families have toiled to build companies that, first, honor God and, second, provide valued products in the marketplace and good jobs for their employees. The Hahns began their company, Conestoga Wood Specialties, in a Lancaster, Pennsylvania garage in 1964. The manufacturer of kitchen cabinetry employs 950 persons.[i] As Mennonites, the Hahns seek to operate their company in accordance with their faith.

Similarly, the Green family's company began in a garage in Oklahoma in 1970. The well-known chain of arts-and-crafts stores, Hobby Lobby, has grown to 559 stores and 13,000 employees. The Green family also owns the Mardel chain of Christian bookstores, which operates 35 stores with 400 employees and sells exclusively Christian books and materials. The Green family operates its companies to "honor[] the Lord in all [they] do by operating the company in a manner consistent with biblical principles."[ii] They seek to "serv[e] [their] employees and their families by establishing a work environment and company policies that build character, strengthen individuals and nurture families." Hobby Lobby is known for its overt Christian values, including Sunday closing and taking out newspaper ads that proclaim the Gospel.

For several decades, the Hahn and Green families have pursued two essentials of the "American Dream": the religious liberty to honor God in all that they do and the economic freedom to build a successful company. Whether the Hahns and the Greens will be allowed to pursue both religious liberty and economic prosperity may be decided by the Supreme Court in its 2013 Term that begins October 7th.

Like many other religious business owners, as well as many religious non-profits, the Hahn and Green families have run afoul of a new government regulation that penalizes religious persons and organizations for their religious belief that it is wrong to destroy nascent human life. Initially proposed in August 2011, the "HHS Mandate" requires certain employers to provide insurance coverage of all "FDA-approved contraceptives," including Ella and Plan B, the so-called "emergency contraceptives." Scientists have not identified the precise mechanisms by which these drugs work, but the FDA itself has stated that the drugs may prevent implantation of a fertilized egg in the uterine lining. For the Hahns and the Greens, these drugs violate their religious convictions that human life begins at conception.

The families filed federal lawsuits to defend their religious liberty to run their companies in accordance with their religious beliefs.[iii] Hobby Lobby and Mardel won in the Tenth Circuit.[iv] Conestoga Wood lost in the Third Circuit.[v] The Hahns have announced that they will ask the United States Supreme Court to review their case. Because it lost the Hobby Lobby case, the government must decide whether it will ask the Supreme Court to review the Tenth Circuit decision. The results and rationales of the two circuits are so contradictory that it is likely that the Court will hear one or both cases and rule by late June 2014.

The Tenth Circuit Decision

The Greens challenged the Mandate as violating the two fundamental federal protections of religious liberty: the constitutional protection found in the Free Exercise of Religion Clause and the statutory protection found in the Religious Freedom Restoration Act of 1993 ("RFRA").[vi] Because it found that RFRA likely protects Hobby Lobby and Mardel from having to include the objectionable drugs in their insurance plans, the Tenth Circuit did not reach the constitutional free exercise claim.

The Greens' challenge had a bumpy start in the district court, which initially denied injunctive relief in October 2012,[vii] and was affirmed by the Tenth Circuit.[viii] The Greens took the unusual step of asking the Supreme Court to intervene at that early stage, but Justice Sotomayor, sitting as Circuit Justice for the Tenth Circuit, denied relief in December 2012.[ix]

Back in the Tenth Circuit, prospects improved when it agreed to hear the case on an expedited basis and *en banc* (meaning that eight, rather than the customary three, judges would hear the case). By a 5-3 ruling, in June 2013, the Tenth Circuit essentially held that RFRA protected Hobby Lobby and Mardel from the Mandate's compulsion to provide coverage for abortion-inducing drugs.[x]

The five-judge majority first determined that a corporation may qualify as a "person" with religious exercise rights protected by RFRA. Although RFRA does not explicitly define the term "person," the Dictionary Act[xi] defines the term to include corporations. The court further noted that the Supreme Court has applied RFRA to protect corporate claimants.

The court rejected the government's argument that a for-profit entity does not qualify for RFRA's protections. The government insisted that Title VII's exemption for religious organizations should be read to limit RFRA's protection to include only non-profits. But the court rejected that argument by noting that Title VII (which the court carefully observed might not be limited to non-profits) demonstrated that Congress could have crafted a narrow exemption but chose not to do so in RFRA. An individual "may enter the for-profit realm intending to demonstrate to the marketplace that a corporation can succeed financially while adhering to religious values."[xii] The court questioned why an individual who operated for profit and retained free exercise rights should lose those rights simply because of incorporation. Because the court found that the companies were protected by RFRA, it did not decide whether the Greens' individual free exercise rights were violated by the Mandate.

