

Supreme Court Vindicates Religious Liberty of Family Businesses

Yesterday, the United States Supreme Court ruled that owners of for-profit companies do not forfeit their religious freedom rights when they organize their businesses as corporations and engage in commercial activities. Nearly two years to the day after the U.S. Supreme Court narrowly upheld the constitutionality of the federal Affordable Care Act's ("ACA") individual mandate, the Court has again addressed the constitutionality of a provision of the Act. In the companion cases [*Burwell v. Hobby Lobby Stores Inc.*](#), and *Conestoga Wood Specialties Corp. v. Burwell*, the Court, in a 5-4 decision written by Justice Alito, yesterday ruled that the ACA's contraceptive mandate violates the Religious Freedom Restoration Act of 1993 (RFRA) as applied to closely-held for-profit corporations. RFRA prohibits the government from substantially burdening a person's free exercise of religion, unless the burden advances a compelling government interest by the least restrictive means. In the Court's words, "separate and apart from the human beings who own, run, and are employed by them," a corporation "cannot do anything at all."

These two appeals challenged the ACA's contraceptive mandate that requires all group health plans and health insurance issuers to provide the full range of FDA-approved contraceptives, sterilization surgeries, and patient counseling for women with reproductive capacity without any cost-sharing. Many religious corporations, charitable organizations, and para-church groups opposed the mandate and more than 100 cases challenging the mandate have been filed by a broad range of for-profit and nonprofit companies.

Gammon & Grange has long been committed to helping our clients - both nonprofit and for-profit -faithfully and effectively carry out their missions, including where those missions are faith-based or religious. In fact, Gammon & Grange assisted one of the few (and perhaps only) expressly religious for-profit corporations to be listed on a national public stock exchange (NASDAQ) and has helped hundreds of religious nonprofit organizations protect their religious identities through our legal audits and other legal advice. Because the principle in the two cases decided yesterday is vital to almost all religious organizations, [Gammon & Grange submitted an *amicus curiae* brief](#) on behalf of a for-profit corporation supporting the religious freedom rights of the businesses and their owners.

While courts have long protected the sincerely held religious beliefs and practices of individuals against intrusive government regulations, yesterday's decision confirms that those protections extend to at least some for-profit corporations. Justice Alito's majority opinion makes clear that: (i) for-profit corporations are *persons* protected under RFRA; (ii) closely held for-profit corporations are capable of engaging in an *exercise of religion* protected by RFRA. (the Court noted that it was not deciding whether a publicly traded corporation could assert a RFRA claim); (iii) the contraceptive mandate *substantially burdens* the exercise of religion by the individual owners and their companies; and (iv) even if the contraceptive mandate is *in furtherance of a compelling governmental interest*, it would still be struck down because it is not the *least-restrictive-means* of achieving the government's interest. As Gammon & Grange and others argued in *amicus* briefs, a corporation engaged in commercial activity can have religious beliefs and base its commercial actions upon faith principles (even distinct from the religious beliefs of its owners).

Yesterday's decision will have far-reaching effects impacting corporate identities and corporate actions of both for-profit and nonprofit corporations. While yesterday's decision deals directly with closely held for-profit corporations, many of the government's arguments in the case could have been raised against religious nonprofit organizations as well. In fact, over 100 nonprofits have filed suit against the contraceptive mandate under RFRA and the First Amendment. However, those challenges have largely been frozen pending the Court's decision in yesterday's cases.

Following the Supreme Court's ruling, any for-profit or nonprofit religious corporation needs to take steps to ensure that its religious identity is sufficiently established and articulated to withstand a challenge by the government or a third party litigant. As the Court did yesterday, the government can make a neutral facial inquiry whether the organization holds itself out - to the public and internally - as having religious purposes and engaging in religious activities.

For more than thirty years, Gammon & Grange has successfully assisted many for-profit and nonprofit corporate clients in proactively auditing and revising mission, vision, governance, and other corporate documents to unambiguously establish their faith-based bona fides. For more information regarding the Supreme Court's decision and how your for-profit or nonprofit organization can better protect its religious identity and free exercise rights, contact Scott Ward, Steve King, or Patrick Purtill at (703) 761-5000.

© 2014 Gammon & Grange, P.C. For more information, contact Gammon & Grange, P.C. (GGAlert@gg-law.com; 703-761-5000), a law firm serving nonprofit organizations and businesses throughout the United States and abroad. Readers may freely copy and distribute this Alert *in full without modification*.

Disclaimer: This memo is provided for general information purposes only and is not a substitute for legal advice. The transmission of this memo does not create an attorney/client relationship. No recipients of this memo should act or refrain from acting on the basis of this memo without seeking professional legal counsel. Gammon & Grange, P.C. expressly disclaims all liability relating to actions taken or not taken based on the content of this memo.