Supreme Court Decisions

Perhaps the two biggest developments from late June through September concerned decisions by the US Supreme Court.

On June 26, the Court issued its opinion in *McCullen v. Coakley*.[1] The case concerned whether a law passed by the state of Massachusetts violated the Constitution of the United States. The law made it a crime knowingly to stand on a "public way or sidewalk" within thirty-five feet of an entrance to a "reproductive health care facility," defined as "a place, other than … a hospital, where abortions are … performed."[2] The law permitted employees of abortion clinics to be in this space and did not restrict their speech.[3]

Although the Supreme Court unanimously ruled that the law *did* violate the Constitution, their unanimous vote masks essential disagreements that rob the decision of much of its pro-life force. The ruling was 9 to 0, but it reads more like the 5 to 4 splits we are used to getting from the Court on disputed social issues. Chief Justice John Roberts, who is often among the four conservatives in such cases, wrote for the majority. (Usually it is Justice Kennedy who provides the fifth, or "swing," vote.) Roberts was joined by the four liberals, Justices Ruth Bader Ginsburg, Sonia Sotomayor, Elena Kagan, and Stephen Breyer. Thus, only five of the nine justices entirely supported the opinion written by Roberts.

Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito "concurred" in what was a dissent in all but name. They officially "concurred in the

---

[1] 573 US __ (2014).

[2] Mass. Gen. Laws, ch. 266, §§120E1/2(a), (b) (2012).

[3] Ibid., (b)(2). Obviously such employees have to cross the space to enter the clinic for work. However, the issue, as we shall see, was whether it was legally significant that their speech while within the thirty-five-foot radius was not limited.

judgment" that the law was unconstitutional (thereby making it a 9 to 0 vote), but they saw the factual situation much differently and would have applied a different legal test. In other words, they supported the holding of the case (that the Massachusetts law was invalid) but disagreed thoroughly with its reasoning. It is this difference in reasoning that will bedevil future situations and lead to additional litigation.

For the four justices who concurred, the facts that the law (a) was aimed at abortion clinics, rather than at all health clinics and (b) permitted abortion clinic workers to be in, and to speak freely in, the thirty-five-foot zone (c) while excluding pro-life persons provided convincing evidence that the law was not "content neutral."[4] If a law is not content neutral, it can only be upheld if it satisfies the "strict-scrutiny" standard. The strict-scrutiny standard will be familiar to readers of this column, as it is the same standard applied in the HHS mandate cases. It is the toughest standard for the government to satisfy: government must show that it has a compelling interest and is using the least restrictive means. Since the government did not show that it had a compelling reason to restrict pro-life speech or that the restrictions were the least restrictive, it did not satisfy the test and the statute was invalid.

The majority of five, finding that the statute *was* content neutral, did not employ the strict-scrutiny test and instead used the lesser (that is, easier for the government to satisfy) test—to wit, "time, place, and manner" restrictions may be imposed on speech if they (a) are narrowly tailored to (b) serve a significant government interest and (c) leave open ample alternative channels for communication. The majority five found that the Massachusetts law was not "narrowly tailored"—the government could have accomplished its purposes in other ways, such as having police disperse crowds if they gather, without prohibiting pro-life speech with thirty-five feet of abortion clinic entrances—and hence it failed to satisfy the test. However, its analysis demonstrates, as I will show, why the majority should have used the strict-scrutiny test in the first place.

First, the majority-five said the statute *was* content neutral (and thus the strict-scrutiny test, which is almost always fatal to a statute, did not need to be employed to judge it). Its evidence for content neutrality was that the concerns raised by Massachusetts—public safety, patient access to health care, and unobstructed use of sidewalks—were not implicated at other kinds of health care facilities. But in saying this, the Court made clear that the law was aimed at *abortion clinics,* not at health care clinics generally; thus, it was not content neutral (it is aimed only at abortion). Hence, the strict-scrutiny standard should have been used to decide whether the law, though not content neutral, is still valid (i.e., if the government could show a "compelling purpose" and the means it used are "least restrictive").

