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What the Supreme Court's Hobby Lobby Decision Means for LGBT People

By Jennifer C. Pizer, Senior Counsel and Law and Policy Project National Director
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PART I—Has the Court turned the clock back half a century?

Fifty years ago, the Supreme Court upheld the right of individuals to access birth control despite the opposition of some religious sects. Since then, mainstream attitudes have changed. But fundamentalist religious views about reproductive health and sexuality still influence our politics and law.

Last week's *Hobby Lobby* decision is a prime example. By a 5-4 vote, the Court held that religiously minded business owners essentially may "line-item veto" birth control coverage out of their employees' health plans. The ruling is the fruit of an intensive strategy by today's religious conservative movement. At Lambda Legal, we wrangle often with its law firms in our marriage and discrimination cases. And while they are losing dramatically on marriage, they have been ramping up their drive for religious exemptions to LGBT rights laws as well as to the Patient Protection and Affordable Care Act (ACA), and especially the inclusion of birth control within basic care coverage for women.

Tom Ude has explained the multiple opinions that comprise the Supreme Court's ruling. Looking forward, many wonder if the ruling means the Court's conservative majority has succeeded in elevating religious interests over equality in the marketplace? As the dust settles on this Court term, I think we must answer "yes" for women's equality, and the changes in the legal doctrine are problematic for everyone. But, for LGBT equality, the answer is "no, certainly not yet." But, this will remain the case for LGBT people only if we continue making the case for LGBT equality and collaborating within a broad, inclusive movement against the use of religion to discriminate. Make no mistake, it's up to all of us to work together because *Hobby Lobby* could in time stand for either of at least two propositions.

On the one hand, it could mean that religious interests should be accommodated if and only if there is

no harm to others. That has been the rule in religious freedom cases for decades. It may continue to apply thanks to Justice Alito's emphasis in his majority opinion on the ostensible lack of impact on women workers who will, he posits, be able to receive complete contraceptive coverage either directly from their insurers or from the federal government.

Whether or not that that coverage will materialize is unclear at present, however, the majority based its ruling on the assumption that women will have coverage for all approved, essential medical care from some source or another. The "get your care somewhere else" differential treatment of women's needs has an obvious gender-bias problem. But the Court majority says the decision is limited to the unique birth control rules of the ACA. And if that is true, then business owners have ***not*** just received a free pass to impose their religious views on workers. It would mean the decision is simply one more problematic ruling about women's reproductive health. It doubtless would reflect a sexist bias in its disregard for both its actual effects on women and Congress's desire to reduce gender discrimination by ensuring equal benefits. But, this reading of the decision would not mean "open season" on LGBT people and would have fewer implications for other issues.

On the other hand, the decision *could* mean that religious interests now trump other interests in many circumstances, with religious believers entitled to impose their views at others' expense in ways systematically rejected in the past. This is the result Justice Ginsburg calls out in her clarion dissent. She accurately observes that the majority's approach invites case-by-case testing of religious objections to federal laws and may give unprecedented approval to objections by finding fault with those laws, just as was done here.

Justice Ginsburg and the three who joined her dissent are right to be alarmed. Justice Alito has interpreted the Religious Freedom Restoration Act (RFRA) as an enthusiastic protector of religious rights requiring others to accommodate religion in diverse settings. Religious interests are to win the day except when compelling state interests outweigh religious concerns and when federal laws are written to permit as much religiously motivated conduct as possible.

But Congress usually writes laws to accomplish public purposes in a religion-neutral way that treats everyone alike regardless of their beliefs. That is what the Constitution calls for, as Justice Scalia wrote back in 1990. In other words, the Constitution does not demand that government craft laws that allow exceptions whenever requested by the diverse belief systems of our pluralistic society; as long as government does not target believers, everyone should conduct business under the same rules.

Yet, Congress imposed a higher standard when it passed RFRA in 1993, unintentionally setting the stage for *Hobby Lobby*, which already is being taken by some as having made religion dominant over other interests in employment. The Alliance Defending Freedom, our frequent opposing counsel in marriage and other cases, hailed the decision, saying "The Supreme Court victory for the Hahn and Green families upholds religious freedom in the workplace, but the fight continues."

Indeed, it does. *Hobby Lobby* is being applied in many similar cases, with results to be decided. In *Gilardi v. HHS*, in which we filed a friend-of-the-court brief, the two Catholic brothers who own this food distribution company object to all contraceptives. The Supreme Court just ordered the appeals court to reconsider the brothers' arguments. And in *Autocam Corp. v. Burwell*, the Catholic owners of an auto parts and medical products manufacturer likewise object to all services covered by the birth control rule. As in *Gilardi*, the appellate court had rejected the owners' claims and the Supreme Court has just ordered reconsideration.

