

# LAW REVIEW 14080<sup>1</sup>

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## The Supreme Court's Recent *Hobby Lobby* Decision Is Unlikely to Present a Significant Problem in USERRA Enforcement.

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And Nathan Richardson<sup>3</sup>

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

***Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).**

**Q: I am a noncommissioned officer (NCO) in the Army Reserve. I joined ROA recently, after you amended your constitution to make NCOs eligible for membership. I have found ROA's "Law Review" articles to be immensely valuable to me in understanding and enforcing my legal rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that Congress and the state legislatures have enacted for service members and military families.**

**I was born in 1981 and graduated from high school in 1999. Shortly after graduation, I enlisted in the United States Army and served on active duty for five years. After I left active duty in 2004, I affiliated with the Army Reserve, and I also found a job working for an intermediate-size company that is owned by a family of Arab-Americans who are devout Muslims. I have worked for the company for a decade already and expect to remain there for my entire career.**

**As an NCO in the Reserve, I participate in drill weekends once per month and annual training, usually in the summer. In recent years, my drills have often started on Friday or even Thursday, and the annual training is frequently longer than the traditional two weeks.<sup>4</sup> In 2006-07, I was mobilized and sent to Iraq for a year. In 2011-12, I was mobilized and deployed to Afghanistan.**

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<sup>1</sup> We invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find almost 1,300 articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

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<sup>4</sup> We invite the reader's attention to Law Review 13099 (July 2013), titled "This Is Not your Father's National Guard."

**Over the years, I have had many confrontations with my employer (the elderly man who founded the company before I was born) about my absences from work for military training and service, but these issues have been resolved, with a lot of help from a Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR). Last week, the Supreme Court decided the “Hobby Lobby” case about the constitutionality of the Affordable Care Act (ACA) requirement that private sector employers with more than 50 employees must provide no-cost contraception services<sup>5</sup> to female employees.**

**The elderly man who owns and operates the company where I work told me on Friday: “The Supreme Court has held that it is unconstitutional to require Christians with sincere religious objections to abortion to finance (for their employees) contraception methods that amount to abortion. As a Muslim, I have sincere religious objections to participating in the Bush-Obama war of aggression against my Muslim brothers. What is good for the Christian is also good for the Muslim. By accommodating your absences from work for Army training and service, I am effectively participating in the war that I find religiously objectionable. No more! The next time that you miss even one hour of work for your Army stuff, I will fire you. I will take this case all the way to the Supreme Court if I must.”**

**I really need this job, because I live in an area of high unemployment. I want to reenlist in the Reserve when my current enlistment expires in a few months. I need to remain active in the Reserve at least until 2019, to qualify for Reserve Component retirement benefits. I need the Army, but I need the civilian job more. If I must choose between keeping my civilian job and remaining in the Reserve, I will have to choose the civilian job.**

**Do you think that the recent Supreme Court “Hobby Lobby” decision presents a serious problem to me in enforcing my USERRA rights against this family-owned business operated and owned by devout Muslims?**

**A:** No. It is most unfortunate that your employer is now apparently in the mood to fight you tooth-and-nail about your military service and training, but if push comes to shove and you must sue the employer we think that you will prevail. We have read the recent Supreme Court decision very carefully, and we have read the case law and statutory law that the Court’s majority decision cited. We think that the recent Supreme Court decision does not provide any significant support to your employer’s unsupportable position.

Let us start by reviewing the facts of the recent Supreme Court case and just what the Court held and did not hold. The Supreme Court granted *certiorari* (discretionary review) to review a 10<sup>th</sup> Circuit decision and a 3<sup>rd</sup> Circuit decision that directly conflicted with each other on an

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<sup>5</sup> The United States Food & Drug Administration (FDA) has approved 20 different contraception methods, and four of those methods operate on the fertilized egg, rather than preventing the sperm from fertilizing the egg. Some folks (including the plaintiffs in the “Hobby Lobby” case) have sincere religious objections to any technology that has the effect of killing a fertilized egg, because (in their view) human life begins at conception so killing a fertilized egg, even minutes after fertilization, constitutes murder. The plaintiffs in the “Hobby Lobby” case object to these four contraception methods, not to contraception in general.

important question of federal law. The 10<sup>th</sup> Circuit is the federal appellate court that sits in Denver and decides appeals from district courts in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. The 3<sup>rd</sup> Circuit is the federal appellate court that sits in Philadelphia and hears appeals from district courts in Delaware, New Jersey, and Pennsylvania. Whenever there is a conflict among the federal intermediate appellate courts on an important question of federal law, it is likely that the Supreme Court will step in and establish a uniform nationwide rule.