Second, having said the statute was content neutral, the Court found that it failed, nonetheless, under the time-place-manner test because it was not "narrowly tailored." The Court's evidence for this was that women who approached abortion clinics could

[4] Justice Alito filed a separate concurring opinion and did not join Scalia's opinion on behalf of Scalia, Kennedy, and Thomas. Alito focused on the fact the statute was not "viewpoint" neutral. But in many ways, the two standards are identical, and I will so treat them in the body of this article.

hear only pro-abortion speech. But this again points up the contradiction in the majority-five analysis. If such women will be able to hear only pro-abortion speech, is that not proof that the statute is excluding another kind of speech (pro-life) and hence is not content neutral?[5]

A non-lawyer may well ask, What difference does it make which test is employed, whether it is the concurring-four's strict scrutiny or the majority-fives's time-place-manner narrow tailoring? After all, the Massachusetts statute failed under both tests! That is true, but the reason it matters is for future cases, which will have different facts. Will those facts be judged under the exacting strict-scrutiny test or under the lenient time-place-manner test? If they are judged under the more lenient test, the government will be able to justify greater restrictions on pro-life speech. If laws dealing with abortion are content neutral, such laws have a much greater chance of being upheld by courts.

As both the majority-five and concurring-four agree, speech, particularly on public sidewalks, is customarily judged under the exacting strict-scrutiny test (and limits on such speech are rarely upheld). An exception was carved out by a prior Supreme Court decision, *Hill v. Colorado*.[6] *Hill v. Colorado* upheld an eight-foot bubble zone around those approaching an abortion clinic; in other words, pro-life speakers could not approach closer than eight feet unless the person consented. The decision has been heavily criticized, since at least part of the point of the First Amendment is to provide the opportunity to persuade, to engage those who disagree as well as those within earshot. (So long as the potential listener is free to walk away, he has no right to prevent the other from speaking.) Despite what the majority said in *Hill*, eight feet is not normal conversational distance, and one would have to be the proverbial Plastic Man to offer—and deliver—a pamphlet from that distance. (Pamphleting on public streets has long been protected by the strict-scrutiny standard.)

Hence, perhaps the most important question raised in *McCullen v. Coakley* was whether *Hill v. Colorado* would be overruled. Sadly, it was not. However, Scalia, a dissenter in *Hill* (along with Kennedy and Thomas), suggested that the majority-five, in saying that a law would not be content neutral if it were concerned with protecting unwilling listeners, may have effectively overruled *Hill*, since *Hill* is premised on the protection of the unwilling listener! That would be ironic, indeed, particularly since it is the strongest proponents of abortion-rights who voted with Chief Justice Roberts in *McCullen*. However, the fact that two of those votes came from justices (Ginsburg and Breyer) who were on the Court when *Hill* was decided—and who voted with the majority to grant a Constitutional imprimatur to the eight-foot bubble

[5] This kind of targeting would traditionally be called viewpoint discrimination. This is what Justice Alito focused on in his concurrence, showing how discriminatory on this basis the statute was. However, as noted above, since a violation of either content or viewpoint neutrality subjects a statute to strict-scrutiny analysis, I am treating the two as synonymous in this article. Criticisms from either angle—content or viewpoint—demonstrate that the statute should be examined under strict scrutiny.

[6] 530 US 703 (2000).

zone—makes it unlikely that Scalia is right[7] (though that question will certainly be raised in subsequent litigation).

The other case was, of course, the one involving Hobby Lobby.[8] But here too the Supreme Court rendered a decision, coming at the very end of its annual term and four days after its decision in *McCullen*, that while providing a pro-life victory may, on closer examination, offer less than appeared at first blush.

