2013

High Court May Take Up Religious Exemptions

Arthur S. Leonard
New York Law School, arthur.leonard@nyls.edu

High Court May Take Up Religious Exemptions

BY ARTHUR S. LEONARD

A September 17 federal appeals court ruling that a business corporation owned by Roman Catholics is not entitled to claim a religious exemption from complying with the Obamacare requirement that employee health insurance plans cover contraception adds to the likelihood that the US Supreme Court will take up the question of whether corporations have a First Amendment right of "free exercise of religion" based on the beliefs of their owners.

Religious exemptions have been a particularly fraught issue in gay rights and marriage equality laws, with church groups arguing they should not be bound by requirements at odds with their beliefs. One of the controversial questions under the pending Employment Non-Discrimination Act (ENDA), which would ban employment discrimination based on sexual orientation or gender identity, concerns the scope of a religious exemption from compliance for certain employers. As currently drawn, the exemption would apply broadly to entities owned or controlled by religious bodies (too broadly in the view of many), but would not create an exemption for non-religious business corporations, even if their owners had religious objections to employing gay or transgender people.

Sweeping claim that private corporations can sidestep nondiscrimination laws poses significant threat

Similar stories

BREAKING NEWS: High Court Says For-Profit Corporations Can Claim Religious Exemptions

BREAKING NEWS: Trump Goes With Scalia Acolyte for High Court

BREAKING NEWS: Gorsuch Pushes Court Balance to the Right

BREAKING NEWS: Obama Stand-Up Guy on Religious Exemptions, But Questions Remain

FROM THE EDITOR: Kudos to the President and Next Steps for All of Us

FROM THE EDITOR: Praying for Your Job

Regarding the contraception requirement, the Sixth Circuit Court of Appeals, based in Cincinnati, ruled two weeks

ago that business corporations do not have such a First Amendment right, agreeing with a recent decision by Philadelphia's Third Circuit Court of Appeals but disagreeing with a ruling by the 10th Circuit Court of Appeals, based in Denver. Federal trial courts are also split on this issue, with profound implications for nondiscrimination and same-sex marriage laws.

A Supreme Court decision like the 10th Circuit's ruling could provide a constitutional mandate to extend the religious exemption to privately owned corporations. Given the split among the nation's appellate circuits, it seems likely that the high court will grant petitions for review of one or more of the religious exemption rulings in its term beginning October 7.

Autocam Corporation and Autocam Medical, LLC, are for-profit manufacturing companies owned by members of the Kennedy family, Roman Catholics from Western Michigan who agree with the Church's ban on contraception and object to any requirement that they pay for contraceptives for their employees. The healthcare law's mandate that went into effect this year requiring such coverage, they argue, forces them to either violate the Church's teachings or pay significant fines. Their lawsuit relied on the First Amendment's protection for free exercise of religion and on the Religious Freedom Restoration Act (RFRA), a 1993 statute that Congress passed to ensure that individuals would not be required to violate their religious beliefs, unless the government could show a compelling reason for requiring them to.

The Sixth Circuit panel concluded, as had the Third Circuit before it, that business corporations — as opposed to religious corporations, such as churches or religious schools, incorporated under state laws — are not covered by RFRA and not protected by the First Amendment's free exercise clause. Their owners might have religious beliefs burdened by the application of the law, but by deciding to do business as a corporation they are creating an entity separate and apart from themselves, a distinction very important for a variety of reasons, including liability for corporate actions.

Writing for the court, Judge Julia Smith Gibbons found that the contraception mandate falls on Autocam, not the Kennedys, who themselves lack "standing" as individuals to bring the lawsuit.

In 1990, the Supreme Court ruled that the First Amendment does not bar legislators from passing "a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that [a person's] religion prescribes (or proscribes)." Congress passed RFRA three years later for the express purpose of giving "a claim or defense to persons whose religious exercise is substantially burdened by the government," to "restore" the constitutional protections its supporters believed the Supreme Court tore down in its 1990 decision.

Autocam argued it can claim an exemption under RFRA using the argument that the corporation's right to free exercise of religion was "substantially burdened" by the government. But that claim goes nowhere if a business corporation, even a closely held one like Autocam, does not enjoy any right of free exercise of religion. Surely, a publicly-traded business corporation with thousands of shareholders could not plausibly make such a claim, but Autocam and the other companies challenging the

contraception mandate are family businesses that argue they consider the expenditure of corporate funds to be virtually personal expenditures.

RFRA is phrased in terms of protecting the right of a “person” to free exercise of religion, and corporations are treated like “persons” for various purposes under the Constitution. In its controversial 2010 Citizens United decision, the Supreme Court ruled that corporations are “persons” for purposes of First Amendment free speech protection in their political spending. They also enjoy due process and equal protection rights as “persons” in matters of government appropriation of corporate property or discriminatory treatment of particular corporations.

The Supreme Court, however, has never held that a business corporation is an entity capable of practicing a religion or that requiring a corporation to comply with general laws could place a burden on the collective free exercise of religion of their shareholders. The Sixth and Third Circuits, unlike the 10th, were unwilling to take this step.

The 10th Circuit case, decided in June, found that the reasoning of Citizens United applied to closely-held family-owned corporations like Hobby Lobby, an Oklahoma arts and crafts supply retailer. The identity of the owners and the corporation were deemed so entwined that imposing the mandate on Hobby Lobby was, in effect, imposing it on its owners, the court found.

In the Autocam case, Judge Gibbons wrote it should be viewed in the “context” of “the body of free exercise case law that existed at the time of RFRA’s passage,” and she found “strong indications that Congress did not intend to include corporations primarily organized for secular, profit-seeking purposes as ‘persons.’” Interpreting RFRA to allow such claims “would lead to a significant expansion of the scope of the rights the Free Exercise Clause protected” prior to the 1990 ruling, she wrote.

Noting that “the Free Exercise Clause and the Free Speech Clause of the First Amendment have historically been interpreted in very different ways,” Gibbons rejected any analogy to the Citizens United case.

A recent ruling by the New Mexico Supreme Court illustrates the significance of this issue for LGBT rights. The high court ruled that Elane Photography violated the state’s public accommodations law because its owner declined a job photographing a same-sex commitment ceremony, on the ground that this would violate her religious liberty. As a public accommodation and business corporation, the court found, Elane could not raise a free exercise claim under the First Amendment or under a New Mexico religious freedom statute similar to RFRA. Courts have generally come to the same conclusion in cases arising against bakeries, florists, and catering halls that have declined to take on same-sex ceremonies.

A Supreme Court decision to the contrary on First Amendment grounds, which would take priority over state anti-discrimination laws, could tear a big hole into gay rights protections. A dramatic example of its potential impact was the high court’s 2000 Boy Scouts ruling, in a 5-4 vote, that New Jersey’s public accommodations law did not protect openly gay James Dale’s right to serve as an assistant scoutmaster. The Scouts won on their claim to a federally protected First Amendment right of

expressive association, and the Supreme Court did not find it necessary to address the group's separate religious freedom claim.

That issue could be up next.