David and Barbara Green founded the corporation now called Hobby Lobby Stores, Inc. 45 years ago, and the two of them and their three adult children still own all the stock in the company and operate it as a closely held corporation. The chain now has 500 stores and more than 13,000 employees. They sued the United States Department of Health & Human Services (HHS) in the United States District Court for the Western District of Oklahoma, which ruled against them and denied them injunctive relief. 870 F. Supp. 2d 1278 (W.D. Okla. 2012). The Greens appealed to the 10<sup>th</sup> Circuit and prevailed. 723 F.3d 1114 (10<sup>th</sup> Cir. 2013).

Norman Hahn founded Conestoga Wood Specialties Corporation 50 years ago, and the company is still operated as a closely held family corporation, with members of the Hahn family owning all the stock and operating the company. The Hahns are devout members of the Mennonite Church, which firmly opposes abortion and believes that “the fetus in its earliest stages shares humanity with those who conceived it.” Like the Greens, the Hahns sued to enjoin enforcement of the requirement that they provide their female employees contraceptive methods that in their view amount to abortion. The Hahns lost in district court and in the 3<sup>rd</sup> Circuit. 724 F.3d 377 (3<sup>rd</sup> Cir. 2013). It is not surprising that the Supreme Court agreed to take this case, because it is difficult to imagine more diametrically opposed circuit court decisions on an important question of federal law.

### **Religious Freedom Restoration Act**

Justice Samuel Alito wrote the majority decision and was joined by Chief Justice John Roberts, Justice Antonin Scalia, Justice Anthony Kennedy, and Justice Clarence Thomas. The majority relied on a federal statute called the Religious Freedom Restoration Act (RFRA) and avoided reaching the constitutional question of whether the “free exercise of religion” clause in the Constitution’s First Amendment made it unconstitutional for a federal law to require folks like the Hahns and the Greens to finance for their employees contraceptive methods as to which these individuals have sincere religious objections. Applying the Constitutional-Doubt Canon of construction, the Supreme Court chose to decide the “Hobby Lobby” case on statutory grounds, under RFRA, in order to avoid having to consider serious constitutional challenges to the ACA.<sup>6</sup>

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<sup>6</sup> The Canons of Construction are a series of rules that have evolved over the centuries in common law courts. They are used to interpret statutes and other legal provisions. The Constitutional-Doubt Canon is a cardinal principle of interpretation that avoids any interpretation of a statute that would raise serious questions of constitutionality. When a statute could be construed in multiple ways, the court will select the approach that does not raise serious questions of constitutionality. For further reading, we recommend *Reading Law: The Interpretation of Legal Texts* by Justice Antonin Scalia and Professor Bryan A. Garner, pp. 247-53.

The pertinent section of RFRA is as follows:

**§ 2000bb-1. Free Exercise of Religion Protected**

**(a) In general.** Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

**(b) Exception.** Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is *the least restrictive means of furthering that compelling governmental interest.*

**(c) Judicial relief.** A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. 2000bb-1 (emphasis supplied).

**The History of RFRA**

Congress enacted RFRA in 1993, as a direct response to an important Supreme Court decision decided three years earlier: *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). The *Smith* case dealt with two members of the Native American Church (NAC), which used peyote (a controlled substance with psychedelic effects) as a sacrament in NAC services. The two NAC members were employed as drug rehabilitation counselors and were required to undergo regular drug testing. They “popped positive” for peyote and were fired. They filed for unemployment compensation, which the State of Oregon denied, noting that ingestion of peyote is a crime and that these two individuals were not eligible for unemployment compensation because they had been properly fired for their own criminal behavior. They appealed in the state court system and prevailed in the Oregon Supreme Court. 301 Or. 209, 221; 721 P.2d 445, 451.

The United States Supreme Court granted *certiorari* (discretionary review) and reversed the decision of the Oregon Supreme Court. The United States Supreme Court held that the “free exercise of religion” clause does not give an individual a “religious get out of jail free card” and that the individual can be held accountable (by criminal prosecution or by the denial of government benefits like unemployment compensation) even if the individual can claim “my religion made me do it.”

In the months and years following *Smith*, Senators and Representatives on the right and the left objected to this Supreme Court decision, arguing that it represented a step backward in our nation’s commitment to accommodate religious minorities by applying a balancing test. If an individual has a *sincere religious objection* to a law or regulation that requires the individual to do something or to refrain from doing something, the law or regulation will be upheld only if it

is shown to advance a *compelling government interest* and that the law or regulation utilizes the *least restrictive means* to advance the compelling government interest without unnecessarily trampling upon religious rights.

Justice Alito's majority opinion stipulates that the Federal Government has a compelling interest in providing no-cost contraceptives to female employees. In the view of Justice Alito and the majority, the problem is with the *least restrictive means* test. There are several other ways (identified in the majority opinion) that the government could ensure that female employees have no-cost access to contraceptives without drafting objecting employers into providing these services, in the face of their sincere religious objections. Because less restrictive means are available, the approach chosen by Congress when it enacted the ACA violates RFRA.

