

No. 13-354

In the Supreme Court of the United States

KATHLEEN SEBELIUS, Secretary of Health and
Human Services, *et al.*

Petitioners,

v.

HOBBY LOBBY STORES, INC., *et al.*,

Respondents.

*On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit*

**BRIEF OF THE STATE OF OKLAHOMA AS
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

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**STATEMENT OF THE IDENTITY, INTEREST,
AND AUTHORITY OF *AMICUS* TO FILE**

The State of Oklahoma is interested in this case because Respondents Hobby Lobby Stores, Inc., and Mardel, Inc. (“Hobby Lobby” and “Mardel”) are corporations organized under the laws of the State of Oklahoma. Both Hobby Lobby and Mardel, and Respondents David Green, Barbara Green, Mart Green, Steve Green and Darsee Lett (collectively, “the Green Family”), are citizens of the State of Oklahoma whose right to practice their religious faith has been violated. The actions of the Petitioners substantially burden the undisputed, sincere, and deeply held religious faith of these citizens of Oklahoma that are otherwise fully protected by the Constitution and laws of the State of Oklahoma, and forcibly require them to personally undertake actions that are contrary to the undisputed, sincere, and deeply held religious faith of these citizens.

SUMMARY OF THE ARGUMENT

Petitioners ask the Court to exclude from RFRA protection certain corporations merely because they are “for-profit”. This interpretation of RFRA and the Free Exercise Clause is inconsistent with clearly established Oklahoma and federal law. Oklahoma law allows corporations like the Respondents here to operate for any lawful purpose, including religious purposes. State law also broadly protects the religious freedom of all “persons,” and the law plainly defines “person” to include corporations. The Federal Government’s narrow view of RFRA and Free Exercise protections, on the other hand, would exclude from protection even unquestionably religious organizations—such as

churches—formed under Oklahoma’s General Corporation Act. That narrow view hinges, however, on the fact of incorporation under state law, yet there simply is no basis in Oklahoma law for concluding that taking advantage of the corporate form strips Oklahoma businesses of the strong religious freedoms afforded to all Oklahoma citizens. To the contrary, Oklahoma has a longstanding tradition of using its laws to *protect* religious freedom rather than to deprive it.

The Tenth Circuit accordingly held that Respondents’ utilization of Oklahoma corporate law does not abrogate protections under RFRA and the Free Exercise Clause. Nor did the Tenth Circuit find any evidence that Congress intended to preempt state law by defining “person” more narrowly in the context of RFRA: “the government has given us no persuasive reason to think that Congress meant ‘person’ in RFRA to mean anything other than its default meaning in the Dictionary Act—which includes corporations regardless of their profit-making status.” *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1132 (10th Cir. 2013).

Having found that Hobby Lobby and Mardel are persons deserving of RFRA protection, the court below had little trouble finding that the contraceptive mandate at issue here substantially burdens Respondents’ exercise of their religion. Rightly so. The Federal Government has on the one hand threatened Respondents with astronomical fines for failing to violate their religious beliefs and comply with the mandate for not complying with the mandate, while on the other hand it has all but admitted that the mandate burdens the exercise of religion, by doling out

exemptions from the mandate to certain favored religious entities. This type of coercive federal infringement on religious practice is exactly what RFRA and the Free Exercise Clause were meant to prevent.

ARGUMENT

I. The Tenth Circuit correctly concluded that incorporation under Oklahoma law does not automatically result in a loss of religious freedom.

The Tenth Circuit found no distinction between non-profit, religious corporations and for-profit, secular corporations. Instead, the appeals court correctly concluded that had Congress intended to narrow the scope of protection under RFRA to non-profit, religious corporations only, it would have said so. The court also found that no explicit distinction exists in other statutes or case law to support the Federal Government's contention that protection is limited to only non-profit, religious corporations. *Hobby Lobby*, 723 F.3d at 1129.

A. Under Oklahoma law, any organization may incorporate as a “general business corporation,” including churches and others with religious purposes.

Corporations in Oklahoma are most often organized under the Oklahoma General Corporation Act. OKLA. STAT. tit. 18, §§ 1001 – 1144 (2011).¹ In Oklahoma,

¹ Corporations may also be organized in Oklahoma under special provisions: Savings and Loan corporations, OKLA. STAT. tit. 18, §§

corporations may be created for “any lawful purpose:”

B. A corporation may be incorporated or organized pursuant to the provisions of the Oklahoma General Corporation Act to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this state.

Id. at § 1005(B).

The “lawful purpose” need not be stated with any particularity in its certificate of incorporation.