And the day after *Hobby Lobby*, a group of religious leaders petitioned President Obama to include a broad exemption in the executive order he has announced to prohibit discrimination against LGBT

workers by federal contractors. These faith leaders seek the right to discriminate against LGBT workers on public projects funded with public tax dollars. They are taking *Hobby Lobby* as a green light to press for an exemption from the executive order although the legal issues are entirely separate.

But let's be clear: Justice Alito's opinion repeatedly assures that his analysis does ***not*** sanction discrimination. He says, Justice Ginsburg's dissent "raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield." He then explains that there is "a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."

There is solid case law and legal reasoning for the proposition that discrimination based on sexual orientation or gender identity receive the same analysis as race discrimination. That means Justice Alito's assurances, and Justice Kennedy's concurring opinion on this point, prevent the decision from licensing discrimination against LGBT people. Indeed, it appears that Justice Kennedy may have written his concurrence to reinforce this principle, in keeping with the concern for the dignity and equality of LGBT people he expressed eloquently in *Romer*, *Lawrence* and *Windsor*. He explains that those exercising their religion may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling."

Justice Kennedy adds that these birth control cases may prove different from other religious-objection cases because of the government's existing system for accommodating religious non-profits by requiring insurers to pay for contraception. Providing birth control saves insurers money because costs for pre-natal care and child birth are higher. But for many if not most medical services, additional insurance means additional cost. So, in other circumstances, trying to shift costs to insurers due to employers' religious objections may meet insurer's own objections. In any event, Justice Kennedy's concurrence strongly suggests that any discriminatory attempts to exclude coverage for LGBT workers or their same-sex partners will cause his vote to shift from the owners' to the workers' perspective.

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PART II—Fending off discrimination cloaked as religion

Unfortunately, we probably will have cause to cite Justice Alito's "no shield for discrimination" language often, given the frequency with which some business owners try to justify anti-LGBT discrimination with religion. For example, in *Odgaard v. Iowa Civil Rights Commission*, we represent Lee Stafford and Jared Ellars, a couple in love who asked to rent the Görtz Haus Gallery, a gallery, bistro and event space, for a post-wedding party. Betty and Richard Odgaard refused, citing their Mennonite beliefs despite Iowa's nondiscrimination laws. Likewise, when Diane Cervelli and Taeko Bufford were refused lodging by the Aloha Bed & Breakfast, its owner claimed a religious right to ignore Hawaii law.

Both of these cases involve state civil rights laws and the *Hobby Lobby* decision does not apply because it concerns RFRA, a *federal* statute. Still, we expect that those who want to use religion against same-sex couples will cite this decision. And we will point out, as often as we must, that all nine members of the Supreme Court explicitly condemned discrimination, whether based on religion or not, despite the other disagreements in their *Hobby Lobby* opinions.

Turning back to health insurance, what questions may arise post- *Hobby Lobby* for LGBT people and

people living with HIV and can we predict answers? Given the majority's rejection of discrimination, it seems unlikely that the Court would condone religious refusals of family coverage for workers in a same-sex relationship when coworkers receive coverage for a different-sex partner. And when a health plan includes coverage for a particular medical treatment, the Court probably will nix religiously based refusals of that treatment to LGBT people. Thus, for example, if there is coverage for hormone replacement therapy for menopausal women and men after testicular cancer surgery, it should likewise be available for transgender people. Likewise, if donor insemination or in vitro fertilization is covered for different-sex couples, it similarly should be covered for same-sex couples. Finally, prescription drug coverage to manage a persistent viral infection or boost the immune system should not be excludable based on employers' religious judgments about how a person may have contracted HIV.

In each of these examples, treating LGBT differently would be discriminatory. The work ahead includes insisting that nondiscrimination standards must themselves be nondiscriminatory. That is, "equal" must mean the same thing for everyone.

