
RELIGIOUS LIBERTIES

SEBELIUS V. HOBBY LOBBY STORES, INC.

By Hon. Michael W. McConnell*

Note from the Editor:

This article is a discussion about the *Sebelius v. Hobby Lobby Stores, Inc.* case before the U.S. Supreme Court. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to further discussion about *Hobby Lobby*, the Religious Freedom Restoration Act, and the First Amendment. To this end, we offer links below to different perspectives on the case, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

Related Links:

- Brief for Petitioners, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (filed Jan. 10, 2014): http://sblog.s3.amazonaws.com/wp-content/uploads/2014/01/01.12.14_brief_for_petitioners_doj.pdf
 - Elizabeth Wydra, *Symposium: Under a straight-forward reading of constitutional text and history and fundamentals of corporate law, Hobby Lobby's claims fail*, SCOTUSBLOG (Feb. 27, 2014, 10:27 AM): <http://www.scotusblog.com/2014/02/symposium-under-a-straight-forward-reading-of-constitutional-text-and-history-and-fundamentals-of-corporate-law-hobby-lobbys-claims-fail/>
 - Marty Lederman, *Symposium: How to understand Hobby Lobby*, SCOTUSBLOG (Feb. 23, 2014, 7:20 PM), <http://www.scotusblog.com/2014/02/symposium-how-to-understand-hobby-lobby/>
 - Ilya Shapiro, *Symposium: Mandates make martyrs out of corporate owners*, SCOTUSBLOG (Feb. 24, 2014, 5:03 PM), <http://www.scotusblog.com/2014/02/symposium-mandates-make-martyrs-out-of-corporate-owners/>
 - Richard Garnett, *Symposium: Accommodations, religious freedom, and the Hobby Lobby case*, SCOTUSBLOG (Feb. 28, 2014, 2:11 PM), <http://www.scotusblog.com/2014/02/symposium-accommodations-religious-freedom-and-the-hobby-lobby-case/>
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Cutting through the politicized hype about the *Hobby Lobby* and *Conestoga* case¹ (“Corporations have no rights!” “War on Women!”) the Justices during oral argument focused on four serious legal questions, which deserve a serious answer:

- (1) Could Hobby Lobby avoid a substantial burden on its religious exercise by dropping health insurance and paying fines of \$2,000 per employee?
- (2) Does the government have a compelling interest in protecting the statutory rights of Hobby Lobby’s employees?
- (3) Would a ruling in favor of Hobby Lobby give rise to a slippery slope of exemptions from vaccines, minimum wage laws, anti-discrimination laws, and the like?
- (4) Has the government satisfied the least restrictive means test?

I think the answer to all four questions is “no.” I offer brief thoughts on each below.

I. CAN HOBBY LOBBY AVOID A SUBSTANTIAL BURDEN BY DROPPING INSURANCE?

Justices Sotomayor, Kagan, and Kennedy asked several
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questions about whether Hobby Lobby could avoid a substantial burden on its religious exercise by dropping insurance altogether and paying an annual “tax” of \$2,000 per employee.² Some have suggested,³ based on admittedly “speculative” calculations, that this option would actually save Hobby Lobby money, because health insurance typically costs more than \$2,000 per employee. This argument—which the government never raised below and which no lower court has addressed—is wrong both in principle and on the facts.

First, the Greens (owners of Hobby Lobby) have alleged that their religious beliefs include a belief in treating employees well, a belief they practice by, among other things, offering quality health care to their employees. (Their religious beliefs are also why they start employees at nearly double the minimum wage, reduce operating hours to promote family time, and provide other benefits.) The government has never contested the sincerity of those beliefs. And that should end the argument. The government is forcing the Greens to cover contraception or drop insurance altogether, both of which would burden their religious exercise.

Even apart from religious convictions, the right of an employer to provide health insurance coverage for its employees is a valuable right under the law. If employers were better off dropping insurance coverage and paying the “tax,” we would expect many large employers to do so. That has not happened—which confirms the common-sense conclusion that dropping insurance coverage is bad for employees and bad for business.

