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HALLIBURTON CO. V. ERICA P. JOHN FUND, INC. (13-317)

Appealed from the U.S. Court of Appeals for the Fifth Circuit

Oral argument: March 5, 2014

Issue

Should the fraud-on-the-market theory of reliance be overruled or substantially modified to allow the defendants to challenge a class certification by introducing evidence that the alleged fraud did not impact the price of its stock?

Questions as Framed for the Court by the Parties

1. Whether this Court should overrule or substantially modify the holding of *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), to the extent that it recognizes a presumption of class-wide reliance derived from the fraud-on-the-market theory.
2. Whether, in a case where the plaintiff invokes the presumption of reliance to seek class certification, the defendant may rebut the presumption and prevent class certification by introducing evidence that the alleged misrepresentations did not distort the market price of its stock.

Facts

The Erica P. John Fund, Inc. alleges that between June 3, 1999, and Dec. 7, 2001, the Halliburton Company (Halliburton) and its top executives misrepresented significant aspects of its operations. According to the fund, Halliburton fraudulently misrepresented three key issues—underestimating costs for an asbestos liability claim, overestimating revenues, and inflating benefits derived from a merger with Dresser Industries. These misrepresentations artificially inflated Halliburton's stock price and, when the misrepresentations were revealed, the stock plummeted, damaging purchasers of stock during the period in question.

The fund moved in September 2007 to certify as a class all those who purchased Halliburton stock between June 1999 and December 2001. The District Court held it had satisfied the threshold requirement of Federal Rules of Civil Procedure (FRCP) 23(a) for class actions. The District Court, however, denied class certification under FRCP 23(b)(3). Fifth Circuit precedent placed substantial burden on plaintiffs in securities fraud cases to show loss causation before receiving class certification. The fund appealed the decision, upon which a panel of the Fifth Circuit affirmed the lower court's decision.

The Supreme Court granted certiorari, ultimately reversing the Fifth Circuit's decision and holding the court erred in requiring proof of loss causation for certification. The Court remanded the case to the Fifth Circuit, which in turn remanded the case to the district court. The district court rejected Halliburton's proffered evidence that the alleged misrepresentation did not cause the inflation or distortion of the company's stock and certified the class. Halliburton appealed this decision, filing a *writ of certiorari* on Sept. 9, 2013, which the Supreme Court granted on Nov. 15, 2013.

Discussion

This case presents the Supreme Court with an opportunity to reaffirm or reject the validity of the fraud-on-the-market theory from *Basic v. Levinson*. Petitioner Halliburton and its supporters believe the theory is invalid and should be overruled because it leads to high volumes of securities fraud litigation, which deters companies from doing business or accessing capital markets in the United States. Respondent Erica P. John Fund and its supporters assert that the theory preserves shareholders' ability to bring lawsuits against companies, to hold them accountable for their fraudulent actions, and to deter future bad behavior.

Costs of Securities Class Action

The Committee on Capital Markets Regulation (CCMR) argues that securities class actions impose significant costs to the U.S. economy and its capital markets. Indeed, according to the CCMR, in 2012, almost 150 securities class action suits were filed, and the aggregate cost of settlements added up to $3.3 billion. CCMR also reports that more than 40 percent of the corporations traded on major U.S. stock exchanges are targets of securities class action suits. It further alleges that the mere threat of litigation to the companies leads to deteriorating profitability and higher risk of bankruptcy. In fact, according to the Securities Industry and Financial Markets Association (SIFMA), the perception of such litigation costs is cited as one reason why foreign companies stay away from U.S. capital markets.

On the other hand, the respondent argues that the litigation and settlement costs spent by companies are exaggerated. It claims that more cases have been dismissed than settled or continued beyond the pleading stage. Indeed, the respondent reports that a total of 73 percent of cases were resolved through dismissal or settlement even before a motion for class certification was filed, and that 12 percent were resolved before any ruling on the class certification motion. Therefore, according to the respondent, 85 percent of the cases were resolved even before the court granted a class certification. Moreover, although 10 cases accounted for almost $30 billion in settlement claims, there was no question that executives in those companies committed significant securities fraud.

Deterrent Effects of Securities Class Action

According to the U.S. Chamber of Commerce, the threat of class action of secu rities fraud does not deter corporate fraud among companies. The chamber argues that the Securities and Exchange Commission (SEC) has power to bring statutory causes of action against companies that commit securities fraud and can redress securities fraud through enforcement actions by imposing

monetary penalties. Indeed, the chamber contends that both the SEC and the Department of Justice have pursued restitution for investors harmed by fraud. The CCMR further supports this by noting that since 2009, the SEC has devoted greater staff resources to securities enforcement efforts and successfully obtained roughly $2 billion in penalties and disgorgements. Given such robust securities fraud enforcement regimes, the CCMR argues that private class actions are not necessary to protect investors.

Conversely, the respondent argues that without the class certification based on the fraud-on-the-market theory, defrauded investors would have no sufficient legal recourse. Indeed, according to the respondent, the Court has held that private securities litigation is an essential supplement to criminal prosecutions and civil enforcement actions brought by the SEC and the Department of Justice. The respondent emphasizes that even the SEC has noted the importance of private actions. Furthermore, it alleges that numerous empirical studies have confirmed the deterrent effect that private actions have on corporate fraud. According to the respondent, one study found that "private plaintiffs' attorneys … [provide] greater deterrence against more serious securities law violations compared with the SEC." In fact, the respondent notes that managers are deterred from committing securities fraud due to the "fear of dismissal, fear of reputational harm, and fear of personal, financial consequences."

Analysis

This case presents the Court the opportunity to determine whether to maintain the fraud-on-the-market reliance presumption in securities fraud class action cases. The Court will decide whether to overrule the *Basic* precedent or substantially modify its standard. It will also determine whether a defendant may rebut the presumption through a showing that stock prices were not impacted by an alleged misrepresentation at class certification.