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PART III—Religion, race, campaign riches and clinic police—noting the Court's right-ward shift

Looking back over this Supreme Court term, numerous decisions leap out as revealing what an exceedingly conservative institution the Court has become. A quick look at 4 of them puts *Hobby Lobby* in a larger, troubling context. In Town of Greece v. Galloway (May 5, 2014), a 5-4 majority upheld a New York town council's practice of opening public meetings with Christian prayers, and only Christian prayers. The Supreme Court's all-Catholic majority turned deaf ears to plaintiffs' complaint that these prayers felt exclusionary and alienating, ruling that town leadership had no duty to include other faiths or be non-denominational. In Schuette v. BAMN (April 22, 2014), a 6-2 all-male majority concluded that Michigan voters can ban consideration of race in state university admissions, based on a simple majority vote, because the majority's right to set policy must be respected. Justices Ginsburg and Sotomayor dissented; Justice Kagan, who had prior involvement as Solicitor General, abstained.

This year's younger sibling of *Citizens United*, which notoriously upheld the free speech rights of corporations to defy campaign spending limits, was McCutcheon v. FEC (April 2, 2014), which likewise affirmed the freedom of the super-rich to blow through election spending caps. And McCullen v. Coakley (June 26, 2014) struck down the buffer-zone law Massachusetts had enacted to secure safe access to women's health clinics. The Court's 4 liberal justices joined Chief Justice Roberts' ruling that the 35-foot buffer improperly prevented abortion opponents from approaching patients to engage them in "caring, consensual conversations," and that the state had not tried enough other ways—such as injunctions and increased police presence—to control aggressive protesters. The majority decided obstruction of clinic access is manageable because it is worst on Saturdays in Boston, as if patients should go to other towns or schedule appointments during the week to avoid the weekend gauntlet of "sidewalk counselors." Although the Court has upheld a 100-foot buffer around polling places, it here concluded 35 feet is too much. And yet, Justices Alito, Scalia, Thomas and Kennedy would have gone further and ruled that the buffer is an improperly biased suppression of the protesters' message, rather than a neutral safety and access rule.

Monday, June 30, the day *Hobby Lobby* was released, marked the official close of the Court's term. Analyses of that decision swirled across news and social media all week. Then, just before the holiday weekend, the Court released an epilogue raising yet more questions and controversy about employers' objections to birth control. In Wheaton College v. Burwell, the Court granted temporary relief to one of the dozens of religiously affiliated employers that has sued because it objects even to using the HHS

form to be excused from providing contraception coverage. The men of the Court issued a brief order directing that Wheaton can simply inform HHS of its objection without completing the form.

Justice Sotomayor, joined by Justices Ginsburg and Kagan, explained in firm detail how improper it is for the Court (a) to second-guess a reasonable administrative process of the Executive Branch; (b) to substitute a more cumbersome, less effective process; and (c) to issue even temporary relief when Wheaton's chances of prevailing are mixed at best. The dissent stressed the deep analytical flaw in Wheaton's claim that its religious freedom is "substantially" burdened (meaning it can sue), if it must inform the health plan administrator of its objection so patients' needs can be met another way. Doing so, it believes, "makes it complicit in grave moral evil." Not so, says the dissent. Doing so merely takes Wheaton out of the process, allowing the civil law to function as Congress intended and working women to access care without their employers' involvement. As a legal matter, the negligible contact between the employer and patients' decisions is not "substantial." Considering the relative burdens borne by employer and employee, Justice Sotomayor underscores that "Today's injunction thus risks depriving hundreds of Wheaton's employees and students of their legal entitlement to contraceptive coverage. In addition, … the issuance of an injunction in this case will presumably entitle hundreds or thousands of other objectors to the same remedy."

The *Wheaton* injunction is temporary and the Court says it does not foreshadow its views of the merits. Still, *Hobby Lobby* emphasized the majority's assumption that women will receive contraception coverage without interruption or difficulty. The issues Justice Sotomayor identifies inspire concern about (i) how the religious non-profit cases will be handled, (ii) how many women will be negatively affected, and (iii) how this theory of burden will be used in other "religious refusal" cases.

Basic health care needs of half the adult population must not be deemed exceptional, subjected to separate rules, and made uncertain. Everyone, including women, should have access to the range of professionally appropriate wellness services without interference by those trying to limit others' care per their own religious views. We will be working with our allies toward this long-term goal.

Meanwhile, we are gratified that all nine justices appear aware of the potential implications of *Hobby Lobby* for LGBT people. We surmise with pride that our amicus brief may deserve some credit. Looking forward, we know our work for clear, effective nondiscrimination laws is ever more important given the Court's reference to the compelling interests such laws serve. At the same time, this term showcases how radical views are reshaping our Nation's jurisprudence. Our Fair Courts Project has expanded impressively. Yet, its task looms larger than ever. So too does the responsibility we all bear to amplify Justice Kennedy's *Hobby Lobby* bottom line: "no person may … in exercising his or her religion … unduly restrict other persons." With that refrain, either Congress or the Court ultimately will have to hear and act because undue restrictions do weigh on working women. For now, that theme fuels the momentum of our complementary LGBT-nondiscrimination cases.