As readers know, the case involved the mandate from the Department of Health and Human Services (HHS) that insurance plans include coverage of certain services—contraception, including some abortifacients, and sterilization—that some employers objected to including for religious or moral reasons. These objectors included many nonprofit religious organizations, and after much political turmoil, as recounted in previous columns here, HHS offered them an "accommodation," under which, speaking broadly, the burden of providing the objectionable services was supposedly shifted from the employers to the insurance companies.[9]

This accommodation was not offered to businesses or "for-profit" organizations. Hence, the owners of for-profit businesses (such as Hobby Lobby and Conestoga Wood) who had moral or religious objections to providing insurance for the objectionable services brought suit, claiming their rights were violated under, *inter alia*, the Religious Freedom Restoration Act (RFRA).[10] RFRA requires the government to provide a compelling reason for a substantial infringement of "a person's" religious liberty. It also requires the government to prove that it is using the least restrictive means in doing so. This, again, is the strict-scrutiny test.

In a 5-to-4 opinion, the Supreme Court upheld the claims of the closely held family business corporations.[11] (The question whether publicly held corporations,

---

[7] It should be noted that in *Hill*, the Court deferred to the legislature's judgment regarding narrow tailoring. However, in *McCullen*, the majority-five "put teeth" into the narrow-tailoring requirement. If the Court adheres to a tough narrow-tailoring requirement in subsequent cases, the likely result will be the invalidation of many restrictions on pro-life speech. For instance, the majority-five held that Massachusetts did not satisfy the requirement because it could not show that it had tried to enforce less restrictive measures before enacting the thirty-five-foot speech-free zone. Thus, the statute burdened "substantially more speech than necessary" and was not narrowly tailored.

[8] *Burwell v. Hobby Lobby Stores*, 573 US __ (2014). The Hobby Lobby case was consolidated with another case involving another family business, Conestoga Wood, which raises the same issues. Hobby Lobby was vindicated in one federal circuit (the Tenth), while Conestoga Wood was denied in another (the Third). This "circuit split" provided the opportunity for the Supreme Court to review the decisions and clarify the law for all circuits. Notice that since June 2014, Sylvia Burwell, rather than Kathleen Sebelius, is the secretary of HHS, and cases proceeding after that date are titled in her name.

[9] Churches and religious orders were "exempted" completely from the HHS mandate.

[10] 42 USC §§2000bb et seq.

[11] Justice Ginsburg wrote a blistering and intemperate dissent in which Sotomayor, Kagan, and Breyer joined. She called the decision—carefully limited by the majority to the facts before it—"a decision of startling breadth." She labeled it "extreme," and began her analysis by citing the contested and contentious assertion of the three-justice plurality in *Planned Parenthood*

i.e., those whose shares are publicly traded, had similar rights was not before the Court, which refused to address that issue.[12]) Since RFRA does not define "person," the Court had, as a preliminary matter, to determine whether these businesses were entitled to sue under RFRA, and the Court had little difficulty in concluding that they were. The Court noted that RFRA was intended to provide broad protection for religious liberty, without any indication that it does not extend to closely held corporations. Further, the ordinary rule of construction of a statute is that "person" includes corporations (artificial persons).[13] In addition, HHS had conceded during the case that *nonprofit* corporations were "persons" under RFRA.

The Court found that the burden on the businesses was "significant," as required by RFRA to trigger the strict-scrutiny test. (The fines would have amounted to millions of dollars.) Assuming, for the sake of argument, that the government had a compelling interest for the mandate, the Court found that the government failed to satisfy the second part of the strict-scrutiny test, that is, that the means used were the least restrictive, a requirement that the Court termed "exceptionally demanding."[14] What alternatives existed for the government that were less restrictive? The Court supplied two: the government itself could assume the cost of providing the contraceptives, or it could extend the accommodation to for-profit corporations.[15]

The Court's second example raises an important question, one at the heart of the litigation of the second group of cases challenging the HHS mandate, cases brought by *religious nonprofits*. These cases are based on the claim that the accommodation provided by HHS is *not sufficient* to satisfy the demands of RFRA. Plaintiffs assert that their religious beliefs prevent them from cooperating in evil, which they claim they would be doing if they provided notice to their insurer as required by the terms of the accommodation ("self-certification," which includes a statement that the insurer is thus obligated to provide coverage for the objectionable services). How does the outcome in *Hobby Lobby* affect their prospects of success?

