



Hobby Lobby v. Sebelius: Crafting a Dangerous Precedent

By Julia Mirabella and Sandhya Bathija October 1, 2013

Hobby Lobby, the giant craft retailer known for providing knitting wool, holiday trinkets, fake flowers, and just about any other craft-centric material one could need, balks at providing certain types of medical care for its employees. That is because the company, which has 559 stores across the country and brings in \$3 billion in revenue each year,¹ is owned by the Green family—devout Christians who believe that human life begins at conception and that using certain types of birth control violates their religious beliefs.

The Greens, who often have Hobby Lobby buy newspaper ads encouraging people to “know Jesus as Lord and Savior,”² also think that their religious beliefs should be imposed on Hobby Lobby’s 22,000 employees. Because of their religious convictions, the Greens have asked a federal court, in a case called *Hobby Lobby v. Sebelius*, to exempt their for-profit corporation from the Affordable Care Act’s requirement that companies with more than 50 employees offer health plans covering contraception.³

In 2011, the Department of Health and Human Services announced that minimum standards for employer health plans would include preventive care for women, including mammograms, cervical-cancer screenings, prenatal care, and contraceptives—all services that are vital to women’s health and well-being.⁴ The Obama administration provided an exemption from the contraception-coverage requirement for “religious employers”—churches and nonprofit religious organizations—but not for for-profit, secular corporations such as Hobby Lobby.⁵

Hobby Lobby v. Sebelius is one of 40 lawsuits filed across the country asking federal courts to exempt a for-profit corporation from the Affordable Care Act’s contraception requirement. It is also one part of a coordinated effort led by conservative legal groups to undermine the Affordable Care Act and avoid complying with other laws.

In June, an all-male majority of the 10th U.S. Circuit Court of Appeals agreed with the Greens and ruled that corporations have religious rights equal to living, breathing humans. The panel of judges said that asking Hobby Lobby to provide contraception coverage would violate the corporation’s religious freedom under federal law.

Two other cases have already made it through the Courts of Appeals in the 3rd and 6th Circuits where the courts have not been as easily swayed by corporations' religious arguments.⁶ The 3rd and 6th Circuits split from the 10th Circuit and held that for-profit corporations do not have religious rights. On September 19, both *Hobby Lobby* and the 3rd Circuit case, *Conestoga Wood Specialties Corp. v. Sebelius*, were appealed up to the Supreme Court; the current circuit split makes it likely that the Court will agree to hear one of these cases this term.⁷ If a majority of the justices agree with the “corporate conscience” argument—that for-profit corporations can have religious beliefs⁸—thousands of American women will be denied access to critical health care, simply because their bosses do not believe in contraception.

If the Supreme Court were to side with Hobby Lobby, it would be another piece of pro-corporate precedent from an increasingly pro-business court.⁹ Such a decision would also impact how we define religious liberty in America. Will corporations soon be permitted to override the religious-freedom rights of their employees? What other types of exemptions will these corporations have? Will these companies be free to disregard all civil rights laws barring discrimination?

As 10th Circuit Chief Judge Mary Beck Briscoe, the only active woman on that appeals court, wrote in her *Hobby Lobby* dissent, the court's holding is “unprecedented” and no one “can confidently predict where it may lead, particularly when one considers how easily an ‘exercise of religion’ could now be asserted by a corporation to avoid or take advantage of any government rule or requirement.”¹⁰

It is exactly because of this possibility that the justices, should the Supreme Court take one of these religious-exemption cases, must recognize that corporations were never intended to have religious-freedom rights.

Corporations do not have religious freedom

There are currently 40 federal court lawsuits brought by for-profit corporations challenging the Affordable Care Act's contraception requirement.¹¹ These corporations range from an industrial material-shredding and scrap-metal company to a property-management firm.¹² While these companies are in no way religious in their enterprise, their owners believe they deserve the same exemption from the rules as nonprofit religious organizations and places of worship.¹³

These owners argue that their corporations share in the owners' personal religious beliefs, and as such have rights protected by the First Amendment and a 1993 federal law called the Religious Freedom Restoration Act, or RFRA. These business owners say that by requiring a corporation's health insurance to cover women's contraception, the government is violating that corporation's religious rights. This argument is severely flawed because:

1. History and the law recognize religious-freedom protections only for individuals and nonprofit, religious entities.

In a 1782 letter, James Madison called religious rights “private rights,”¹⁴ and prior to the *Hobby Lobby* opinion, neither the Supreme Court nor any other federal court had disputed that assertion.¹⁵ In fact, in the famous school-prayer case, *Abington School District v. Schempp*, the Supreme Court explicitly said that the purpose of the Free Exercise Clause “is to secure religious liberty *in the individual* by prohibiting any invasions thereof by civil authority.”¹⁶ A Supreme Court decision holding that corporations have free exercise rights would ignore our Founding Fathers’ understanding of religious liberty and the Court’s own consistent treatment of “free exercise rights as confined to individuals and non-profit religious organizations.”¹⁷

2. A corporation and its owner are two different entities in the eyes of the law. The Supreme Court has noted that “[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status.”¹⁸ When owners of corporations, such as the Greens, decide to incorporate their business, they gain advantages that come with incorporation—namely a separation from the activities of their corporation and protection from personal liability. While the owners certainly have religious-freedom rights, their corporations, which are separate from them, do not.