In any event, the speculation that Hobby Lobby could save money by dropping its employees’ health insurance plan,

paying the tax, and making it up to them in increased salary disregards three important facts: (1) employer-provided health insurance is tax-exempt to the employee, but the compensatory increase in salary would not be; (2) the provision of insurance is tax-deductible to the employer, but payment of the tax is not; and (3) employer-based group coverage is cheaper and usually better than individual plans on the exchanges. It is almost certainly cheaper for Hobby Lobby to provide health insurance than to pay for its employees to purchase equivalent coverage on the exchanges.

True, some of Hobby Lobby's employees might be eligible for subsidies, which in theory might lower its costs. But those subsidies depend on information an employer does not have—family size and income—and employers cannot pay different amounts to workers based on these factors. To make all of its employees whole, Hobby Lobby would have to assume none will receive subsidies.

In short, if Hobby Lobby drops insurance, it would not simply pay a \$2,000 “tax.” Requiring it to cease providing insurance would cause massive disruption to Hobby Lobby's employees, major uncertainty for its business, and cost millions of dollars in taxes and salaries beyond what it was previously paying just for insurance. It is easy to see how imposing such a choice constitutes a substantial burden—which is likely why the government never raised the issue, and the courts of appeals never considered it.

II. DOES THE GOVERNMENT HAVE A COMPELLING INTEREST IN PROTECTING THE STATUTORY RIGHTS OF HOBBY LOBBY'S EMPLOYEES?

Turning to strict scrutiny, the government's main argument is that it has a compelling interest in protecting the “statutory rights” of third parties—namely, the right of Hobby Lobby's employees to get cost-free contraception through Hobby Lobby's insurance plan. Evaluating the strength of the government's interests is often one of the most difficult inquiries in constitutional law. But in this case, the government has almost insuperable difficulties in making the case.

First and foremost, the government's compelling interest argument suffers from a rather glaring problem: Congress did not impose the contraceptive mandate, but left it to the Department of Health and Human Services (HHS) to decide what “preventive services” must be covered. If Congress really viewed contraceptive coverage as a compelling interest it would not have left it to the vagaries of the administrative process, which are subject to political change from administration to administration.

The interest is further undermined by HHS's statutory authority to grant religious exemptions to whomever it chooses—which HHS itself understands to include authority to grant such exemptions to for-profit businesses.⁴ Genuinely compelling interests—that is, those that cannot tolerate religious exemptions—do not come with open-ended regulatory authority to create exceptions.

The government argues that it necessarily has a compelling interest in protecting the “statutory rights” of the employees to contraceptive coverage. The employees, it argues, cannot be

made to bear the burden of the employer's religious exercise.

This argument is circular. It assumes the conclusion—that employees are legally entitled to this benefit—when that is the very question before the Court. The Affordable Care Act shifts the legal responsibility for paying for an employee's contraceptive coverage from the employee to the employer. There is nothing wrong with that in principle; the government shifts economic burdens all the time. But when the burden is an imposition on conscience the government may not shift the burden without a compelling justification. If the mere fact that the statute creates a new “statutory right” for a third party were enough to make the government's interest compelling, no one could ever raise a First Amendment or Religious Freedom Restoration Act (RFRA) challenge to a law forcing them to do something for someone else.

As Justice Kennedy pointed out in oral argument, the government could require employers to pay for employees' abortions (or could require for-profit doctors to perform them), and RFRA would be no help, because the government would always have a compelling interest in protecting the “statutory rights” of third parties. That cannot be the law.

Religious accommodations often impose burdens on third parties. In *Sherbert*,⁵ the employer's unemployment tax rate was increased on account of covering an employee who could not work on Saturday; military draft exemptions for religious conscientious objectors—the most venerable of all religious accommodations—make it more likely that other people will be drafted; Title VII's religious accommodation requirement requires employers and other employees to adjust their practices; conscience clauses force women seeking abortions to locate a different doctor or hospital. It would break with long-standing law and tradition to say that religious accommodations can never shift a burden to a third party.