### **How Your Case is Different**

Unlike the Hahns and the Greens, your employer does not appear to have a *sincere religious objection* to the requirements of a specific federal law (in this case USERRA). Your employer has a *political* objection to the specific deployments and missions of United States service members in the 13 years since the terrorist attacks of September 11, 2001, together with a *practical* objection (typical of the attitude of all too many employers) to the inconveniences that National Guard and Reserve service can impose on civilian employers.

But even if we concede (for the sake of argument) that the employer's objection is religious and is sincere, your employer's RFRA argument must fail because there is no *less restrictive means* that could be utilized to serve the compelling government interest in national defense and national survival, without putting this minimal burden on civilian employers (the duty to reemploy persons returning from military service and to refrain from discrimination against those who have served, are serving, or have an obligation to serve).

Without a law like USERRA, it would not be possible for the services to recruit and retain the necessary quality and quantity of young men and women needed to defend our country. In the All-Volunteer Military<sup>7</sup> recruiting is a constant challenge. Despite our country's current economic difficulties and the military's recent reductions in force, recruiting remains a challenge for the Army Reserve—the only component that has been unable to meet its recruiting quota for Fiscal Year 2014.<sup>8</sup>

Recruiting difficulties will likely increase in the next few years as the economy improves and the youth unemployment rate drops, meaning that young men and women will have more civilian opportunities competing for their interest. Recent studies show that more than 75% of young men and women in the 17-24 age group are not qualified for military service, because of medical issues (especially obesity and diabetes), the use of illegal drugs or certain prescription

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<sup>7</sup> Congress abolished the draft 41 years ago, in 1973.

<sup>8</sup> Source: DOD news release, available at: <http://www.defense.gov/Releases/Release.aspx?ReleaseID=16516>

medicines (including medicine for conditions like attention deficit hyperactivity disorder), felony convictions, cosmetic issues, or educational deficiencies (no high school diploma).<sup>9</sup>

Less than half of one percent of America's population has participated in military service of any kind since the September 11 attacks.<sup>10</sup> A mere 1% of young men and women between the ages of 17 and 24 are interested in military service and possess the necessary qualifications.<sup>11</sup> The services will need to recruit a very high percentage of that 1%.<sup>12</sup> As a nation, we cannot afford to lose any qualified and interested candidates based on their concerns that their military service (especially service in the Reserve or National Guard) will make them unemployable in civilian life. There definitely is a compelling government interest in the enforcement of USERRA, and there is no less restrictive means by which the compelling interest can be advanced without requiring employers to reemploy returning service members, even when employers can establish that they have sincere religious objections to this requirement.

You have an additional weapon in your arsenal: preventing a national incentive against joining the military will most likely be considered a matter of national security. Historically, courts grant deference to the government in determining whether or not an issue is in fact a matter of national security. When this issue arises, the Defense Department will not fail to point out that the judicial imposition of a policy that makes it more difficult for the services to recruit qualified young men and women poses a national security problem. As Chief Justice Roberts wrote (for the majority) in a recent national security case, "[R]espect for the Government's factual conclusions is appropriate in light of the courts' lack of expertise with respect to national security and foreign affairs . . . and conclusions must often be based on informed judgment rather than concrete evidence."<sup>13</sup> This does not mean that the court would automatically side with you, but it does serve as a powerful policy-focused argument that would help to tilt the decision in your favor.

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<sup>9</sup> Source: Mission: Readiness Press Release, November 5, 2009, available at: <http://cdn.missionreadiness.org/NATPR1109.pdf>

<sup>10</sup> Source: Pew Research Center, *War and Sacrifice in the Post-Modern Era*, available at: <http://www.pewsocialtrends.org/2011/10/05/chapter-6-a-profile-of-the-modern-military/>

<sup>11</sup> Source: The Wall Street Journal, *Recruits' Ineligibility Tests the Military*, June 27, 2014, by Miriam Jordan, available at <http://online.wsj.com/articles/recruits-ineligibility-tests-the-military-1403909945>.

<sup>12</sup> According to 2010 Census estimates and military demographic surveys, there are approximately 34.5 million civilian Americans between the ages of 17 and 24. Of these, only approximately 1% (roughly 344,500) will be both interested and qualified for military service. In 2014, the Defense Department's recruiting goal for both active and reserve components was 121,363 personnel. Assuming these numbers remain constant, the DOD would have to recruit about 35% of all interested and qualified individuals from the ages of 17-24 in order to meet its recruiting goals. And to the extent that more are recruited this year, there are fewer available next year.

<sup>13</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1, 5 (2010).