Overruling or Modifying Basic v. Levinson

Petitioners argue that the Court should overturn, or at least substantially modify, *Basic*'s reliance on the fraud-on-the-market theory. According to petitioners, the *Basic* majority incorrectly adopted the reliance presumption and violated Congressional intent, thus exceeding proper judicial discretion. Petitioners further posit that *Basic* was based in now-discredited economic theories, and the Court should therefore update its precedents to reflect reality. Petitioners maintain that the *Basic* Court relied on an overly simple efficient-markets hypothesis that scholars have subsequently rejected. Finally, petitioners argue that lower courts either inconsistently apply the reliance presumption or refuse to follow the precedent altogether. Because of the ambiguous, inconsistent, and unreasonable application of *Basic*'s reliance presumption in lower courts, petitioners urge the Court to overrule this decision.

Respondent asks the Court to uphold *Basic*'s reliance presumption, argues that *Basic* was correctly decided, and contends the Court has reaffirmed the 25-year-old precedent five times in the past 10 years. Respondent further maintains that *Basic* follows congressional intent, positing that Congress has had multiple opportunities to legislate contrary to *Basic*'s reliance presumption and has declined to do so. Respondent rejects petitioners' contention that *Basic* rests on shaky economic foundations, instead arguing that the reliance presumption is based on modest—not controversial—economic grounds. Finally, respondent counters petitioners' position that lower courts inconsistently, if at all, apply *Basic*'s standard. According to respondent, any confusion surrounding the *Basic* precedent has been appropriately resolved.

Rebuttal of Presumption

Petitioners argue that even if the Court maintains *Basic*'s presumption of reliance standard, the Fifth Circuit erred in not allowing petitioners to rebut the presumption of reliance. According to petitioners, *Basic*'s rebuttal right is essentially useless. Petitioners instead argue the Court should adopt a direct price-impact rebuttal, instead of the prevailing indirect price-impact rebuttal. Petitioners also maintain that *Basic* allows for rebuttal of presumption at class certification if defendants can show the absence of price impact, which the petitioners would have done had the Fifth Circuit not erred in precluding them from doing so.

Respondent contends that the Court does not need to allow rebuttal at the class certification stage. According to respondent, the "truth-on-the-market" defense (the argument that an alleged misrepresentation cannot impact the market if it is already aware of the truth) is well established and readily available for defendants. Respondent further argues that successful rebuttals are evident in analogous cases brought under Section 11. Respondent also maintains that courts frequently grant motions to dismiss for Plaintiffs that fail to plead price impact on the face of the complaint. Respondent argues that the willingness of the courts to grant a motion to dismiss based on the weakness of a plaintiff's complaint decreases the need for rebuttal at class certification.

Conclusion

In this case, the Court will determine whether to maintain, overrule, or change the prevailing presumption of reliance for securities fraud cases. The Court will also decide whether a rebuttal of this presumption should be allowed at the class certification stage of proceedings. Petitioner Halliburton argues that the fraud-on-the-market theory should be overruled because it is based on a mistaken understanding of the principles of economics and creates a litigious environment that deters companies from engaging in business in the United States. Respondent Erica P. John Fund asserts that the fraud-on-the-market theory is a legitimate presumption of reliance on the shareholders' part and does not harm companies because the theory is rebuttable. The Court's decision will impact the costs of securities class action lawsuits and the ease with which plaintiffs can bring such suits. ⊙

Written by So Yeon Chang and Madeline Weiss. Edited by Angela Lu.

UTILITY AIR REGULATORY GROUP V. EPA, AMERICAN CHEMISTRY COUNCIL V. EPA, ENERGY-INTENSIVE MANUFACTURERS V. EPA, SOUTHEASTERN LEGAL FOUNDATION V. EPA, TEXAS V. EPA, CHAMBER OF COMMERCE V. EPA, 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272 (CONSOLIDATED)

Appealed from the U.S. Court of Appeals, District of Columbia Circuit

Oral argument: Feb. 24, 2014

Issue

Does the Environmental Protection Agency (EPA) have authority under the Clean Air Act to regulate stationary sources of greenhouse gas (GHG) emissions?

Questions as Framed for the Court by the Parties

After *Massachusetts v. EPA,* 549 U.S. 497

(2007), the EPA found that its promulgation of motor vehicle GHG emission standards under Title II of the CAA, 42 U.S.C. § 7521(a)(1), compelled regulation of carbon dioxide and other GHGs under the act's Prevention of Significant Deterioration (PSD) and stationary-source permitting programs. Even though the EPA determined that including GHGs in these programs would vastly expand them contrary to Congress's intent, it adopted rules adding GHGs to the pollutants covered. The appellate panel below held that the Act and the Massachusetts decision compelled the inclusion of GHGs and, therefore, dismissed all petitions to review the permitting program rules on standing grounds.

The questions presented are:

1. Whether Massachusetts compelled the EPA to include GHGs in the PSD and Title V programs when such inclusion would (1) transform the size and scope of these programs into something that the EPA found would be "unrecognizable to ... Congress," Petition Appendix 345a, 380a, and (2) expand the PSD program to cover a substance that does not deteriorate the quality of the air that people breathe.
2. Whether dismissal of the petitions to review the EPA's GHG permit-program rules was inconsistent with the court's standing jurisprudence where the panel premised its standing holding on its merits, holding that GHGs are regulated "pursuant to automatic operation of the [Clean Air Act]." *Id.* at 96a.

Facts

After *Massachusetts v. EPA* categorized greenhouse gases as an air pollutant subject to regulation under the act, the EPA began regulating them. First, the EPA issued an Endangerment Finding, stating that GHGs can "reasonably be anticipated to endanger public health or welfare." It then issued the Tailpipe Rule, which set GHG emissions standards for cars and small trucks. Additionally, the EPA determined that the Tailpipe Rule triggered the Timing Rule, a requirement that major stationary sources of GHGs obtain construction and operating permits. Because of the administrative burdens thereby imposed on permitting authorities and GHG sources, the EPA issued the Tailoring Rule, which requires that only the largest stationary GHG sources obtain permits.

The Clean Air Act addresses stationary sources of air pollution in various ways. The EPA's position is that GHGs must be regulated under Title I, the Prevention of Significant Deterioration (PSD) program, and Title V, the stationary-source permitting program. The PSD program mandates pre-construction permitting for stationary air pollutant sources. Under Title V, certain stationary sources of air pollutants are required to obtain operating permits. Both programs fall within the Act's section that addresses National Ambient Air Quality Standards (NAAQS). Under the NAAQS, the EPA regulates six criteria pollutants: carbon monoxide, lead, nitrogen oxides, ozone, particulate matter, and sulfur dioxide.