The government's argument cannot be squared with the Court's recent, unanimous, decision in *Hosanna-Tabor*,⁶ allowing religious employers to impose substantial burdens on the “statutory rights” of employees. In that case, the Court held, without dissent, that religious organizations have a First Amendment right to fire ministerial employees for any reason at all—even reasons that would violate anti-discrimination laws. Obviously, firing an employee in violation of anti-discrimination laws is a more substantial deprivation of the employee's “statutory rights” than declining to pay for the employee's contraception.

The government struggles to distinguish *Hosanna-Tabor* on the ground that it arises in “the special context of autonomy for churches and religious institutions.”⁷ But that simply dodges the question: *Why* should the government have no interest when a religious group imposes a severe burden, but a compelling interest when a business imposes a light burden? Perhaps the government thinks this is because a for-profit business is categorically incapable of exercising religion. But for reasons that I⁸ and others⁹ have explained, that argument is untenable. And it certainly found little support at oral argument. So we are left with the conclusion that burdens on third parties do not automatically foreclose a claim of religious freedom.¹⁰

This conclusion is consistent with other areas of the law,

where the Court consistently protects civil rights—even when they impose burdens on third parties. In the free exercise context, the Court has recognized a right to sacrifice animals, despite “a substantial health risk . . . [to] the general public” and “emotional injury to children who witness the sacrifice of animals.”¹¹ It has recognized a right to use illicit drugs, despite the harm to third parties from diversion of the drugs for recreational use.¹² And it has recognized a right to keep children out of public school, despite the harm to children who leave the Amish faith and are “ill-equipped for life.”¹³

Outside the free exercise context, the Court protects free speech, even when it causes financial and emotional harm to third parties.¹⁴ It protects freedom of the press, even when it could undermine national security and thus the safety of third parties.¹⁵ It protects freedom from unreasonable search and seizure, even when it allows dangerous criminals to escape conviction for crimes committed against third parties.¹⁶ And it protects the right against self-incrimination, even when it does the same.¹⁷ In short, the fact that a civil right may impose burdens on third parties is not, standing alone, sufficient reason to restrict that right. What we need is theory of which burdens give rise to a compelling governmental interest, and which do not. But the government offers no such theory.

One objective way to decide which governmental interests are compelling is to look at whether the government exempts a significant amount of conduct that undermines that interest. As the Court said in *Lukumi*, “[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.”¹⁸ Here, due to exemptions for grandfathered plans, exceptions for small businesses, accommodations for religious non-profits, the failure to reach church plans, and exemptions for religious employers, the contraception-coverage provision does not apply to tens of millions of employees.

Another way to evaluate the strength of the government’s interest is to look at how the government itself treats that interest. As Justice Alito pointed out,¹⁹ the HHS regulations require grandfathered health plans to comply immediately with “certain particularly significant protections”—such as covering dependents to age 26, covering preexisting conditions, and reducing waiting periods²⁰—but *not* with the contraception mandate. Thus, HHS itself characterized the contraception mandate as *not* “particularly significant.”

Finally, there is something Alice in Wonderland-ish about the government’s position. According to the government, there may be some employees who need contraception, who can’t use one of the 14 kinds of free contraception provided under Hobby Lobby’s plan, and who might be deterred from buying Plan B, ella, or IUDs with their own money. Yet the government also argues that, in order to avoid the burden on its religious exercise, Hobby Lobby should drop its insurance coverage, pay a fine, and force its employees to obtain coverage on a government exchange. In that case, all 13,000 employees would lose excellent health insurance and be forced to buy their own insurance on an exchange. That imposes a far greater burden on Hobby Lobby’s employees. The government strains at a gnat while swallowing a camel.