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SEE ALSO: HEALTH CARE FAIRNESS, HOBBY LOBBY, SCOTUS, U.S. SUPREME COURT, HEALTH CARE FAIRNESS, BURWELL V. HOBBY LOBBY STORES AND CONESTOGA WOOD SPECIALTIES CORP V. BURWELL

COMMENTS

John D. Moore • 2 years ago

It will be interesting to see the ramifications of this recent decision by SCOTUS . My sense is that we have yet to see how wide ranging this will be. We should all be concerned when organizations are treated as if they are people. Clearly, they are not.

1 • Reply • Share ›

jimdt • 2 years ago

It has everything to do with LGBT right and the rights of our allies. The Hobby Lobby case was NOT correctly decided. The conservatives on the court extended religious beliefs to corporations and also said bosses have the right to determine the healthcare choices of employees. What's next? Stopping LGBT people from getting AIDS treatment or preventative care? Not covering divorced people?

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Zachary Brinkman • 2 years ago

Peoples Rights to work and people having to pay for things they neither want and or need are two very different things so this doesn't mean anything LGBT rights. Its not the governments Job to determine health care people need.

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Michael Kutzin Zachary Brinkman • 2 years ago

Zachary, I agree. The Hobby lobby case was correctly decided, as no one should be required to pay for something that grossly violates their religious beliefs. The business owners are not stopping someone from using contraceptives -- they just can't be forced to pay for it.

The Supreme Court got the Windsor case right (although it should have gone further and prohibited bans on same sex marriage altogether), and it got the Hobby Lobby case right.

Jobs are different from forcing an employer to pay for contraception, and, with the exception of actual churches and religious institutions, which should never be forced to hire someone who openly violates their religious beliefs, both secular businesses and businesses operated by religious institutions that provide secular services, like hospitals, nursing homes, etc., should not be permitted to discriminate, and I cannot envision the Supreme Court, based on the Hobby Lobby opinion, sanctioning it. Nevertheless, if the law as it currently exists needs to be tightened to protect the LGBT community while providing the proper deference to religious beliefs (and remember, the First Amendment explicitly prohibits Congress from enacting any laws that abridge religious freedoms, so churches and institutions that spread religious beliefs need to be excluded from this law).

jimdt ➚ Michael Kutzin • 2 years ago

The court and law already allows religious institutions that provide secular services-and even taking tax money-to discriminate against LGBT people. Hello. FYI, this Hobby Lobby case was a statutory case not a Constitutional case. The first amendment cases will come up. This is an entire new area where the court has extended actual Constitutional rights to businesses. You can not envision this Supreme Court-based on Hobby Lobby-sanctioning it? Where have you been. have you even read the decision? Alito's comments? The dissent?

Michael Kutzin ➚ jimdt • 2 years ago

Exactly what Supreme Court case does this? None. And yes, this was statutory, but it protects basic religious rights, which MUST be respected, whether we agree or disagree with it. But employment discrimination is fundamentally different from forcing an employer to pay for something that fundamentally violates his or her religious beliefs.

Alito says repeatedly that this is not an excuse for discrimination.

It is the distinction, in the Civil Rights Act, between a public accommodation and a private club, which is permitted to discriminate on the basis of freedom of association. Individual liberties, no matter how much we may disagree with them, must be balanced against something as fundamental as employment and public accommodations.

It is the very notion of individual liberties that screams out to all exactly WHY same sex marriage must be legal in all 50 states.

And I would ask that you keep the discussion civil. Disagreement is fine, but tenor is key. We are on the same side.

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jimdt ➚ Michael Kutzin • 2 years ago

Let me try and keep the tenor civil, since we are on the same side mostly. I could not disagree with you more on the issue of employment discrimination and the employer's new right to deny employee's benefits-and yes even Constitutional rights-because of the employer's religious beliefs. It opens the door. However, having said that ENDA is dead because it has way too broad of a "religious exemption"-one that is already allowed to religiously affiliated hospitals and schools- and the Hobby Lobby case has just opened more eyes. Yes I do respect peoples' faith and freedom of association. I am a person of faith who has openly challenged my