PSD programs require that a state issue construction permits for stationary sources (e.g., iron and steel mill plants) that have the potential to emit more than 100 tons per year of any air pollutant. Any other stationary source is subject to the PSD permit requirement only if it has the potential to emit more than 250 tons per year of any air pollutant. Title V requires that stationary sources that have the potential to emit at least 100 tons per year of any air pollutant have an operating permit issued by the state. Any air pollutant is and has been traditionally interpreted by the EPA to include all those regulated under the Clean Air Act.

The EPA thus enacted the Timing and Tailoring Rules to implement GHG regulations. Under the Timing Rule, an air pollutant only becomes subject to the act's regulations when a regulation requiring control of the particular pollutant becomes effective. The EPA determined that applying the statutory thresholds in the Title V and PSD programs would include regulation of thousands of additional industrial, residential, and commercial sources under the PSD program and millions under the Title V program. Because, the EPA determined, immediate regulation of smaller sources would not be beneficial and would severely overwhelm permitting authorities, the Tailoring Rule required that only the largest GHG sources (i.e., those exceeding 75,000 or 100,000 tons per year of carbon dioxide) would be subject to the GHG permit requirement.

Petitioners—various industry groups, states, and interest groups—petitioned for review of the GHG regulations in the U.S. Court of Appeals for the District of Columbia Circuit. The D.C. Circuit upheld the promulgated EPA regulations. The U.S. Supreme Court granted certiorari to determine whether the EPA permissibly determined that GHG's can be regulated under the PSD and Title V programs.

Discussion

Effects of Regulating GHGs Under the Clean Air Act

The EPA asserts that it created the Tailoring Rule, which requires that only the largest stationary GHG sources obtain permits, to reduce the heavy administrative burdens that would result from the current pollution thresholds that trigger EPA oversight. In support of the EPA, the South Coast Air Quality Management District and the Emmett Center on Climate Change and the Environment argue that regulating GHGs at the statutory thresholds provided by the Title V and PSD programs will create workable results in time. Moreover, these parties assert that petitioners fail to account for the EPA's plans to reduce the administrative burden on small source polluters.

In support of petitioners, various states warn that the EPA's new regulations will be extremely costly. They argue that by the EPA's own initial estimates, "annual permit applications would increase by over 300-fold, from 280 to almost 82,000" and "costs to the permitting authorities would increase more than 100-fold, from $12 million to 1.5 billion." They also assert that the burden of reviewing additional permits for GHG emissions on top of existing permitting requirements for non-GHG pollutants will put substantial and overwhelming costs on states.

Environmental Impacts of Including GHGs in the PSD and Title V Programs

The respondent states argue that for decades, the EPA, in conjunction with the states, has applied PSD permitting to any air pollutant regulated under the act, and that regulating GHGs under the PSD is the most recent application of this longstanding construction of the act. The states argue that limiting the definition of air pollutant to only those regulated under the NAAQS program would have serious adverse environmental effects. Moreover, they contend that many states have followed the PSD provision to require a permitting process for many harmful pollutants that are not subject to the NAAQS.

In support of petitioners, the Committee for a Constructive Tomorrow argues that the EPA's attempt to regulate GHGs is inherently flawed and contrary to the public interest. It asserts that regulating GHGs though the PSD and Title V programs would impose overwhelming costs on thousands of American businesses. Further, the committee argues

that the potential adverse employment effects will damage the health and wellbeing of Americans, which undermines the purpose of the Clean Air Act.

Analysis

In this case, the Supreme Court will decide whether the EPA's regulation of GHGs through the act's PSD and Title V permitting programs increases their scope beyond what Congress intended.

The Timing Rule: Triggering PSD and Title V Programs

The EPA argues that it has authority to regulate GHGs under the PSD and Title V programs. Its Timing Rule determines that a pollutant becomes subject to regulation at the moment when regulations regarding that pollutant are promulgated under the Clean Air Act.

The coalition, citing the act's text and structure, rejects the EPA's interpretation. It argues that looking broadly at the act's structure, it is apparent that "any air pollutant" refers to any of the NAAQS pollutants, which are regulated under a scheme that separates attainment areas (areas where specific pollutant levels are safe) and nonattainment areas (areas where specific pollutant levels negatively affect public health or welfare). The coalition states that the PSD program's purpose is to prevent factories from moving from nonattainment areas to attainment areas, thus avoiding regulation while sullying the clean areas. Therefore, it infers from this statutory language that Congress only intended NAAQS pollutants to be regulated, not GHGs with uniform global levels, under the PSD program.

The EPA counters that the coalition's reading of the statute as only applying PSD requirements to NAAQS pollutants fails to account for Section 165(3), which requires PSD-regulated facilities to not contribute to air pollution in excess of any NAAQS standard or "any other applicable emission standard" under the Clean Air Act. Responding to the coalition's argument that the PSD program cannot apply because no attainment area for GHGs exists, the EPA argues that applying this reasoning would create anomalies in the PSD program unrelated to GHGs.

The Tailoring Rule: Congressional Intent to Regulate Greenhouse Gases

Petitioners contend that the EPA lacks authority to regulate GHGs under the PSD or Title V programs because it expands the programs' scope to the point that they are unrecognizable. Specifically, they argue that Congress's narrow scope for these programs is evidenced by the fact that the EPA had to modify the strict numerical triggers through the Tailoring Rule to prevent administrative chaos. Petitioners maintain that if the Court determines that the EPA reasonably interpreted the act in implementing the programs through the Timing Rule, then it nevertheless must vacate the Tailoring Rule because the act sets out unambiguous, numerical thresholds.

The EPA claims that it has the authority to increase the threshold triggers for permitting requirements. It contends that it needed to temporarily apply a higher threshold level to avoid a conflict between the act's congressional directive to set certain numerical levels with the congressional order that permits be processed expeditiously. In the EPA's view, because the threshold amounts in the Clean Air Act are an inappropriate measure of carbon dioxide impact, the Tailoring Rule was within its broad discretion to allocate its limited resources and personnel. The EPA continues that this temporary numerical adjustment is more consistent with the act than the alternatives proposed by petitioners of declining to follow the EPA's longstanding interpretation of "pollutants subject to regulation" or setting unworkable standards to force Congress to act.