III. WOULD A RULING IN FAVOR OF HOBBY LOBBY PRODUCE A PARADE OF HORRIBLES?

In its reply brief, the government argued that a ruling in favor of Hobby Lobby “would entitle commercial employers with religious objections to opt out of virtually any statute protecting their employees”—including anti-discrimination laws, minimum-wage laws, Social Security taxes, or immunization-coverage requirements. Several Justices raised this issue at oral argument. But the government’s parade of horrors argument is quite weak.

First, as Hobby Lobby’s counsel pointed out, the government’s parade of horrors is identical to Justice Scalia’s parade of horrors in *Smith*. Justice Scalia argued that courts should not be in the business of balancing the importance of general laws against the significance of burdens on religious practice; Justice O’Connor disagreed, arguing that courts could strike sensible balances. In RFRA, Congress obviously sided with Justice O’Connor. So the parade of horrors is simply an argument against Congress’s decision to enact RFRA, not an argument against Hobby Lobby.

Second, we can be quite confident that taking Congress at its word will not produce the parade of horrors the government suggests. RFRA has been on the books for 20 years; *Sherbert* was the law for almost 30 years; and more than half of the states apply the same legal standard as a matter of state law—yet this parade of horrors has not even come close to appearing. If there were serious objections to complying with these laws, they would have been raised long ago by churches, religious non-profits, sole proprietorships, and partnerships—all of which the government concedes can bring RFRA claims. And if, as Justice Kagan suggested, a stringent interpretation of RFRA would bring religious objectors “out of the woodwork,” we would have seen that after the Court’s stringent, unanimous ruling in *O Centro* eight years ago. But we haven’t.

Third, if new cases do arise, RFRA requires the Court to analyze each case on its own merits. Some cases will be rejected on grounds of insincerity or lack of a substantial burden—such as the minimum-wage claim in *Tony and Susan Alamo Foundation v. Secretary of Labor*.²¹ Of course, when a for-profit business claims a religious exemption that results in a windfall, courts view such claims with skepticism—just as they view claims to the use of marijuana or special treatment in prison with skepticism.

Other claims will be rejected under the compelling interest test. For instance, immunization-coverage requirements may be justified by the need for herd immunity,²² a public health benefit that only becomes possible when a large portion of the population is immunized. As Justice Alito noted, the government already provides free vaccines to children²³ who lack insurance coverage for vaccines. Courts typically regard antidiscrimination laws, especially with respect to race, as one of the most compelling of governmental interests, superseding free exercise rights.²⁴

In short, the government’s parade of horrors is contrary to the basic premise of RFRA, far-fetched, and easily distinguishable. The Court should reject it—just as it did in *O*

IV. HAS THE GOVERNMENT SATISFIED THE LEAST RESTRICTIVE MEANS TEST?

None of these approaches to the case involves making new law. But if the Justices wish to rest the decision on a still narrower ground, it could hold that the government failed to prove that the mandate is the least restrictive means of achieving its claimed interests. Justice Breyer may have been laying the groundwork for this type of resolution by asking why employer coverage is the least restrictive way to provide that access.²⁶ A decision focusing on least restrictive means would be easiest for the Court to distinguish in later cases, thus leaving the most room for the government to win future RFRA cases when its claims might be more meritorious.

Even accepting (arguendo) the notion that insurance coverage for contraceptives is a compelling interest, it is hardly obvious that the least restrictive way to provide that coverage is by forcing employers to provide it. Indeed, the government's argument that Hobby Lobby should just drop insurance altogether demonstrates that the government actually does *not* view it as essential that people receive insurance *through their employers* as opposed to from other sources. The important point for the government, it seems, is that employees who work at Hobby Lobby have access to this coverage from *some* source.

This could be structured in any number of ways. The government could extend the same accommodation to the small number of businesses with this conscientious objection that it already has to religious employers. It could subsidize the contraceptive coverage directly. Employers with conscientious objections could compensate for not providing contraceptive coverage by adding other valuable coverage to the employees' plans, thus ensuring that the employer receives no financial benefit from the objection and that the employees bear no net burden. The government could allow employers to substitute cash for coverage on a tax-free and tax-deductible basis.