A. The certificate of incorporation shall set forth:

3. The nature of the business or purposes to be conducted or promoted. It shall be sufficient to state, either alone or with other businesses or purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the general corporation law of Oklahoma, and by such statement all lawful acts and activities shall be within the purposes of the corporation, except for express limitations, if any[.]

Id. at § 1006(A)(3). Both of the Hobby Lobby corporations declare the above general corporate

381.1 - 381.86 (2011); Cooperative corporations, *Id.* at §§ 421 - 439.2; Educational corporations, *Id.* at §§ 571 - 575; Charitable, and Fraternal Corporations, *Id.* at §§ 581 - 594; Professional corporations, *Id.* at §§ 801 - 819; Business Development corporations, *Id.* at § 912; and Farming or Ranching Business corporations, *Id.* at §§ 951 - 956.

purpose of “any lawful act or activity” to be the purpose of the corporations.

Similarly, Oklahoma corporations may describe their lawful purposes and activities in their bylaws:

B. The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its shareholders, directors, officers or employees.

Id. at § 1013(B).

Additionally, every Oklahoma corporation organized under the Oklahoma General Corporation Act is specifically authorized to use its assets for charity:

Every corporation created pursuant to the provisions of the Oklahoma General Corporation Act shall have power to:

9. Make donations for the public welfare or for charitable, scientific or educational purposes, and in time of war or other national emergency in aid thereof[.]

Id. at § 1016(9). And perhaps most notably, every Oklahoma corporation organized under the Oklahoma General Corporation Act may restrict itself from undertaking particular types of otherwise lawful conduct:

17. Renounce in its certificate of incorporation or by action of its board of directors any interest

or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or one or more of its officers, directors or shareholders.

Id. at § 1016(17). Plainly, Oklahoma’s laws do not restrict corporations from running their businesses in accordance with their owners’ faith. Indeed, Oklahoma law favors corporations undertaking “any lawful act or activity,” which clearly includes religious expression and practice. *Id.* at § 1006(A)(3). Accordingly, a lawful purpose of any corporation organized under the Oklahoma General Corporation Act may be to express the views and even the religious beliefs and actions of its owners and the persons who operate it.

Religious corporations in Oklahoma have the option of incorporating under a separate statutory provision:

The members of any church or religious society, not less than three, who by its rules, usage and general discipline, or otherwise, do not desire to organize and become incorporated under the foregoing provisions relating to corporations may organize and become corporate...by adopting and signing articles containing:

First. The name of the church, society, association or corporation, its general purpose and plan of operation and its place of location.

Second. The terms of admission and qualifications of membership, and the selection of officers and the filling of vacancies, and the

manner in which the same is to be governed and managed.

Id. at § 562. But although this alternative procedure exists for the creation of religious corporations, the scope of authorized powers of corporations created thereunder is far more limited than a corporation created under the Oklahoma General Corporation Act. Because of this, a church may choose to incorporate as a non-profit corporation under these same general corporation laws and enjoy all of the lawful rights and powers of any other corporation provided by those laws. *See id.* at § 1006(A)(7). And yet under the Federal Government's rigid, categorical view of incorporation (*i.e.* "religious corporation" as distinct from every other kind of corporation), it is not clear that even a church that chose to organize under the Oklahoma General Corporation Act would be entitled to Free Exercise and RFRA protections. The Tenth Circuit recognized that Oklahoma law provides such protection for all corporations. And instead of relying on the Federal Government's inflexible and unrealistic rule, the court looked beyond the mere choice of corporate form to determine whether Hobby Lobby and Mardel were religious organizations deserving of those protections.

B. Just as a church is in the eyes of the law nothing more than a collection of people acting to further a certain religious purpose, a corporation is nothing more than a collection of people acting to further certain purposes—purposes that can be religious.

In Oklahoma, corporations are what they do. When a church organizes itself as an Oklahoma non-profit

corporation, the corporation's speech or acts express the faith and religious values of its congregants and undertakes its corporate acts through the congregants who operate and manage the corporation. In this sense, the corporation is a direct extension of the congregants. "General" corporations are no different. A corporation cannot do or say or act except through the natural persons who control it. Corporations will conduct themselves consistently with the purposes and goals of the natural persons who created them and control them, and who undertake actions on their behalf.

And if an Oklahoma corporation organized for-profit chooses to speak and act consistently with the religious faith and beliefs of its corporate directors and owners, those expressions and acts are no less lawful—and no less valid—than the expressions of faith and religious values of non-profit businesses.

Importantly, the "for-profit"/"non-profit" distinction is not one created by religion, but rather by federal tax laws. Indeed, the non-profit status of corporations is not dependent upon the sincerity or active devotion of its members' religious faith or their practice of religious faith, but instead depends upon government-made factors. As a result, whether actions undertaken for religious reasons are within the context of a closely held and operated corporation operating "for-profit" or within the context of a corporation operating "not-for-profit" should not be determinative of the rights of the corporation to claim a religious liberty.