Conclusion

This case will have significant consequences for states, industry groups subject to EPA regulation, and federal and state administrators. If the Court finds that the EPA lacks the authority to regulate greenhouse gases under the CAA, Congress will face immense political pressure to combat climate change through other mechanisms. If, however, the EPA is found to have the authority, some believe that the agency will be saddled with an ineffective tool that cannot truly address GHGs broadly. Additionally, others believe that if the EPA's method of regulating GHGs is upheld, it will have an unconstitutional degree of decision-making authority. In either case, the outcome will greatly affect efforts to curb climate change. ⊙

Written by Rose Petoskey and Katherine Hinderlie. Edited by Chanwoo Park. The authors would like to thank former Supreme Court Reporter of Decisions Frank Wagner for his assistance in editing this preview.

SEBELIUS V. HOBBY LOBBY STORES (13-354); CONESTOGA WOOD SPECIALTIES CORP. V. SEBELIUS (13-356)

Appealed from the U.S. Court of Appeals, Tenth Circuit; the U.S. Court of Appeals, Third Circuit

Oral argument: March 25, 2014

Issues

1. Does the Religious Freedom Restoration Act (RFRA) protect for-profit corporations?
2. Does the contraceptive coverage mandate of the Patient Protection and Affordable Care Act of 2010 (ACA) violate corporations' religious exercise rights?

Questions as Framed for the Court by the Parties

Sebelius v. Hobby Lobby Stores

RFRA, 42 U.S.C. § 2000bb et seq., provides that the government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. § 2000bb-1(a) and (b). The question presented is whether RFRA allows a for-profit corporation to deny its employees the health coverage of contraceptives to which they are otherwise entitled by federal law, based on the religious objections of the corporation's owners.

Conestoga Wood Specialties Corp. v. Sebelius

Whether the religious owners of a family business, or their closely held business corporation, have free exercise rights that are violated by the application of the contraceptive coverage mandate of the ACA.

Facts

Under the ACA, employment-based health care plans covered by ERISA are required to provide coverage for certain preventative health services. The Health Resources and Services Administration (HRSA) of the Department of Health and Human Services (HHS) adopted a recommendation from the Institute of Medicine to require that health plans must include coverage for contraceptive methods approved by the Food and Drug Administration (FDA). The 20 approved methods include 16 that prevent fertilization and 4 that prevent implantation of an egg after fertilization.

Hobby Lobby is a closely held family business organized as an S corporation with about 13,000 employees. The business is owned

and operated by the Green family. The family operates its business to reflect their religious beliefs. Similarly, Mardel, joining in this suit and also owned by the Green family as an affiliate of Hobby Lobby, describes itself as a faith-based company. One of the family's religious beliefs is that human life begins at the moment of conception. Thus, the family believes that facilitating the death of a human embryo is immoral. The Greens do not object to providing coverage for the 16 contraceptive methods that prevent fertilization; however, they do object to providing coverage for the four methods that prevent implantation of a fertilized egg, which include Ella, Plan B, and two intrauterine devices (IUD).

Conestoga is a Pennsylvania corporation with 950 employees. The Hahn family, practicing Mennonites, own 100 percent of the voting shares of Conestoga stock. The Hahns believe it is a sin to terminate a fertilized embryo; as a result, the Hahns object to providing health coverage for Ella and Plan B.

On Sept. 12, 2012, Hobby Lobby filed suit in the U.S. District Court for the Western District of Oklahoma under RFRA, the Free Exercise Clause of the First Amendment, and the Administrative Procedure Act (APA). The company sought relief from the ACA mandate to comply with providing contraceptive services by July 1, 2013. It filed a motion for preliminary injunction based on its RFRA and Free Exercise Clause claims, which the district court denied. Hobby Lobby appealed the denial and also moved for injunctive relief pending appeal but was denied the motion for injunctive relief. It then unsuccessfully sought emergency relief from the U.S. Supreme Court under the All Writs Act. As a result, Hobby Lobby moved for *en banc* appeal consideration by the U.S. Court of Appeals for the Tenth Circuit.

The Tenth Circuit granted the motion for *en banc* appeal, as well as Hobby Lobby's motion to expedite consideration of the appeal to accommodate the July 1, 2014, compliance deadline of the ACA. Reversing the district court's denial of a preliminary injunction, the circuit held that Hobby Lobby has standing to bring RFRA claims. However, the court remanded the case to the district court to address the likelihood of success under the other two factors to be considered when deciding whether to grant or deny a preliminary injunction—the public interest and the balance of equities in the case. The solicitor general, on behalf of HHS Secretary Kathleen Sebelius, petitioned for a writ of certiorari to the Supreme Court.

Conestoga filed suit in the U.S. District Court for the Eastern District of Pennsylvania, seeking declaratory and injunctive relief from the ACA mandate under RFRA and the Free Exercise Clause. The district court granted a temporary restraining order but denied a preliminary injunction, holding both that a for-profit corporation could not exercise religion under the Free Exercise Clause or RFRA and that the ACA mandate did not substantially burden the Hahn family's exercise of religion. Conestoga appealed and moved for an injunction pending appeal, which was denied by the U.S. Court of Appeals for the Third Circuit. The Third Circuit also affirmed the district court's denial of the preliminary injunction. Conestoga petitioned for a *writ of certiorari* to the Supreme Court.

On Nov. 26, 2013, the Supreme Court granted the government's and Conestoga's petitions to resolve the circuit split between the Tenth and Third Circuits. The Supreme Court consolidated the two cases and will determine whether RFRA allows a for-profit corporation to deny employees health coverage for contraceptives based on the religious beliefs of the corporation's owners.

Discussion

The government argues that the ACA imposes a general obligation upon corporations and not their individual owners. Accordingly, it contends that RFRA does not apply because for-profit corporations are not persons with religious beliefs. Hobby Lobby argues that because RFRA does not separately define "person," and because the Dictionary Act provides that it includes natural persons and corporations, RFRA should also protect corporations. Similarly, Conestoga argues that the tax code distinction between for-profit and nonprofit entities should not extend to First Amendment and RFRA claims. The Supreme Court's decision will implicate the tension between private and public interests, the boundaries of the Free Exercise Clause and RFRA, and the evolution of the corporate form.