Ultimately, the government's problem here is that it has essentially reduced its own compelling interest to a funding question: Who should pay for the contraceptive coverage the government has decided people should have? Almost by definition, where the government's claimed interest is merely a question of who should fund something, there will always be less restrictive alternatives, because the government can always choose to fund its own priorities (which it of course does with a great many things that even the government would not claim to be compelling interests).

The political dynamics of this case have attracted extraordinary attention, but the Supreme Court is a court of law, not of politics. The excellent questions posed at oral argument are evidence that the Court intends to decide this case in accordance with standard principles of constitutional and statutory analysis. My guess is that in the cold light of legal principle, the challenge to the contraceptive mandate will carry the day.

Endnotes

- 1 Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (argued Mar. 25, 2014).
- 2 Transcript of Oral Argument at 23-29, Sebelius v. Hobby Lobby Stores,

Inc., No. 13-354 (argued Mar. 25, 2014).

3 Marty Lederman, *Hobby Lobby Part III—There is no “Employer Mandate,”* BALKINIZATION, (Dec. 16, 2013, 9:36 AM), <http://balkin.blogspot.com/2013/12/hobby-lobby-part-iii-theres-no-employer.html>.

4 See 77 Fed. Reg. 16504 (March 21, 2012) (“The Departments seek comment on which religious organizations should be eligible for the accommodation and whether, as some religious stakeholders have suggested, for-profit religious employers with such objections should be considered as well.”).

5 *Sherbert v. Verner*, 374 U.S. 398 (1963).

6 *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Opportunity Employment Commission*, 132 S. Ct. 694 (2012).

7 Reply Brief of Petitioners at 13, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (filed Mar. 12, 2014), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/03/13-354rbUnitedStates1.pdf>.

8 Brief for Christian Booksellers Association et al. as Amici Curiae Supporting Respondents, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (filed Jan. 28, 2014), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_amcu_cba-et-al.authcheckdam.pdf.

9 Eugene Volokh, *2B. Does RFRA Allow Exemptions from Burdens Imposed on Corporations?*, THE VOLOKH CONSPIRACY (Dec. 3, 2013, 11:15 AM), <http://www.volokh.com/2013/12/03/rfra-allow-exemptions-burdens-imposed-corporations/>.

10 See also Transcript of Oral Argument at 43-44., *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (argued Mar. 25, 2014).

11 *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 529-30 (1993).

12 *Gonzales v. O Centro Espirita Beneicentre Uniao do Vegetal*, 546 U.S. 418, 426 (2006).

13 *Wisconsin v. Yoder*, 406 U.S. 205, 224 (1972).

14 *Snyder v. Phelps*, 131 S. Ct. 1207 (2010); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

15 *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

16 *Mapp v. Ohio*, 367 U.S. 643 (1961).

17 *Miranda v. Arizona*, 384 U.S. 436 (1966).

18 *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993).

19 Transcript of Oral Argument at 60, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (argued Mar. 25, 2014).

20 75 Fed. Reg. 34538, 34540, 34542 Tbl. 1 (June 17, 2010).

21 471 U.S. 290 (1985).

22 *Community Immunity (“Herd Immunity”)*, VACCINES.GOV, <http://www.vaccines.gov/basics/protection/> (last visited Apr. 1, 2014).

23 *Vaccines for Children Program (VFC)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/vaccines/programs/vfc/about/index.html> (last visited Apr. 1, 2014).

24 *E.g.*, *Bob Jones University v. United States*, 461 U.S. 574 (1983).

25 See *Gonzales v. O Centro Espirita Beneicentre Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (“The Government’s argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions.”); *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Opportunity Employment Commission*, 132 S. Ct. 694, 710 (2012) (noting that the government “foresee[s] a parade of horrors that will follow our recognition of a ministerial exception,” but that “[t]here will be time enough to address the applicability of the exception to other circumstances if and when they arise”).

26 Transcript of Oral Argument at 63, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (argued Mar. 25, 2014).