C. Oklahoma has a long tradition of protecting religious liberty through its laws.

Corporations under Oklahoma law can be managed consistently with its creators', operators', and owners' religious faith, as evidenced by Oklahoma's long tradition of protecting and preserving religious liberty. Oklahoma's Constitution provides extensive protection of religious beliefs:

Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship; and no religious test shall be required for the exercise of civil or political rights.

OKLA. CONST. art. I, § 2 (emphasis added). That constitutional guarantee of religious liberty is hardly a hollow promise. Indeed, those that infringe on the religious liberty of any "person" in Oklahoma are subject to criminal sanctions:

Any willful attempt, by means of threats or violence to compel any person to adopt, practice or profess any particular form of religious belief, is a misdemeanor.

OKLA. STAT. tit. 21, § 913 (2011).

Every person who willfully prevents, by threats or violence, another person from performing any lawful act enjoined upon or recommended to such person by the religion which he professes, is guilty of a misdemeanor.

Id. at § 1914. The word “person” as used within the State’s Penal Code is specially defined to *include* corporations. *Id.* at § 105 (“The word ‘person’ includes corporations, as well as natural persons.”). As a result, Oklahoma’s criminal laws both punish and protect corporations.

Further, Oklahoma undertaken to restrain both itself and all of its branches, departments, agencies, officers and employees, together with its political subdivisions, from interfering with religious liberties through the Oklahoma Religious Freedom Act:

A. Except as provided in subsection B of this section, no governmental entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability.

B. No governmental entity shall substantially burden a person's free exercise of religion unless it demonstrates that application of the burden to the person is:

1. Essential to further a compelling governmental interest; and
2. The least restrictive means of furthering that compelling governmental interest.²

² OKLA. STAT. tit. 51, § 253 (2011). This statute is substantially the same as the statute included within the federal RFRA, compare, 42 U.S.C. § 2000bb-1, specifically and generally, 42 U.S.C. § 2000bb et seq. Under the State law quoted above, “Government entity” means any branch, department, agency, or instrumentality of state government, or any official or other person acting under color of state law, or any political subdivision of this

These laws illustrate that Oklahoma law does not treat election of a corporate form offered under the Oklahoma General Corporation Act as a waiver of religious liberty.

D. Hobby Lobby and Mardel are corporations deserving of protection under the Free Exercise Clause and RFRA.

By promulgating and putting into effect the following exception to the contraception mandate, the Federal Government has admitted through its conduct that certain corporations, as “religious organizations,” should be completely exempt from the operation of the mandate:

(A) In developing the binding health plan coverage guidelines specified in this paragraph (a)(1)(iv), the Health Resources and Services Administration shall be informed by evidence and may establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines.

(B) For purposes of this subsection, a ‘religious employer’ is an organization that meets all of the following criteria:

state[.]” and “Substantially burden’ means to inhibit or curtail religiously motivated practice.” *Id.* at § 252.

- (1) The inculcation of religious values is the purpose of the organization.
- (2) The organization primarily employs persons who share the religious tenets of the organization.
- (3) The organization serves primarily persons who share the religious tenets of the organization.
- (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

45 C.F.R. § 147.130 (eff. August 3, 2011).

By creating this exemption for “religious employers,” the Federal Government has acknowledged that both individual and corporate religious rights are implicated by the mandate. And while the Federal Government allows certain corporations, as “religious organizations,” to be completely exempt from the operation of the mandate it disallows a similar organization merely because it is organized as “for-profit.” The error in not allowing “for-profit” corporations to claim these exemptions is in concluding that the religious views of persons operating those corporations are somehow impacted differently, or in a manner that deserves less respect and protection, than those corporations that meet the necessary exemption criteria.

And remarkably, Hobby Lobby and Mardel do not seek to avoid providing *all* contraceptives through their

insurance plan. Instead, they only seek to be relieved from that limited portion of contraceptives they believe are analogues to abortion. Consequently, the relief they seek from the mandate is much narrower and of much less impact upon the public policy sought to be promoted by the Federal Government than the wholesale exemption granted to some others.