It is hard to be certain, because the precise issue was not before the Court.[16] However, though the majority spoke favorably of the accommodation as a "less restrictive means," it offered no opinion whether provision by HHS of an accommodation

v. Casey (505 US 8343) that women cannot participate as full citizens unless they have access to abortion. HHS subsequently asked for comments from the public on how to define "closely held corporation," as a for-profit entity that is to be protected under the amended HHS mandate rules. See Department of Health and Human Services et al., "Coverage of Certain Preventive Services under the Affordable Care Act," 79 Fed. Reg. 51118 (Aug. 27, 2014), http://www.gpo.gov/fdsys/pkg/FR-2014–08–27/pdf/2014–20254.pdf.

[12] *Burwell v. Hobby Lobby Stores*, 29.

[13] Dictionary Act, 1 USC §1.

[14] *Burwell v. Hobby Lobby Stores*, 40.

[15] Ibid., 40–45. Notice that if one less restrictive means is for the government to supply the objectionable services, and if religious objections continue to various iterations of the accommodation, it may be that the Supreme Court will conclude that the *only* way to satisfy RFRA is for the government to provide the services.

[16] As the Court said in footnote 40 of the decision, "The principal dissent faults us for being 'noncommittal' in refusing to decide a case that is not before us here. … The less

"complies with RFRA for purposes of all religious claims."[17] On this point, it cited its own treatment of the *Little Sisters of the Poor* case.[18] In that case the Court, in an interim ruling while appeal was pending, said religious nonprofits could "comply" with the accommodation by providing written notification to HHS rather than (as the accommodation required) providing the self-certification to the insurer. Therefore, it appears the majority in *Hobby Lobby* was indicating that the accommodation as it then existed might *not* provide a "lesser restrictive means" that would satisfy RFRA in the religious nonprofit cases.[19] In other words, while the existence of the accommodation was sufficient to show that there were less restrictive means HHS could have used vis à vis for-profit corporations, the terms of the existing accommodation itself might still be subject to a successful RFRA challenge.[20]

Nevertheless, a concurrence by Justice Anthony Kennedy suggests there are enough votes on the Court (i.e., his and presumably those of the four dissenters in *Hobby Lobby*) to hold, when the Court considers the matter on the merits, that the accommodation satisfies RFRA vis à vis religious nonprofits (and, for that matter, vis à vis for-profits as well).[21] In his concurrence, Kennedy seems almost giddy about the accommodation, calling it "existing, recognized, [and] workable." He says, "The

restrictive approach we describe accommodates the religious beliefs asserted in these cases, and that is the only question we are permitted to address." *Burwell v. Hobby Lobby Stores*, 44.

[17] Ibid.

[18] Ibid., 44 note 39, which in turn cites its own prior note 9. The cited case is *Little Sisters of the Poor v. Sebelius*, 571 US__(2014).

[19] However, it is fair to wonder whether this amounts to a conclusion by the majority that an accommodation modified along these lines (i.e., one permitting the provision of notice to HHS rather than notice of self-certification to the insurer) would be sufficient to satisfy RFRA (i.e., that no further modification of the accommodation would be required).

[20] In permitting the Little Sisters to report to HHS rather than provide the self-certification to the insurer, the Court appeared to indicate that the then-existing accommodation was deficient in failing to provide this option. HHS took the hint when it issued a revised version of the accommodation subsequent to the decision in this case, permitting religious nonprofits to provide notice solely to HHS if they wished. Department of Health and Human Services et al., "Coverage of Certain Preventive Services under the Affordable Care Act," 79 Fed. Reg. 51092 (Aug. 27, 2014), http://www.gpo.gov/fdsys/pkg/FR-2014–08–27/pdf/2014–20252.pdf. Of course, whether the new alternative satisfies RFRA is highly speculative. The Supreme Court has not rendered a final judgment on the sufficiency of the existing accommodation under RFRA. It might turn out that the new alternative from HHS is inadequate.

