

Dissecting the *Hobby Lobby* Case

Burwell v. Hobby Lobby Stores, Inc., No. 13-354 and 13-356

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One of the more controversial Supreme Court decisions of recent times, the *Hobby Lobby* case has been celebrated and vilified, depending on the point of view. This article is an attempt to clarify how it was

decided, and what it may mean for future disputes over the subject matter.

PARTIES. Sylvia Burwell, Secretary of Health and Human Services, *et al.*, Petitioners, Hobby Lobby Stores, Inc., *et al.*, Respondents.

(Additional parties include the owners of the corporations involved [the “Greens”], and the U.S. Department of Health and Human Services.)

FACTS. Hobby Lobby Stores, Inc. (“Hobby Lobby”), is a for-profit corporation that owns a national chain of about 500 arts-and-crafts stores. It employs more than 13,000 full-time workers.

Regulations promulgated under the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, have certain requirements for employment-based health insurance plans. These include, in general, that a full range of contraception methods be made available to women, as prescribed by a physician, at no out-of-pocket cost.

The Greens object to “facilitating” coverage of four types of contraceptives. These include two types of intrauterine device (IUD), Plan B, and Ella. Their objection is based on a religious belief that human life begins at the moment of conception.

None of these methods causes an abortion, that is, the termination of a pregnancy, under the standard definition of pregnancy. Under 45 C.F.R. 46.202, for example, pregnancy begins when a fertilized egg attaches to the uterine wall. The four methods have in common, however, the possibility that a fertilized egg may be destroyed, prior to implantation in the uterine wall, by the operation of the contraception.

ISSUES

1. Does the mandate of providing access to the four contraception methods specified substantially burden the Respondents’ exercise of religion for purposes of the Religious Freedom Restoration Act (RFRA), 42 USC. § 2000bb-1?
2. Is the mandate in furtherance of a compelling government interest?
3. Is the mandate the least restrictive means of furthering the government interest?

HOLDING

The majority, in an opinion written by Justice Alito, concluded that the mandate

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does substantially burden the Respondents' exercise of religion, by requiring their facilitation of birth-control methods that have the potential for destroying fertilized eggs. It assumed, without much discussion, that the government's interest in providing healthcare is a compelling one. However, it determined that the mandate is not the least restrictive means of furthering the government's interest.

Thus the ruling of the 10th Circuit Court of Appeals was affirmed, and the ruling of the Third Circuit Court of Appeals was reversed. The mandate of the ACA with regard to the Hobby Lobby and related parties' being required to provide the four specified types of contraception was found to violate the RFRA.

ANALYSIS

Much of the argument in this case is based on the presence of a for-profit corporation as the entity that does the "facilitating," *i.e.*, provides the insurance coverage. The Respondents suggest that a corporation cannot have religious beliefs or exercise religion. Central to this argument was the word "person" in the relevant provision of the RFRA: "Government may substantially burden a person's exercise"

The majority dispatched this argument by referring to the Dictionary Act, 1 USC § 1, which says that "person" shall include corporations, etc., unless the context clearly indicates otherwise. The dissent took the position that the context did clearly indicate otherwise here. It returned to the argument that a for-profit corporation cannot exercise religion and noted an absence of case law to the contrary.

The majority noted that 1) non-profit corporations are conceded to be covered by RFRA, and 2) modern corporate law provides for the use of for-profit form, for associations whose primary purpose is other than generating profit. It therefore extrapolated that for-profit corporations could come within the term "person" for RFRA coverage.

COMMENTARY

There is an elephant in the room. It should be addressed.

The crux of Hobby Lobby's objection to the ACA requirement is the Greens' "deeply held" religious conviction. At no point was this conviction challenged, despite its being the *sine qua non* for the entire issue. All mention of this conviction is with considerable deference. One wonders if the posited religious convictions would have received such deference, had they varied substantially from those of the justices who formed the majority.

The stated religious convictions are subject to two observations. First, they did not prevent Hobby Lobby from offering the same types of contraception that the subject of the objection in this case, in its self-insurance program. (Petitioners' Brief at 8). Second, they do not prevent Hobby Lobby's considerable trade with China, a country well known for the prevalence of abortion. The purpose of making these observations is not to allege that the stated convictions are not sincere. It is, rather, to point out that unquestioning acceptance of such sincerity may not be appropriate, when the convictions are used to halt an action that is

admittedly in furtherance of a compelling government interest.

The majority opinion expresses discomfort with the idea of assessing the sincerity of religious convictions. Such discomfort seems entirely appropriate. The notion of the government determining the sincerity of one's religious convictions conjures up images of the Spanish Inquisition, and the Salem witch trials. Yet establishing a mechanism for avoiding legal mandates by claiming such convictions inexorably leads in that direction.

The ACA contains exemptions for religious organizations and persons (§ 1311[d]4[H]). Taking an individual's professed beliefs at face value is a minor adjustment. A non-profit organization formed expressly for the furtherance of religious objectives seems *pima facie* to deserve some deference in assessing its sincerity.

A for-profit corporation, however, presents a less-clear profile. By definition, a for-profit corporation's purpose is to generate a profit. As the majority opinion suggests, state laws have broadened the purposes for which a corporation may be formed.

However, if the purpose were exclusively for social or religious objectives, then forgoing the tax advantages of other entity types would make little sense. This leads to the conclusion that the purposes of the corporation must therefore be mixed. The phrase "God and mammon" comes to mind.

Extending an exemption for "deeply held religious beliefs" to for-profit corporations puts the government in a position of evaluating the sincerity of those beliefs. If it

uniformly accepts it without question, as the court did in this case, the potential for abuse is enormous. If it accepts those with which it is familiar and gives detailed scrutiny to others, then the "establishment clause" of the First Amendment is in jeopardy. If it scrutinizes all such claims, one can only imagine the mechanism by which this can be accomplished.

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