Advocacy Update

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On Tuesday, March 25, 2014, the Supreme Court heard oral argument in *Sebelius v. Hobby Lobby Stores, Inc.*, and *Conestoga Wood Specialties, Corp. v. Sebelius*, two cases that grapple with important questions of religious liberty and reproductive rights and women's health.

Later that day, Women of Reform Judaism Executive Director Rabbi Marla J. Feldman joined President of the Union for Reform Judaism, Rabbi Rick Jacobs, CEO of the Central Conference of American Rabbis, Rabbi Steve Fox and Director and Counsel of the Religious Action Center of Reform Judaism, Rabbi David Saperstein in a statement regarding oral argument. You can read the statement here.

What's at Stake in these Cases

Women of Reform Judaism, the Union for Reform Judaism, and the Central Conference of American Rabbis all joined an amicus brief in Hobby Lobby and Conestoga. The brief best outlines our position on issues at hand– and you can read it in full here. We believe that the contraception mandate wisely and delicately balances religious liberty and reproductive rights, by ensuring that non-profit institutions with religiously motivated mandates have exemptions and accommodations, but also ensuring that women have access to all the reproductive health care they deserve.

In a post on the WRJ Blog published last week, we discussed some of the central questions of the case and what's at stake before the nine justices (with many articles and blogs to read for background). The blog is available here, but here is a brief recap of the principal items:

Following many months of public debate, the Administration issued a final rule on access to contraception under the Patient Protection and Affordable Care Act (ACA). This mandate dealt with concerns regarding the requirement that new health care plans cover eight kinds of preventive care, including contraception.

The contraception mandate struck the following balance:

1. Houses of worship that object to providing contraception under their health care plans are fully exempt;
2. Religiously-affiliated organizations (such as universities or hospitals that are affiliated with religious groups) that object to providing contraception under their health care plans must self-certify that objection, and then a third-party insurer will contact employees about coverage for contraception separate from the employer; and
3. All other employers that provide health care have to include contraception in the plan they offer.

Corporations required to provide contraception under the ACA are neither exempted from nor accommodated by the contraception mandate. Thus, they must provide full contraceptive coverage. Yet some employers object to this on religious grounds. The owners of both Hobby Lobby, an arts and crafts supplies chain, and Conestoga Wood, a wood products supplier, object for religious reasons to certain kinds of contraception, and have sued the government under the First Amendment and the Religious Freedom Restoration Act of 1993, claiming the contraception mandate places a substantial burden on their religious free exercise rights.

The Religious Freedom Restoration Act (RFRA) is a law that the Reform Movement fought very hard to pass in the 1990s following an unfortunate decision in Employment Division v. Smith, which overturned decades of precedents that protected religiously-observant individuals from government laws that would infringe on their practice. RFRA partially restored that protection as it applied to certain, federal provisions, and many states have their own version of this law.

The owners of Hobby Lobby and Conestoga Wood claim that RFRA would require that an exemption from the contraception mandate should be carved out for them based on their religious objections. An important nuance

here is that Hobby Lobby and Conestoga Wood are bringing the case as corporations; the Court's decision will likely address what religious free exercise rights might be afforded to a corporation regardless of which way it rules.

Looking Ahead to the Decision

Following oral argument on Tuesday morning, eyes are now turning to the end of June 2014 when the Court is likely to issue its ruling. Although much of the deliberating and deciding goes on behind the closed doors of the Court by reading amici briefs and authoring opinions, oral argument is an important opportunity to get an idea of what the justices are considering when looking at the case.