Balancing Public Concerns with Private Interests

The government and supporting *amici* argue that the contraceptive coverage requirement in the ACA advances compelling government interests in promoting public health, employee rights, and gender equality using the least restrictive means. In particular, 91 representatives contend that the ACA's legislative history reflects goals of combating gender discrimination through preventive care. They argue that the ACA achieves this by ameliorating the disparities between the disproportionate share of out-of-pocket costs borne by women and the lack of access to female-specific preventive care. California and 15 other states agree, emphasizing the public health importance of providing affordable access to contraceptives while also citing the potential economic benefits from providing greater access. These benefits include possible reductions in the state burden to provide publicly funded care for medical costs related to unintended pregnancies and the increased ability of women to contribute to the economy after receiving affordable access to contraceptives. Moreover, the American College of Obstetricians and Gynecologists and supporting professional health organizations caution that carving out this exemption in the ACA mandate will compromise the integrity of the provider–patient relationship by allowing employers to dictate a patient's available medical options.

Hobby Lobby, Conestoga, and supporting *amici* argue that the government has not met its burden of establishing that the ACA mandate is the least restrictive means of advancing a compelling government interest. The Institute of Medicine notes that the ACA derived coverage recommendations from one of its reports that excluded research indicating health risks, such as the increased incidence of certain cancers associated with hormonal contraceptives. The institute argues that by relying on this report, the ACA mandate may actually be detrimental to public health. Consequently, the Thomas More Law Center argues that the ACA mandate is a government intrusion into the rights of private employers that is not supported by a compelling government interest. The Reproductive Research Audit also contends that granting an exemption from the mandate for religious purposes would not unduly limit access to affordable contraceptive services, as there are already government programs in place that could provide the same access while respecting employers' private concerns.

The Boundaries of RFRA, the Free Exercise Clause, and the Corporate Form

In its support of the government, California argues that allowing corporations to assert the religious beliefs of their owners would contravene the foundational principle of corporate

law that corporations have a legal identity distinct from that of their shareholders. California acknowledges that corporations can exercise many legal rights, but such rights should not extend to purely personal guarantees like the free exercise of religious beliefs. A number of corporate and criminal law professors agree and caution that allowing religious values to pass through the corporate veil, which gives corporations the privilege of limited liability, would enable corporations to selectively take advantage of the legal separation between the corporate form and the controlling shareholders. In their view, permitting religious values to pass through the corporate veil in only one direction would undermine a foundational principle of corporate law that is also recognized by criminal and agency law. The professors foresee that, if religious values are attributed to the corporation, federal courts would encounter more RFRA and Free Exercise Clause claims that would present difficult questions concerning the legitimacy of religious values, degrees of ownership and control, and disagreements over specific religious identities.

In support of Hobby Lobby and Conestoga, the Cato Institute argues that, contrary to the professors' objections, the corporate form is not inconsistent with the right to exercise personal beliefs. The Cato Institute submits that prohibiting a religious exemption from the ACA mandate would force potential entrepreneurs to choose between limiting their liabilities and exercising their religious freedom. In fact, a number of comparative law and religion scholars describe the growing legal support for exercises of corporate conscience. These scholars argue that exercises of corporate conscience can take many forms, including religious and moral exercises. Given the broad protection of general corporate conscience initiatives, they contend that excluding protection for religious and moral values constitutes discrimination against businesses with religious values in their corporate consciences.

Analysis

In 1990, the Supreme Court held in *Employment Division v. Smith* that the First Amendment's Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability," even when a person's religious exercise is substantially burdened. Congress responded to this decision by passing RFRA, which provides "a claim or defense to persons whose religious exercise is substantially burdened by [the] government." A valid RFRA claim can be overcome, however, if the government has a compelling interest and the law is the least restrictive means of furthering it—or, in other words, if the law passes strict scrutiny.

In this case, the Court will consider whether for-profit corporations can sue under RFRA. If the Court determines that for-profit corporations can sue, it then must also consider whether Hobby Lobby's or Conestoga's religious exercise is substantially burdened by the contraceptive coverage mandate and whether it is the least restrictive means of advancing a compelling interest. The Court must also consider Conestoga's claim that the mandate violates the Free Exercise Clause of the First Amendment.

Does RFRA Allow Claims by For-Profit Corporations?

Hobby Lobby and Conestoga argue that RFRA's protection of a "person's exercise of religion" includes for-profit corporations. First they point out that the Dictionary Act—which provides rules for determining the meaning of Acts of Congress—defines a "person" as including corporations. They contend that this definition controls since RFRA does not specifically define "person," though it defines other words, and nowhere suggests any limitation on the Dictionary Act's definition. Additionally, they point out that RFRA's text cross-references the Religious Land Use and Institutionalized Persons Act (RLUIPA), which recognizes that persons and entities can exercise the religious rights that RLUIPA grants.

The government disagrees with the corporations' application of the Dictionary Act to RFRA's use of "person." Rather, the government maintains, the word must be construed together with the phrase "exercise of religion," and that the Dictionary Act does not address whether corporations are persons that engage in the exercise of religion. Moreover, reliance on the Dictionary Act would raise practical problems, according to the government, because large publicly traded corporations would be persons and could seek exemptions from generally applicable laws based on a corporation's asserted religion—which itself might trigger shareholder battles over a corporation's religious identity.

The government also argues that RFRA was enacted to restore a person's pre-*Smith* rights; and that no pre-*Smith* cases held that for-profit corporations had religious beliefs. The government insists that *Braunfeld v. Brown* and *United States v. Lee*, two cases on which the Tenth Circuit in *Hobby Lobby* relied, involved owners of sole proprietorships who faced personal liability and lost on the merits. Moreover, the government points to the Court's plurality in *Gallagher v. Crown Kosher Super Mkt. of Mass., Inc.,* and its opinion to expressly reserve the question of a corporation's right to assert a free-exercise claim, as evidence that the Court had not yet afforded such a right to for-profit corporations. Finally, the government argues that treating the religious beliefs of the owners as the belief of the corporation would run afoul of the bedrock principle of corporate law that a corporation and its stockholders are separate and distinct entities.

