

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

PACIFIC LUTHERAN UNIVERSITY,)
)
)
 Employer,)
)
 and) Case No. 19-RC-102521
)
 SERVICE EMPLOYEES INTERNATIONAL)
 UNION, LOCAL 925,)
)
 Petitioner.)
)

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE*
NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC.
REGARDING *BURWELL V. HOBBY LOBBY STORE, INC.*

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BRIEF BACKGROUND ON *HOBBY LOBBY*

The issue in *Hobby Lobby v. Burwell* was “whether the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.*, permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies’ owner.” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014). Under RFRA, a government¹ shall not substantially burden a person’s exercise of religion unless it can first show that the burden is in furtherance of a compelling government interest and that interest is pursued by the least restrictive means. 42 U.S.C. § 2000bb-1(a), (b).

In order for the government to substantially burden a person’s exercise of religion, it must “put[] substantial pressure on the adherent to modify his behavior and to violate his beliefs.” *Thomas v. Review Bd. of Indiana Employment Security Division*, 450 U.S. 707, 718 (1981).

The Court in *Hobby Lobby* found that the HHS mandates places a substantial burden on these corporate employers by: (1) forcing the owners of the companies to violate their conscience in providing what they believed to be coverage that facilitates abortions; or, (2) strapping them with heavy monetary costs if they fail to comply. *Hobby Lobby*, 134 S. Ct. at 2759. Having shown that the government placed a substantial burden on the employers, the Court then rejected the argument that the HHS mandate was the

¹ The term “government” includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity. § 2000bb-2(1)

least-restrictive means of accomplishing the government’s interest. The Court noted that there were “other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all FDA-approved contraceptives.” *Id.*

WHY HOBBY LOBBY SHOULD INFLUENCE THE OUTCOME OF THIS CASE

The Court established two important principles that relate to this case. First, the term “religion” is intended to encompass a broader range of protections than was previously thought. *See Hobby Lobby*, 134 S. Ct. at 2772 (“nothing in the text of RFRA as originally enacted suggested that the statutory phrase ‘exercise of religion under the First Amendment’ was meant to be tied to this Court’s pre-*Smith* interpretation of that Amendment”). The Court thought that the legislature intended that RFRA would effectuate a complete separation from First Amendment case law in “favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” *Hobby Lobby*, 134 S. Ct. at 2761-62. The term “religious exercise” now includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief. 42 U.S.C. § 2000cc-5(7)(A).

As applied to this case, Pacific Lutheran University’s (“University” or “PLU”) religious identity and its Lutheran mission are part of the broad protection of the free exercise of religion protected by RFRA in the aftermath of *Hobby Lobby*.

Second, the term “person” in RFRA should be understood to include the University the same way that *Hobby Lobby* intended to include “[c]orporations,

companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals” pursuant to the Dictionary Act. 1 U.S.C. § 1; *see Hobby Lobby*, 134 S. Ct. at 2768 (the Court saw “nothing in RFRA that suggest[s] a congressional intent to depart from the Dictionary Act definition”). “A corporation is simply a form of organization used by human beings to achieve desired ends And protecting the free-exercise rights of corporations . . . protects the religious liberty of the humans who own and control those companies.” 134 S. Ct. at 2768.

Lest there be any doubt about RFRA applying to religiously based schools in general, and PLU in particular, three-days after *Hobby Lobby* was handed down, the Supreme Court granted an emergency preliminary injunction to Wheaton College, a religiously based school of higher education, from providing HHS mandated contraceptive coverage on the basis of its religious objections. *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014).

Hobby Lobby speaks directly to an issue raised in amicus’s original brief: health-care coverage. Just as the HHS mandate forces the corporations in *Hobby Lobby* to endorse the government’s message on contraceptive coverage, so does the jurisdictional oversight of the NLRB, and forced collective bargaining with a union, force the University to surrender its control over its unique religious message when negotiating over employee health care. In the end, PLU, whose religious identity and mission is wrapped up in what it teaches and how it operates, will find its identity and mission distorted by the secular goals of the Board and the Union.

Allowing the Board and Union to force decisions that conflict with the University's religious convictions presents the additional problem of endless litigation under RFRA in the aftermath of *Hobby Lobby*. This endangers the educational mission of the University through financial hardship. Like the substantial burden found in *Hobby Lobby*, the Board forces the University to violate its conscience by bargaining in good faith on promoting the Union's pro-abortion agenda through the collective bargaining agreement; or, be strapped with heavy monetary costs through endless litigation to preserve its religious identity. This economic burden places a substantial pressure on the University to modify its religious behavior or compromise its identity.

Since this places a substantial burden on the religious beliefs of the PLU, the Board must find (and ultimately show to the courts reviewing the decision here), that taking jurisdiction over PLU is in furtherance of a compelling governmental interest which is promoted by the least restrictive means. *Hobby Lobby*, 134 S. Ct. at 2779. Just as all the exceptions to the HHS mandate demonstrated that the least restrictive alternative was not in place, so the massive exceptions to collective bargaining under the NLRA show that mandating collective bargaining for the University is not the least restrictive alternative. According to the January 24, 2014, news release of the Bureau of Labor Statistics, U.S. Department of Labor, union membership is only 6.7% for private sector employers, like PLU. BLS News Release, (January 24, 2014, 10:00 a.m.) <http://www.bls.gov/news.release/pdf/union2.pdf>. Thus, 93.7% of employees in the private sector are non-union and are not required to bargain. According to Table 1 of the *Amicus National Right to Work Foundation's Supplemental Brief on Hobby Lobby*, page 5.

BLS News Release, of the total number of employees in the United States, only 12.4% are represented by unions. (This figure includes both public and private sectors.)

The small number of union represented employees demonstrates that the vast majority of employers are not required to collectively bargain. When the overwhelming number of employers and employees in the private sector are not represented by a labor union, and this is consistent with current law, the government cannot show that it has a compelling interest, implemented by the least restrictive means, in requiring the University to collectively bargain contrary to its religious beliefs.

CONCLUSION

Intermeshing the PLU's mission in society, centered on Lutheran theology and mission, with the jurisdictional purview of the Board and the secular goals of the Union, dilutes the religious message of the University. It interferes with the University's mission to be an agent of the Lutheran Church and a carrier of the Church's message. Conflict over topics dealing with health-care coverage is similar to the issue raised in *Hobby Lobby*. Just as the HHS mandate imposed certain forms of contraceptive coverage that went against the religious tenets of the corporations in *Hobby Lobby*, the same conflict is being created between the University and the Union in mandated collective bargaining. This should not be allowed, because it is not supported by a compelling state interest implemented in the least restrictive way.

Respectfully submitted,

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Amicus National Right to Work Foundation's Supplemental Brief on Hobby Lobby, page 6.

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2014, I electronically filed a Motion for Special Leave to File Supplemental Brief, as well as the Supplemental *Amicus Curiae* Brief of the National Right to Work Legal Defense and Education Foundation, Inc., to the Executive Secretary of the NLRB, and I e-mailed the same to the following:

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