In seeking this narrow relief, the record shows that the Green Family made a strong showing of their operation of their family's corporations in a manner consistent with their religious faith. The showing made by the Green Family in this regard does not appear to have been substantially, if at all, contested by the Federal Government. David Green, Barbara Green, Steve Green, Mart Green, and Darsee Lett have all declared that their personal religious faith is "Christian" and that as corporate officers and management trustees they have sought to operate the family's corporations "in harmony with God's laws and in a manner which brings Glory to God." The Green Family serves as trustees of the management trust that owns all of the voting stock of both corporations. Mardel specializes in the sale of Christian materials such as Bibles, books, movies, apparel, church and educational supplies. Hobby Lobby is a craft store selling art and craft supplies, home decor, and holiday decorations. In fact both Hobby Lobby's and Mardel's publically proclaimed purpose is built on their religious beliefs. Hobby Lobby's publically proclaimed purpose is:

In order to effectively serve our owners, employees, and customers the Board of Directors is committed to:

Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles.

Offering our customers an exceptional selection and value.

Serving our employees and their families by establishing a work environment and company policies that build character, strengthen individuals, and nurture families.

Providing a return on the owners' investment, sharing the Lord's blessings with our employees, and investing in our community.

We believe that it is by God's grace and provision that Hobby Lobby has endured. He has been faithful in the past, and we trust Him for our future.³

Similarly, Mardel's publically proclaimed purpose is:

Mardel Christian & Education is a faith-based company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support. To this end, we provide a large selection of Bibles, books, movies, gifts, music, kid products, apparel, church and educational supplies, and homeschool curriculum. We offer quality products at the best prices on Mardel.com and across our 35 stores located in the central region of the United States. Our products share truth,

³ See http://www.hobbylobby.com/our_company/purpose.cfm.

teach knowledge, offer encouragement, inspire worship, and bring joy by fulfilling the vision of Mardel to make a difference and give hope. Furthering our mission, we faithfully give 10% of our net profits to help print Bibles translated by Wycliffe Bible Translators. Wycliffe Bible Translators is a ministry dedicated to translating the Bible into the language of every people group around the World. We are a resource center equipping the whole person specializing in the provision of all your spiritual and intellectual needs.⁴

The Green Family described in specific detail the numerous actions they have undertaken to operate their family businesses consistently with their professed faith. For instance, they provide health insurance to their companies' employees through a self-insured plan that is administered conscientiously and consistently with their religious beliefs. And while the Green Family's religious beliefs do not prevent them from providing health insurance coverage for contraceptives generally, their religious beliefs do prohibit them from deliberately providing insurance coverage for prescription drugs or devices that are inconsistent with their faith, particularly abortion-causing drugs and devices. The Green Family believes that the prevention of the implantation of a human embryo into the wall of the uterus by the use of drugs or devices amounts to abortion and have a religious objection to providing coverage for such items in their companies' health plans. The Federal Government's

⁴ See <http://www.mardel.com/about/>.

regulations require all employers of fifty or more employees whose group health care plans were not “grandfathered” or made eligible for exemption under the regulations to provide coverage “without cost sharing, for [a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity as prescribed by a provider.” 77 Fed. Reg. 8725-01 (February 15, 2012). These regulations require the Green Family to provide medication and devices that they believe cause the abortion and death of human embryos.

As shown above, the Oklahoma General Corporation Act allows a general corporation to pursue any lawful purpose—including the religious purposes and practices the Green Family further in the operation of their companies. These are all lawful corporate purposes and practices for a general corporation organized under Oklahoma law. Religious purposes furthered by the Green Family are no less lawful or valid than similar purposes and practices reflected in the operation of non-profit “religious” corporations that also may be organized under Oklahoma laws, and who may be exempt from the Federal Government’s broad contraceptives mandate. As outlined above, the Green Family showed the appeals court that they regulate the operation and mission of their corporations as a witness to the existence of their faith. Certainly, no one from the Federal Government will undertake to personally include the contraception drugs, devices and services in the Green Family corporations’ self-insurance plans. The Federal Government will instead force the Green Family to do so. The mandate violates the Green

Family's faith by forcing them to undertake to provide in their self-insurance coverage what the Green Family believes to be abortion-causing drugs and devices.

Religious faith is more than mere belief. It is practice. Even the district court recognized the sincere religious faith the Green Family professes as much more than a mere intellectual exercise. The Green Family plainly wants to avoid being complicit in what they believe is the destruction of unborn human life. Forcing them to personally undertake to include certain abortion-causing drugs, devices and educational services into their companies' self-insurance plans does direct violence to their sincerely held religious faith. Operation of the Green Family's corporations in a manner consistent with the Green Family's religious faith is no less worthy of respect and protection than is the religious faith practiced by church members through a church also organized as a corporation under Oklahoma General Corporation Act.

In short, if any corporations organized under the Oklahoma General Corporation Act are deserving of religious liberty, these corporations are. A categorical denial of protection such as the Federal Government is suggesting is erroneous, and will lead to a result that is wholly inconsistent with Oklahoma's tradition of protecting religious liberty.

CONCLUSION

For these reasons, the judgment below should be affirmed.

Respectfully Submitted,

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