[21] It must also be noted that despite saying that it was not deciding the issue for nonprofits, the majority made a statement that appears to indicate that if the existing accommodation had been offered to the plaintiff *for-profits*, they would have held that it satisfied RFRA: "At a minimum … [an approach of this type, that is, the accommodation] 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." *Burwell v. Hobby Lobby Stores*, 44. So, although the Court said it was not deciding the issue regarding nonprofits, *if* the accommodation sufficiently protected the religious liberty interests of the plaintiffs, it is hard to see any ground on which the Court could find it did not satisfy *the very same interests* of nonprofit plaintiffs. Probably the reason the majority made this confusing statement is that the majority spoke over-broadly on this issue (the sufficiency of the mandate), which was not

means to reconcile [the religious freedom of employers and the 'compelling' interests of others, including employees,] is at hand in the existing accommodation that the Government has designed, identified, and used for circumstances closely parallel to those presented here."[22] Since it seems clear that Kennedy believes the accommodation, designed for *nonprofits*, protects the religious freedom of the plaintiff *for-profits*, it would be surprising if he failed to conclude that it protected the religious liberty of the nonprofits for whom it was designed![23]

GAO Report

On September 17, the Government Accounting Office (GAO) released a report on failure to follow the law in the coverage of abortion under the Patient Protection and Affordable Care Act.[24] The law requires that if plans on state exchanges offer abortion, the insurer must obtain a separate payment from the insured to cover abortions. This prevents federal funds, which can otherwise be used for the payment of insurance premiums, from being used to pay for abortions. However, the GAO report revealed that no such separate payments are being collected by insurance companies, despite assurances by the Obama administration that the requirements of the law would be enforced. Further, the Obama administration has failed in its legal obligation to ensure that states put in place plans for the "segregation of funds."

William L. Saunders

---

before it for decision and which had not been briefed by the parties and argued before the Court (and which was, consequently, not decided in this case).

[22] *Burwell v. Hobby Lobby Stores* (Kennedy, J, concurring, 4).

[23] Justice Kennedy continues to surprise, however, and it may be that he would vote to strike down the accommodation (either as it existed at the time of the case or in the recently announced amended form by HHS). Indeed, that is one way to understand his vote (he joined the majority) in a subsequent case, *Wheaton College v. Burwell*, 573 US __(2014). It concerned the college's application for an injunction, which was granted after having been submitted to the full Court for consideration, though the majority cautioned "this order should not be construed as an expression of the Court's views on the merits," since it was an interim order in an ongoing litigation. Nonetheless, three justices—Sotomayor, Ginsburg, and Kagan—dissented. They had no patience with Wheaton's claims, which they characterized as "objecting to the use of one stamp rather than two." They said that Wheaton could not claim to be complicit, since it was the enactment of federal law, not the completion of the form by Wheaton as required by the accommodation, that triggered contraceptive coverage. Furthermore, even if Wheaton were right about being complicit, the accommodation, they said, would still be justified as it was the least restrictive means. The dissenters pointed to the language I discussed in note 19 as proof that this was actually the position of the majority in *Hobby Lobby*, and they accused the majority here (which is actually not identical to the majority in *Hobby Lobby*, because Breyer joined the majority here and Scalia concurred only in the result) of backing away from that holding, as Justice Ginsburg had predicted in her dissent in *Hobby Lobby*.

[24] U. S. Government Accountability Office, "Health Insurance Exchanges: Coverage of Non-excepted Abortion Services by Qualified Health Plans," GAO-14–742R, September 15, 2014, http://www.gao.gov/products/GAO-14–742R.