MEMORANDUM

To: NFPRHA Members
From: Robin Summers, Senior Policy Director, NFPRHA
Date: July 16, 2014
Re: Hobby Lobby: Analysis and Perspective

The US Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, and *Conestoga Wood Specialties v. Burwell* (hereinafter "*Hobby Lobby*") was a setback, to be sure. The 5-4 ruling that, under the Religious Freedom Restoration Act (RFRA), closely held corporations do not have to comply with the Affordable Care Act's (ACA) contraceptive coverage requirement, undermines the historic expansion of and protections for contraceptive access. Although the requirement—which has enabled millions of women to obtain the best contraceptive method for them without the co-pays or other cost sharing that often serve as a barrier to care, particularly for low-income populations—remains in effect post-*Hobby Lobby*, it has been diminished, leaving the coverage of a growing number of women at the will of their employers.

In the weeks since the Court issued *Hobby Lobby*, much has been written about the decision. It has been explained and re-explained, interpreted and analyzed, deconstructed and contextualized, and vilified and lauded in equal measure. While we in the field of family planning and sexual health have condemned the decision as an assault on women's liberty, contraception, and the right of individuals to make health care decisions in accordance with their own needs and beliefs, opponents of contraceptive access have hailed it as a victory for religious freedom.

The immediate implications of the decision are mindboggling. As Justice Ginsburg points out in her dissent, never before has the "Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA," and the piercing of the "corporate veil" is likely to have a profound ripple effect in American jurisprudence. Yet the full ramifications of the decision will not be known for some time, likely years. As with many significant Supreme Court rulings, the ultimate impact is not limited to the parties or specific issues directly involved in the case. *Hobby Lobby*'s legacy will be written in part by cases currently before the courts, other cases yet to be brought, and how the courts—including the Supreme Court itself—choose to interpret and apply *Hobby Lobby* to a different set of parties and a different set of facts. And the majority opinion in *Hobby Lobby*, written by Justice Samuel Alito, leaves much to be interpreted and applied.

For example, what exactly constitutes a "closely held corporation" (i.e. to which companies does this ruling apply)? The Court does not say, and although Justice Alito writes that the companies involved in *Hobby Lobby* are all "owned and controlled by members of a single family," closely held corporations can take forms other than single-family ownership. The Internal Revenue Service definition is a corporation where more than 50% of the value of its outstanding stock is owned by 5 or fewer people at any time in the last half of the tax year, and which is not a personal service corporation. As has been pointed out, these are not just the "mom and pop" stores down the street, even though Justice Alito seems to think that only publicly traded companies can be "corporate giants." Closely held corporations include the Mars candy corporation, Dell computers, Publix Super Markets, PricewaterhouseCoopers, Toys 'R' Us, and Heinz, to name a few. According to a 2000 study, about 90% of all companies in the US are considered closely held corporations, and they employ 52% of the American workforce.

As for the rest of the workforce employed by publicly traded companies, Justice Alito sweeps the issue under the rug, writing that "it seems unlikely" that such companies would "often assert RFRA claims," and that, regardless, publicly traded companies are not at issue in *Hobby Lobby* so therefore the Court does not rule on RFRA's applicability to them. That, of course, is unlikely to stop some companies from asserting such claims, and so it will likely once again be up to the Supreme Court, somewhere down the road, to decide whether ownership structure really makes a difference in the new world of corporate religious personhood the Court has created.

And what about other health services to which corporate owners might object, such as blood transfusions, immunizations, antidepressants, etc.? The majority opinion focuses significant energy to defending itself against the dissent's accusations that the opinion is broad in its scope. Justice Alito writes, "[O]ur decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests . . ." But as Justice Ginsberg so elegantly points out in her dissent, "Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private. Little doubt that RFRA claims will proliferate, for the Court's expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith."

As the old saying goes, if it walks, quacks, and looks like a duck, it is in all likelihood a duck. Despite the majority's insistence that the decision is limited, the reality is it that, by its very reasoning, it has the potential to be very broad. The Supreme Court has left little guidance for the lower courts as to where to draw the line between religious accommodation and protecting the rights of those impacted by such accommodations. Despite Justice Alito's attempts at reassurance about the decision's impact on future cases, *Hobby Lobby* must be viewed as the sum of all of its parts, and many of those parts are deeply troubling.

We have already seen the Supreme Court demonstrate the potential breadth of *Hobby Lobby*, mere days after the decision. Although the ruling is specific to four contraceptive methods objected to by Hobby Lobby and Conestoga Wood Specialties, it is not limited to those methods. There was some question about this on the day of the decision, and indeed supporters of *Hobby Lobby* called much attention to the "fact" that the ruling was only about four specific methods, and women therefore still had access to sixteen more (that is the polite way of recapping some of the arguments that were far less than polite and which showcased how ill-informed many are about why one method does not fit all women). But on July 1, the Court shattered any illusion that *Hobby Lobby* was limited to four methods, when it issued several orders without comment leaving in place lower court rulings in favor of businesses challenging coverage of all 20 FDA-approved contraceptive methods. The Court also remanded three other cases to lower courts that had ruled in favor of the contraceptive coverage requirement, ordering them to reconsider those decisions in light of *Hobby Lobby*.