3. Congress and state legislatures never intended for corporations to have religious-freedom rights under the Religious Freedom Restoration Act. RFRA was never intended to protect big business, but rather was aimed to prevent the government from trampling on the religious rights of individuals. RFRA was Congress’s response to an unpopular Supreme Court decision, *Employment Division v. Smith*.¹⁹ In the 1990 case, the Supreme Court said the state of Oregon could deny unemployment benefits to two Native American men who were fired for using the illegal drug peyote, even though the drug was used as part of a religious ritual.²⁰ The Court, in an opinion written by Antonin Scalia, ruled that a person’s religious beliefs cannot prevent him or her from abiding by laws that are neutral and not aimed at restricting religious freedom.²¹ Many religious groups were concerned that the holding would hurt the rights of individuals who belonged to minority religions. These fears led to a bipartisan effort to enact RFRA.

The act’s legislative history supports this. Congress made it clear that the law was necessary to protect “individuals,” “religious institutions,” and “religious organizations” that enjoy free exercise rights. Nowhere does the legislative history mention “for-profit corporations.”²²

False religious liberty

Even if corporations could have religious beliefs, the contraception requirements do not burden religious liberty. The Supreme Court, in *United States v. Lee*,²³ held that an employer's personal religious beliefs did not allow a company an exemption from business regulations that applied to its competitors, noting that "limits [employers] accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."²⁴ The Court noted that allowing individual employers religious exemptions from government laws would operate to "impose the employer's religious faith on the employees."²⁵ The same reasoning applies to the corporations seeking exemptions to the ACA's contraception requirements today—for-profit corporations do not have a compelling religious freedom argument.

Dangerous implications

A holding that for-profit corporations have religious beliefs could not only harm employee access to adequate health care, but could also legalize religious-based discrimination while trampling on employees' religious freedom.

More health care exemptions

More than 50 percent of Americans receive health insurance from their employers,²⁶ and the employer health insurance rules are a major piece of the Affordable Care Act legislation and key to its success. The *Hobby Lobby* case and other cases currently in federal court are an attempt by those who were against the Affordable Care Act to slowly chip away at it, and contraception is just the beginning. If for-profit corporations can claim a religious exemption for contraception, they could then refuse to offer other types of health care coverage all because it conflicts with the owners' "faith." Consider the following examples:

- Jehovah's Witnesses do not believe in blood transfusions. A for-profit corporation owned by a devout Jehovah's Witness could be able to refuse to cover blood transfusions for its employees.
- Certain fundamentalist factions of Christianity, Judaism, and Islam are religiously opposed to the use of all vaccinations and could be exempt from covering vaccinations for their employees.²⁷
- Christian Scientists eschew modern medicine entirely, believing instead in the healing power of prayer. A for-profit corporation owned by a Christian Scientist could decline to provide any health insurance based on these religious beliefs.²⁸

- Scientologists are religiously opposed to psychiatry and drugs associated with psychiatry. A Scientologist owner of a for-profit corporation could use the corporation's so-called "religious beliefs" to refuse coverage for psychiatric services for its employees.²⁹
- Some evangelical Christians are opposed to the human papilloma virus, or HPV, vaccine, which prevents cervical cancer, because they believe the protection of the vaccine will increase promiscuity. A for-profit corporation owned by an evangelical Christian could request an exemption for his or her corporation, thus denying the corporation's employees and their families' access to the vaccine.³⁰

Floodgates for discrimination

Beyond health insurance requirements, a Supreme Court holding for Hobby Lobby could codify discrimination into law, all in the name of religious freedom. Courts and Congress have recognized that religious organizations, such as places of worship, should have the freedom to make their own hiring choices because of their religious status and have created exemptions to discrimination laws for them. If for-profit corporations are ruled to have religious beliefs, the lines will be blurred and corporations will be able to argue for these exemptions as well. In fact, it would be difficult to imagine any federal law in which a corporation could not argue for a religious exemption, simply because its owners do not want to follow the law. For example:

- Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex, race, color, national origin, or religion.³¹ But if for-profit corporations have religious beliefs, they will be able to argue they have the right to side-step Title VII and, for example, hire only those who sign a "statement of faith" or share the same religious beliefs.
- The Pregnancy Discrimination Act, which is part of Title VII, protects against sex discrimination on the basis of pregnancy,³² but for-profit corporations may try and use their newly found religious rights to fire unmarried pregnant employees.
- The Fair Housing Act makes it illegal to discriminate on the basis of sex, race, color, national origin, or religion, unless you qualify for certain religious organizations exemptions.³³ If for-profit corporations have religious rights, then property-management firms may argue their religious beliefs do not support certain lifestyles such as living together before marriage. They may choose not to rent or sell to those engaging in the unapproved conduct.
- Many states have public accommodations laws that prevent discrimination based on sexual orientation. A holding that a corporation can be exempt from basically any federal law because of its owners' religious beliefs could lead to similar state law exemptions. (See *Elane Photography v. Willock*.³⁴)

Conclusion

In her dissent, Chief Judge Briscoe called the 10th Circuit’s majority opinion in *Hobby Lobby* “nothing short of a radical revision of First Amendment law, as well as the law of corporations.”³⁵ It is also a direct attack on women and the beginning of a blanket exemption to discriminate in the name of religion. Around 99 percent of women use contraception at some point in their lives, and the burden of paying for that contraception falls squarely on their shoulders.³⁶ There is no reason to deny women access to the care they need. While religious freedom gives Hobby Lobby’s owners—the Green family—the right to make personal decisions about their own faith, it does not give them or their corporation the right to impose those beliefs on others or to discriminate. Hobby Lobby and other for-profit corporations are using a religious liberty argument to avoid complying with a government law they do not like. In this case, it is the Affordable Care Act, but a pro-corporate decision would open the door for corporations to pick and choose which federal laws they want to follow, and they should not be allowed to succeed.

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Endnotes

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