Hobby Lobby disagrees with the government's assertions, arguing that the Court should not look to pre-*Smith* cases, but rather to RFRA's text. Nonetheless, Hobby Lobby argues, the Court's pre-*Smith* cases recognized a profitable business's free exercise of religion. According to Hobby Lobby, the fact that these cases involved sole proprietorships is immaterial because none of them suggests that an entity's particular form determines whether it or its owners can exercise religion. Additionally, Hobby Lobby argues there is no reason that RFRA should apply to nonprofits—a point that the government concedes—but not to for-profits. Furthermore, Hobby Lobby points out that five of the justices in *Gallagher* assumed that a commercial corporation could challenge the law under the Free Exercise Clause. Similarly, Conestoga points out that lower courts have recognized that business corporations can assert free exercise, and, that at the time of RFRA's passage, it was established that religious exercise may occur in business. Finally, Hobby Lobby argues that the fact that a corporation is distinct from its owners in some respects does not mean that it is distinct in other ways, like religious exercise.

Does the Contraceptive Coverage Mandate Substantially Burden Religious Exercise?

The government argues that the owners' exercise of religion is not burdened by a regulation of the corporation. First, the government contends that an owner cannot personally sue because the mandate requires the corporation, rather than the owner, to provide contraceptive coverage—and thus the owners suffer no personal liability. The government avers that corporations are distinct and owners receive both the advantages and disadvantages of the corporate form. One rule of corporate law, the government declares, is that shareholders cannot bring claims to redress injuries to a corporation. Nor can the corporation's managers sue

based on their religious beliefs, according to the government. It argues that allowing such suits would be unprecedented and seemingly allow any human resources manager to sue under RFRA for an exemption for the entire corporation. Moreover, the government submits that the mandate requires payment into an undifferentiated fund and that it is the employee's decision to use contraceptives, not the employer's. Finally, the government argues that, while the Court may not question the sincerity of a religious belief, it can decide whether the belief is substantially burdened.

Both Hobby Lobby and Conestoga submit that their owners—the Greens and the Hahns, respectively—exercise their religion through their corporations. Both argue that the mandate will directly burden their owners through their livelihood. The mandate itself, they assert, burdens their sincere religious belief to not support the destruction of human embryos by requiring them to cover four abortifacient contraceptives. Moreover, if it is forced to carry out the mandate, Conestoga argues, the Hahn family will be the ones who actually have to carry it out; and thus, the only avenue for people like the Hahns, who do not want to abandon their religious beliefs, is to sell their family business and abandon the business world altogether—a substantial burden. Additionally, Conestoga asserts that the fact that the government exempts certain religious organizations shows that the mandate's burdens are substantial. Finally, Hobby Lobby argues that the fines for noncompliance, which it suggests range in the millions of dollars a year, impose a substantial burden.

Does the Contraceptive Coverage Mandate Pass Strict Scrutiny?

The government argues that even if the mandate causes a substantial burden on religious exercise, it passes strict scrutiny. The government first asserts the ACA advances the compelling interest of ensuring comprehensive insurance to employees. It argues that this interest is further evinced by the fact that the provision is an amendment to ERISA, which is a comprehensive scheme to promote employee interests and is incompatible with religious exemptions. Additionally, the government claims that the contraceptive coverage provision is a means of advancing the government's compelling interest in public health and providing women equal access to health care services. The government alleges that the mandate is the least restrictive means of accomplishing these interests and that the corporate parties' alternatives for providing contraceptives—expanding federal programs, like Medicaid, or funding for state contraceptive programs—would not implement Congress's goal of allowing employees to have access to preventive services through their current plans.

The corporate parties argue that the government has not established a compelling interest because the asserted interests of public health and gender equality are too broadly formulated. Furthermore, they point to the numerous exceptions to the mandate as proof that it does not serve a compelling interest. Finally, they argue that the alternatives, like expanding government programs, are a workable and less restrictive means than the contraceptive coverage mandate.

Does the Contraceptive Coverage Mandate Violate the Free Exercise Clause?

Conestoga also argues that the mandate violates the Free Exercise Clause because it is neither generally applicable nor neutral. First, Conestoga points to the numerous exceptions, such as for grandfathered plans and religious nonprofits, as showing that the mandate is not generally applied. Second, Conestoga argues that the fact that some religious organizations are exempted, but Conestoga is not, shows that the mandate is not neutral. It asserts that this distinction is arbitrary because its religious objection is of the same quality as those religiously exempted and its exemption's costs would be the same as those of secular organization that are exempt. Conestoga thus argues this lack of neutrality and generality subjects the mandate to strict scrutiny.

The government counters that the Court has never held that for-profit corporations have rights under the Free Exercise Clause. Moreover, it argues that an exemption for Conestoga, based on religious faith, would directly burden Conestoga employees, and the Court has never suggested that the Constitution requires exemptions that impose a commercial employer's religious faith on their employees. Finally, the government asserts that the mandate reflects no religious animus towards Conestoga.

Conclusion

In this case, the Supreme Court will consider whether RFRA allows a for-profit corporation to deny health coverage of contraceptives based on the religious beliefs of the corporation's owners. In doing so, the Court will also determine whether the ACA mandate substantially burdens the rights, if any, of a corporation to exercise religious beliefs and whether it is the least restrictive means of furthering a compelling state interest. The Court's decision will implicate foundational principles of corporate law and the interpretation of the protections conferred by the Free Exercise Clause and RFRA. The ruling will also substantially affect the viability of the ACA mandate's contraceptive coverage provision, which in turn will dictate whether many employees will have affordable access to contraceptives and certain preventive care services. ⊙

Written by T. Sandra Fung and Jacob Brandler. Edited by Chanwoo Park. The authors would like to thank former Supreme Court Reporter of Decisions Frank Wagner for his assistance in editing this preview.