SCOTUSblog.com offers the most comprehensive coverage of all Supreme Court goings on, and in their reporting, recounted the questions the justices asked the lawyers. Lyle Denniston sets the scene, writing "The Supreme Court, in a one-hour, 28-minute session Tuesday, staged something like a two-act play on a revolving stage: first the liberals had their chance and Justice Anthony M. Kennedy gave them some help, and then the scene shifted entirely, and the conservatives had their chance—and, again, Kennedy provided them with some support." (On many cases, but particularly the ones in the public spotlight, Justice Kennedy is the deciding vote between the liberal wing of the Court: Justices Stephen Breyer, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan; and the conservative wing: Chief Justice John Roberts, Justices Antonin Scalia, Clarence Thomas, and Samuel Alito.) Paul Clement, from the Becket Fund for Religious Liberty, represented Hobby Lobby and its owners, the Green family, and Conestoga and its owners, the Hahn Family. Solicitor General Don Verilli represented the government.

Depending on the way the justices rule, this case could have a sweeping effect on the framework of anti-discrimination protections that have existed in this country for many years. As Jeffrey Rosen explains in The New Republic, the Hobby Lobby case (and possibly *Elane Photography v. Willock*) will "force the justices to confront the future balance between the First Amendment on one hand and anti-discrimination laws on the other. In particular, the justices will have to decide whether the logic of Citizens United—that individuals who organize themselves as for-profit corporations have the same First Amendment rights as natural persons—includes rights of religious freedom as well as free speech."

As our Reform Movement played such a key role in passing the Religious Freedom Restoration Act (RFRA) we look to interpretations and comments on RFRA with particular interest. Dahlia Lithwick of Slate offered her analysis of oral argument, and highlighted one of the responses Justice Kagan gave Clement, saying, "'Your interpretation of [RFRA] would essentially subject the entire U.S. Code to the highest test in constitutional law, to a compelling interest standard' and allow employer after employer to voice religious objections to sex discrimination laws and minimum wage laws and family leave and child labor laws. All of which would be subject to what she describes as this 'unbelievably high test, the compelling interest standard.' Employers will, under that standard, virtually all win."

Another interesting point to consider, especially because the Court seemed divided along its typical lines, is what Cornell Law School Professor Michael Dorf highlights in a SCOTUSblog symposium piece on the contraception mandate. Professor Dorf writes about RFRA's constitutionality as applied to the federal government, and hones in on Justice Scalia's opinion in Employment Division v. Smith (the decision he authored that led to RFRA). Talking Points Memo discusses Dorf's piece, citing examples he raised and pointing out that:

"In 1990, Scalia wrote the majority opinion in *Employment Division v. Smith*, concluding that the First Amendment "does not require" the government to grant "religious exemptions" from generally applicable laws or civic obligations. The case was brought by two men in Oregon who sued the state for denying them unemployment benefits after they were fired from their jobs for ingesting peyote, which they said they did because of their Native American religious beliefs.

"[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability," Scalia wrote in the 6-3 majority decision, going on to aggressively argue that

such exemptions could be a slippery slope to lawlessness and that "[a]ny society adopting such a system would be courting anarchy."

"The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind," he wrote, "ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races."

How Justice Scalia will reconcile his previous opinion with the position he seemed to take in oral argument will an interesting nuance to look out for. Jess Bravin of *The Wall Street Journal* also notes this particular issue in his article, which goes further in depth into the history of religious exemptions in legal precedence pre-Smith.

If the Court determines that corporations are entitled to religious rights. We can hypothesize on how the justices will draw their lines for what constitutes a "substantial burden" on religious liberty. As with many high-profile cases, Justice Kennedy is likely to be the deciding vote.

It is hard to predict what a decision could look like. It could ascribe some religious exercise rights to corporations–or not. From oral argument, it appears that the Court might have accepted the principle that corporations might have some Free Exercise rights (read more analysis about this particular point at *The Washington Post*). *The New York Times*' Adam Liptak writes about the implications this case could have beyond the scope of contraceptive coverage on health care plans. This piece by Nina Tottenberg of NPR underlines the important components of these cases, which combined help explain why the questions before the Court are so complicated and possibly far-reaching.

As usual, WRJ is keeping a close eye on this case–be sure to stay tuned for further updates.