

To: Our Clients and Friends

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Hobby Lobby Decision Strengthens Religious Exemption Claims

The U.S. Supreme Court has ruled that the government cannot require Hobby Lobby, in violation of its religious beliefs, to provide abortion-inducing contraceptives in its health plan. In reaching this conclusion, the Court adopted nearly all of the positions for which we argued in a “friend of the court” (*amicus*) brief we filed with the Court to protect the religious liberty interests of nonprofit religious organizations (for a copy of the brief, click [here](#)).

In our current legal climate, it is becoming increasingly difficult for religious organizations to:

- (1) employ fellow believers as they deem necessary;
- (2) carry out their ministry activities in accordance with their beliefs (e.g., with respect to marriage and sexual conduct); and
- (3) qualify for religious tax exemptions.

The Hobby Lobby decision significantly strengthens the hand of religious organizations in these areas.

Religious Exemptions

Specific Religious Exemptions. Many laws that could impact religious beliefs already include specific exemptions for “religious organizations” or “religious activities.” In some cases, government officials or courts have interpreted these exemptions narrowly so that organizations serving the public or engaging in commercial or secular activities do not qualify. However, the Supreme Court has now expressly affirmed that religious exercise can occur in all types of activities engaged in for sincerely held religious reasons (including Hobby Lobby’s business). In addition, the Court held that the protection of religious exercise applies in the “public square” and cannot be confined to private gatherings. As a result, it will be more difficult to deny exemptions to religious organizations merely because they choose to conduct commercial or secular activities in furtherance of their mission.

General Religious Liberty Claims. For those laws that do not include specific religious exemptions, federal law offers additional protection through the Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause of the U.S. Constitution. In very general terms, a law that *substantially burdens* religious exercise is not valid unless it is the *least restrictive means of furthering a compelling governmental interest*.

The Supreme Court's application of RFRA in the Hobby Lobby decision will make it easier for religious organizations to obtain religious liberty protection. First, the Court held that a *substantial burden* applies whenever a law requires an organization to act in violation of its religious beliefs, and that government officials must defer to an organization's own determination as to what actions violate its beliefs.

Second, the Court held that the test focuses on the marginal interests served by applying the law to the religious objector rather than on broad interests. In addition, the Court noted that a law with exemptions for other interests is unlikely to be serving compelling governmental interests.

Finally, the Court held that the government can be required to set up other programs to serve its interests and that alternative means to further these interests can be required even if they adversely impact third parties (such as employees).

Application to the Contraceptive Mandate "Accommodation." The Court's interpretation of RFRA will be applied immediately in the many current legal challenges to the Contraceptive Mandate "accommodation" for non-church religious organizations (this "accommodation" is summarized in the Client Alert available [here](#)). Although the Hobby Lobby decision specifically does not address the question of whether the "accommodation" satisfies the RFRA requirements, different portions of the decision are being cited either in support of or against the "accommodation." The resolution of this question could determine the extent to which the Court's interpretation of RFRA will apply in other situations.

Points of Caution

It is important to note that the religious liberty protections in the Hobby Lobby decision were supported by only a bare majority of the Supreme Court. There is strong opposition to this protection both on and off the Court. And there are several ways in which this protection could be undermined.

The four dissenting Justices proposed a religious organization/exercise definition that would narrow not only RFRA but also the Title VII religious employer exemption. Under Title VII, religious employers are exempt from the general prohibition on religious discrimination in hiring. However, Title VII does not fully define a religious employer and the courts have not agreed on a definition. In a recent Title VII case involving World Vision, one judge proposed a narrow definition that would NOT apply to any organization engaged substantially in the sale of goods or services. The dissent in Hobby Lobby endorsed this definition and argued that it should apply under RFRA. We expect that others in the future will now argue that this definition should at least apply under Title VII.

Many laws are not subject to RFRA. Because RFRA applies only to federal laws, it does not protect religious exercise with respect to state laws (or federal laws that expressly opt-out of RFRA). Although many states have adopted laws similar to RFRA, the scope of protection provided by these laws (or by the Free Exercise Clause) was not addressed in the Hobby Lobby decision. However, both the majority and the dissent did suggest that the religious liberty protection offered by the Free Exercise Clause is not as broad as that provided under RFRA (although the precise extent of this difference was not addressed).

Strategic Planning

The Hobby Lobby decision gives religious organizations additional protection to accomplish their respective religious missions without being required to sacrifice their religious character. But religious organizations should consider carefully whether they are properly positioned to take advantage of this protection. Among other things, religious organizations should document clearly their religious beliefs regarding current social trends and specific actions that would violate their religious beliefs. They should also document how their various activities and policies reflect their religious beliefs and further their religious mission.

Please feel free to contact any one of us if you would like to discuss these issues in more detail.

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