ALICE CORPORATION PTY. LTD. V. CLS BANK INTERNATIONAL (13-298)

Appealed from the U.S. Court of Appeals for the Federal Circuit

Oral argument: March 31, 2014

Alice Corporation applied for and was granted patents on several processes and systems relating to the use of computer software to facilitate securities trading and reduce risks of parties not fulfilling a contractual obligation. CLS Bank has been developing similar software and programs for its own use in similar transactions. CLS Bank bought an action for a declaratory judgment in federal court asserting that Alice's patents were subject-matter ineligible because they did no more than recite abstract ideas regarding fundamental economic concepts. Alice counterclaimed, asserting patent infringement against CLS. The Federal Circuit held that Alice's patents fell within the abstract ideas exception to the generally broad policy of patent eligibility. Alice argues that the abstract ideas exception is meant to be read narrowly and apply to fundamental truths such as facts of nature. CLS counters that Alice's patents merely cover fundamental economic concepts and that these should fall within the exception. At issue is the effect that the abstract ideas exception will have on encouraging innovation and on other industries in rewarding those who expend resources to bring about a useful product. Full text is available at www.law.cornell.edu/supct/cert/13-298. ⊙

Written by Katherine Hinderlie and Rose Petoskey. Edited by Jeremy Amar-Dolan

CLARK V. RAMEKER (13-299)

Appealed from the U.S. Court of Appeals for the Seventh Circuit

Oral argument: March 24, 2014

In October 2010, Heidi Heffron-Clark and Brandon Clark filed a voluntary joint Chapter 7 bankruptcy and claimed an inherited individual retirement account (IRA) under the retirement funds exemption of Section 522 of the Bankruptcy Code. The bankruptcy trustee and creditors objected to the claimed exemption. The district court concluded that inherited IRAs are exempt because they do not lose their character as retirement funds once they are passed onto the beneficiary. The Seventh Circuit Court of Appeals reversed the district court's decision, stating that an inherited IRA does not qualify for a retirement fund exemption because it was not set aside for the debtor's retirement. The U.S. Supreme Court must decide if an inherited IRA constitutes a retirement fund under Section 522. This case implicates debtors' and creditors' access to inherited IRAs once a debtor files for bankruptcy. Full text is available at www.law.cornell.edu/supct/cert/13-299. ⊙

Written by Melanie Senosiain and Paul Rodriguez. Edited by Angela Lu.

FIFTH THIRD BANCORP V. DUDENHOEFFER (12-751)

Appealed from the U.S. Court of Appeals for the Sixth Circuit

Oral argument: April 2, 2014

John Dudenhoeffer and Alireza Partovipanah are former employees of Fifth Third Bancorp. As part of their benefits plan, they contributed to an employer stock ownership plan (ESOP). By participating in the plan, employees have an option to invest in Fifth Third stock as well as several other funds. In a two-year span, stock value for Fifth Third dropped dramatically. Dudenhoeffer and his fellow class members argue that Fifth Third made misleading disclosures regarding the health of the stock and that the trust managers failed to represent the best interests of the trustees by allowing employees to continue to invest in the company. Fifth Third argues that there is a strong presumption in favor of ESOP managers and their decisions to invest stocks based on long-term company goals. The decision in this case will affect the duties that employers owe to employees who invest in ESOPs and the protection afforded to employee-investors. Full text is available at www.law.cornell.edu/supct/cert/12-751. ⊙

Written by Sean Mooney and Brett Mull. Edited by Dillon Horne.

HALL V. FLORIDA (12-10882)

Appealed from the Supreme Court of Florida

Oral argument: March 3, 2014

The state of Florida sentenced Freddie Lee Hall to death on Sept. 9, 1982 for the murder of Karol Hurst. Hall has challenged his sentence multiple times leading to the Florida state courts vacating and reinstating the sentence each time. During one resentencing trial, the district court found Hall to be mentally retarded. An evidentiary hearing to determine the question of mental competence found that Hall's IQ exceeded the minimum cut-off for mental retardation in Florida. Hall's most recent challenge, therefore, involves the 2002 Supreme Court decision *Atkins v. Virginia*'s ruling that executing mentally retarded criminals violates their Eighth Amendment right against "cruel and unusual punishment." Hall argues that the Florida measure of mental retardation using an IQ score cutoff violates *Atkins*, and that *Atkins* prohibits Florida from executing Hall. Florida argues that the state's definition of mental retardation complies with *Atkins*. Furthermore, Florida asserts that Hall can be executed when applying Florida's definition of mental retardation. This case could determine whether Florida can execute Hall and, more broadly, the scope of the right of states to establish standards for mental retardation based on IQ testing. Full text is available at www.law.cornell.edu/supct/cert/12-10882. ⊙

Written by Chihiro Tomioka and Holly Tao. Edited by Allison Nolan.

HIGHMARK, INC. V. ALLCARE HEALTH MANAGEMENT SYSTEMS, INC. (12-1163)

Appealed from the U.S. Court of Appeals for the Federal Circuit

Oral argument: Feb. 26, 2014

Respondent Allcare Health Management Systems, Inc., owns U.S. Patent No. 5,301,105, which covers a method of data entry and management used in the context of medical treatment. In 2002, Allcare notified Petitioner Highmark, Inc., a medical insurance provider, that it was infringing on Allcare's patent. Highmark sought a declaratory judgment of noninfringement; Allcare counterclaimed for infringement. After the district court granted summary judgment in Highmark's favor, Highmark moved for an award under 35 U.S.C. § 285, which grants attorneys' fees for exceptional cases. Though the district court granted the award for two of Allcare's claims, the Federal Circuit Court of Appeals reviewed the claims *de novo* and reversed one of them. The Supreme Court granted *certiorari* to determine the scope of deference given to district courts to find exceptional cases. The ruling in this case, in tandem with another case before the Court, *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, will impact how long and how readily litigants may pursue future patent cases. Full text is available at www.law.cornell.edu/supct/cert/12-1163. ⊙

Written by Daniel Rosales and Jordan Manalastas. Edited by Dillon Horne.