Having found that RFRA may protect corporations' religious exercise, the court then found that the companies "incurred a substantial burden on their ability to exercise their religion because the [Mandate] requires [them] to compromise their religious beliefs, pay close to $475 million more in taxes every year, or pay roughly $26 million more in annual taxes and drop health-insurance benefits for all employees."[xiii]

Finally, the court concluded that the government's justification for applying the Mandate to Hobby Lobby and Mardel did not meet RFRA's stringent "compelling interest" requirement. While the court "recognize[d] the importance of" the government's "interests in [1] public health and [2] gender equality," the government failed to demonstrate a compelling interest in applying the Mandate to Hobby Lobby and Mardel because it exempted many other employers.[xiv]

The Third Circuit Decision

In a 2-1 ruling in July, a Third Circuit panel came to a diametrically opposite result. The court found that neither the Hahns nor Conestoga Wood Specialties had free exercise rights under RFRA or the Free Exercise Clause that protected them from the Mandate's requirement to provide coverage for the drugs they believe destroy human life. First, the court concluded that there was no history of the Free Exercise Clause applying to for-profit, secular corporations. The Third Circuit then refused to impute the owners' free exercise rights to their company, concluding that "by incorporating their business, the Hahns themselves created a distinct legal entity that has legally distinct rights and responsibilities from the Hahns, as the owners of the corporation."[xv] The majority then turned this legal distinction against the Hahns to find that "[s]ince Conestoga is distinct from the Hahns, the Mandate does not actually require *the Hahns* to do anything. All responsibility for complying with the Mandate falls on *Conestoga*."[xvi]

Turning to RFRA, the Third Circuit simply asserted that its conclusion that a for-profit, secular corporation had no constitutional claim "necessitate[d]" the conclusion that it could not exercise religion for purposes of RFRA.[xvii] The court concluded that to hold "that a for-profit corporation can engage in religious exercise [] would eviscerate the fundamental principle that a corporation is a legally distinct entity from its owners," but it failed to explain why that "fundamental principle" overrides the fundamental constitutional right to freely exercise religion.[xviii]

In eloquent dissent, Judge Jordan showed that the majority's legal reasoning "rest[ed] on a cramped and confused understanding of the religious rights preserved by Congressional action and the Constitution." But more importantly, Judge Jordan brought the focus back to the human cost of forcing religious owners to choose between their faith and bankruptcy: "[O]ne need not have looked past the first row of the gallery during the oral argument of this appeal, where the Hahns were seated and listening intently, to see the real human suffering occasioned by the government's determination to either make the Hahns bury their religious scruples or watch while their business gets buried."[xix]

The Mandate sharply departs from the Nation's bipartisan tradition of respect for religious liberty, especially its deep-rooted protection of religious conscience rights in the context of participation in, or funding of, abortion. We will soon learn, possibly this Term, whether the Supreme Court will uphold genuine religious liberty and require the government to respect the religious beliefs of those who will not participate in providing drugs that may end human lives.

[i] http://www.conestogawood.com.
[ii] http://www.hobbylobby.com/our_company/our_company.cfm.
[iii] For more information about the HHS Mandate litigation, visit the CLS website at www.clsnet.org.
[iv] The Tenth Circuit covers Oklahoma, Wyoming, Colorado, Utah, New Mexico, and Kansas.
[v] The Third Circuit covers Pennsylvania, New Jersey, and Delaware.
[vi] 42 U.S.C. §§ 2000bb, *et al* (2013).
[vii] Hobby Lobby Stores, Inc., et al. v. Sebelius, et al., 870 F. Supp.2d 1278 (W.D. Okla. 2012).
[viii] *Hobby Lobby Stores, Inc. v. Sebelius,* 2012 WL 6930302 (10th Cir. Dec. 20, 2012).
[ix] *Hobby Lobby Stores, Inc. v. Sebelius,* 133 S. Ct. 641 (2012) (Sotomayor, J., in chambers).
[x] Technically, the Tenth Circuit ruled that the companies had shown a likelihood of prevailing on the merits and irreparable harm but remanded for the district court to balance the equities and the public interest of issuing injunctive relief. The district court subsequently ruled in favor of the companies and issued a preliminary injunction prohibiting application of the Mandate to the companies' coverage of the objectionable drugs. *Hobby Lobby v. Sebelius,* 2013 WL 3869832 (W.D. Okla. July 19, 2013).
[xi] 1 U.S.C. § 1 (2013).
[xii] *Hobby Lobby Stores, Inc., et al., v. Sebelius, et al.,* 2013 WL 3216103, at *15 (10th Cir. 2013),.
[xiii] *Id.* at *20 (formatting altered).
[xiv] *Id.* at *23.
[xv] *Conestoga Wood Specialties Corp., et al., v. Secretary of HHS, et al.,* 2013 WL 3845365, at *7 (3d Cir. 2013).
[xvi] *Id.* at *8 (original emphasis).
[xvii] *Id.*
[xviii] *Id.*
[xix] *Id.* at *9 (Jordan, J., dissenting).