Along with the broader application to all contraceptive methods, the Court has also signaled that *Hobby Lobby*'s reach might be more expansive when it comes to the government's options for ensuring contraceptive access. The majority's ruling in *Hobby Lobby* turned on the question of whether the contraceptive coverage requirement was the least restrictive means of furthering a compelling governmental interest. The Court concluded that it was not, in part because the government could simply "assume the cost" of providing the contraception, but in larger part because the government has an existing approach that could be used: the accommodation for religious nonprofit organizations. The accommodation allows religious nonprofits to opt out of directly arranging or paying for contraceptive coverage if they sign a form certifying that such coverage violates their religious beliefs; in such cases, the insurance plan must offer the coverage directly to enrollees without cost-sharing. In *Hobby Lobby*, the Court pointed to this approach as a less restrictive means of ensuring contraceptive access. Although Justice Alito was careful to say that the Court was not ruling on whether the accommodation complies with RFRA, he wrote, "At a minimum, however, it does not impinge on the plaintiffs' religious belief

that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well."

Many analysts interpreted the majority's language to mean that the accommodation—which is being challenged in a separate line of cases brought by religious nonprofits that argue that by signing the form, they are being forced to endorse contraception—would likely be upheld when the nonprofit cases eventually reach the Supreme Court. Yet only three days after *Hobby Lobby*, on July 3, the Court prevented the Obama administration from requiring that Wheaton College comply with the accommodation. The Court, while writing that its order should not be construed as expressing its views on the merits, noted that the lower courts are divided on the accommodation's requirement that nonprofits sign a form, and that this kind of division is "traditional ground" for the Supreme Court. In the Court's view, the order does not prevent Wheaton College's employees and student from getting their contraceptives covered by the insurer because, even without the form, the government had been notified of Wheaton College's objection and can rely on that to require the insurer to provide the coverage.

In a scathing dissent, written by Justice Sonia Sotomayor and joined by Justices Ginsburg and Elena Kagan, the female justices pointed out the hypocrisy of the order. "Those who are bound by our decisions usually believe they can take us at our word. Not so today. After expressly relying on the availability of the religious-nonprofit accommodation to hold that the contraceptive coverage requirement violates RFRA as applied to closely held for-profit corporations, the Court now, as the dissent in *Hobby Lobby* feared it might . . . retreats from that position."

The question now is, where does *Hobby Lobby* leave us? What we know is that women who work for Hobby Lobby, Conestoga Wood Specialties, and Mardel (which is owned by family members that own Hobby Lobby) no longer have access to four methods of birth control. Soon, as other closely held corporations object to providing coverage for some or all contraceptives—although we do not know the precise process required for companies to act on such objections—more women will lose their contraceptive coverage. We can assume that at some point, closely held corporations that are not as closely held as *Hobby Lobby* will file lawsuits challenging their responsibility to provide contraceptive coverage.

Beyond these immediate concerns, the implications are far less clear. Will publicly traded companies challenge the requirement? Will companies, closely held or otherwise, use *Hobby Lobby* to challenge coverage of other health services? Will they go further, relying on this case

to attempt to justify racial, gender, or other discrimination on the basis of religion? And what about the accommodation? If the Supreme Court were to eventually strike down the accommodation, would that effectively turn the contraceptive coverage "requirement" into a mere suggestion? Certainly, based on *Hobby Lobby*, if the accommodation is not a less restrictive means for furthering the government's compelling governmental interest in ensuring contraceptive access, then are we simply left with the Court's alternative suggestion: that the government can assume the cost? Congress's record on creating new government-supported health care programs, or appropriately funding Title X and other safety-net programs, has been very poor in recent years, and as NFPRHA has argued and Justice Ginsburg noted, "'Safety net programs like Title X are not designed to absorb the unmet needs of . . . insured individuals.'"

The good news is that we do not have to wait for *Hobby Lobby*'s full implications to become clear; Congress has an opportunity now to fix the Supreme Court's damaging decision, before it has the chance to undermine contraceptive and other health coverage for millions. Last week, Senators Patty Murray (D-WA) and Mark Udall (D-CO) and Representatives Diana DeGette (D-CO), Louise Slaughter (D-NY), and Jerrold Nadler (D-NY) introduced the "Protect Women's Health from Corporate Interference Act" in Congress. The bill would restore the contraceptive coverage requirement, preventing employers from denying coverage of any health services—including contraception—guaranteed to their employees and dependents under federal law.

There have been several procedural votes on the bill in both the House and Senate this week. Yesterday, Democrats in the House set up a procedural vote that, if it had been successful, would have given them control of the House floor and the ability to call for a vote on the Protect Women's Health from Corporate Interference Act. Today in the Senate, although a majority voted to end debate and allow the bill to receive an up-or-down vote, the Senate could not obtain the 60 votes needed to invoke cloture.

Congress still has a lot of work to do. Please take a moment to urge your representative and senators to pass the bill in their respective chambers.

NFPRHA will continue to work to protect the ability of all individuals, regardless of where they work, their income level, or their gender, to access the full range of contraceptive options. If you have questions about our work on your behalf, please contact Robin Summers at rsummers@nfprha.org or 202-286-6877.