LOUGHRIN V. UNITED STATES (13-316)

Appealed from the U.S. Court of Appeals for the Tenth Circuit

Oral argument: April 1, 2014

A federal district court convicted Kevin Loughrin of bank fraud for using stolen, altered checks to purchase goods from a local Target store and returning them for cash. On appeal, Loughrin claimed he did not violate the bank fraud statute because the statute only criminalizes conduct intended to defraud a financial institution and posing a risk of harm to that institution. Although he used fraudulent checks, Loughrin claims the target of his scheme was, in fact, Target, and not any bank. The United States argues that a scheme does not need specifically to target a financial institution, nor expose that institution to risk, in order to constitute bank fraud. The Supreme Court's ruling in this case will affect not only how broadly Congress can criminalize fraudulent financial actions, but also how expansively federal criminal jurisdiction can stretch. Full text is available at www.law.cornell.edu/supct/cert/13-316. ⊙

Written by Daniel Rosales and Jordan Manalastas. Edited by Allison Nolan.

OCTANE FITNESS V. ICON HEALTH AND FITNESS (12-1184)

Appealed from the U.S. Court of Appeals for the Federal Circuit

Oral argument: Feb. 26, 2014

Icon Health and Fitness sued Octane Health, alleging patent infringement over an elliptical exercise machine. After Octane won in federal district court on summary judgment, it moved for an award of attorney's fees, arguing that the suit was an exceptional case under 35 U.S.C § 285. The district court denied the motion, and the Federal Circuit affirmed. In this case, the Supreme Court may determine the scope of a district court's discretion in granting fees under § 285. Although affirming the Federal Circuit's standard would prevent attorney fees in most instances, it would follow the usual American rule that each party generally bears its own costs of litigation. However, if the Supreme Court decides to broaden the lower courts' discretion, this may limit frivolous or predatory patent suits. Icon argues that the Supreme Court should affirm the Federal Circuit's two-part test because it comports with the legislative intent behind § 285 and prior judicial interpretation of that provision. Octane argues that the Supreme Court should overturn the Federal Circuit's test because the test is not party neutral and violates principles of statutory construction. Full text is available at www.law.cornell.edu/supct/cert/12-1184. ⊙

Written by Kalson Chan and Alex Kerrigan. Edited by Jeremy Amar-Dolan.

PLUMHOFF V. RICKARD (12-1117)

Appealed from the U.S. Court of Appeals for the Sixth Circuit

Oral argument: March 4, 2014

Around midnight on July 18, 1994, West Memphis police officer Joseph Forthman stopped a white Honda Accord for a broken headlight. Donald Rickard was the driver of the Honda and Kelly Allen, the passenger. After noticing an indentation in the windshield and Rickard's erratic behavior, Forthman requested that Rickard step out of the vehicle. Rickard instead fled, leading to a high-speed pursuit by several officers across state lines into Memphis, Tenn. After crashing into several vehicles, officers shot at Rickard's Honda 15 times as he was driving away in a final attempt to escape. Rickard lost control and hit a building, resulting in fatal injuries to both driver and passenger. The District Court for the Western District of Tennessee denied the police officers' motion for summary judgment based on qualified immunity. The Court of Appeals for the Sixth Circuit affirmed the judgment. The U.S. Supreme Court will now consider whether the Sixth Circuit correctly relied upon case law decided subsequent to the officer's actions or whether the court was required to consider only case law clearly prohibiting the use of lethal force at the time the event occurred. The Supreme Court will also decide whether the Sixth Circuit erred in denying qualified immunity as a matter of law. The Court's decision will implicate the limits on the use of force by peace officers as they carry out their duties and the rights of suspects to be free from excessive force. Full text is available at www.law.cornell.edu/supct/cert/12-1117. ⊙

Written by Paul Kang and Oscar Lopez. Edited by Stephen Wirth.

ROBERS V. UNITED STATES (12-9012)

Appealed from the U.S. Court of Appeals for the Seventh Circuit

Oral argument: Feb. 25, 2014

Benjamin Robers pled guilty to conspiracy to commit wire fraud for his role as a straw man in a mortgage fraud scheme. Under the Mandatory Victims Restitution Act of 1996, Robers was ordered to pay restitution to the lenders he defrauded. The amount owed was determined based on the amount the lenders lost minus the amount they received when the homes were resold. Robers argues that the statute offsets damages based on the remaining value due after the lenders received part of the property they lost, which he argues is when the lenders took title to the foreclosed homes. The government counters that the property lost, for which restitution is owed, is the cash the lenders lost because of Robers' fraudulent actions. Thus, restitution should be determined based on the amount of cash the lender recovers after selling the home. The Supreme Court's resolution of this case will settle whether the property is returned and restitution set when the lender takes over the title at foreclosure or when the lender receives cash at resale. This case will address the consequences for criminals convicted of fraud who are required to pay restitution and the amount they are responsible for paying. Full text is available at www.law.cornell.edu/supct/cert/12-9012. ⊙

Written by Sean Mooney and Brett Mull. Edited by Angela Lu.

WOOD V. MOSS (13-115)

Appealed from the U.S. Court of Appeals for the Ninth Circuit

Oral argument: March 26, 2014

In 2004, President George W. Bush made an unannounced campaign stop at the Jacksonville Inn in Jacksonville, Ore. Expecting the President to appear only at the nearby Honeymoon Cottage, pro-Bush and anti-Bush demonstrators arranged lawful demonstrations in the area. When the President changed his plans, Secret Service agents ordered local law enforcement to clear the area where the anti-Bush protestors were demonstrating. The anti-Bush demonstrators sued for viewpoint discrimination under the First Amendment. Secret Service agents Tim Wood and Rob Savage argue that the Ninth Circuit's generalization of the protestors' constitutional rights incorrectly deprived them of qualified immunity. Wood and Savage also argue that protestors failed to adequately plead a plausible claim because the complaint shows that the agents had a permissible security motive. Respondent Michael Moss argues that the Ninth Circuit properly denied Wood and Savage qualified immunity because the agents moved the protesters because of the content of their speech. Moss also argues that he adequately pleaded viewpoint discrimination by laying out facts that plausibly establish the agents' discriminatory motive. This case will determine whether law enforcement agents are able to account for demonstrators' viewpoints when protecting public officials and the general public during political events. Additionally, this case will help define the parameters of the Court's previous *Iqbal* ruling. Full text is available at www.law.cornell.edu/supct/cert/13-115. ⊙

Written by Gabriella Bensur and Jennifer Brokamp. Edited by Stephen Wirth.