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How Serious Is the Supreme Court About Religious Freedom?

A new case will test whether the justices' defense of conscience in Hobby Lobby applies to minority religions like Muslims, or just to Christians.

By Dawinder Sidhu

The Atlantic
September 30, 2014

Religious freedom in the United States has ebbed and flowed between two competing concepts: the principled view that religion is a matter of individual conscience that cannot be invaded by the government, and the practical concern once expressed by Justice Antonin Scalia that accommodating all religious practices in our diverse society would be “courting anarchy.” In June, the Supreme Court ruled in *Burwell v. Hobby Lobby* that closely held corporations, whose owners objected to contraception on account of sincere Christian beliefs, could not be forced by the Affordable Care Act to include certain contraceptives in their employee insurance plans. In supporting the religious rights of business owners over a national health-care policy predicated on broad participation, the Roberts Court seemed to stake its place on the more protective end of the religious-freedom spectrum.

But the idea that Hobby Lobby creates robust protections will be credible only if the justices are willing to recognize the religious freedom of marginalized religious minorities—not just the Judeo-Christian tradition. The next religious-freedom case to come before the Court, *Holt v. Hobbs*, will test whether the Roberts Court's stance on religious freedom includes a minority faith, Islam, practiced by a disfavored member of our society: a prisoner. At stake are both the state of religious freedom in the country and the Court's reputation.

Holt involves Gregory Holt, an inmate in Arkansas also known as Abdul Maalik Muhammad. A dispute arose between Holt and the state's Department of Correction when he sought to grow a one-half-inch beard in observance of his faith. According to the department's grooming policies, inmates may only grow a “neatly trimmed mustache.” In 2011, Holt filed a lawsuit against the director of the department, Ray Hobbs, and other state employees, saying that the prison had violated his religious rights. After decisions by federal trial and appeals courts in favor of the department, Holt filed a hand-written petition to the Supreme Court, which agreed to review the case. The justices are scheduled to hear arguments in *Holt* on October 7.

If Hobby Lobby and federal law are faithfully applied, Holt should prevail. Prisoners surrender many of their rights at the prison gates. “Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights,” the Supreme Court wrote in *Price v. Johnston* more than 60 years ago. In 2000, however, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) to help safeguard inmates’ religious freedom. The law states that the government may not place a substantial burden on a prisoner’s ability to practice his or her religion unless that burden is the “least-restrictive means” to achieve a “compelling” goal.

This standard may sound familiar—RLUIPA is the sister statute to the Religious Freedom Restoration Act, or RFRA, the federal law which was at issue in *Hobby Lobby*. These laws apply to different laws implicating religious freedom—RFRA only to federal laws and RLUIPA to the land use and prison contexts—but both ask whether a religious burden is the “least-restrictive means” of accomplishing the government’s “compelling” goals.

In this case, there is no dispute that the prison regulations substantially burden Holt’s religious freedom. His Hobson’s choice—either obey the prison grooming policies and violate his religious beliefs, or adhere to his conscience and face disciplinary measures—is a quintessential substantial burden.

But the prison authorities have a “compelling” reason to restrict Holt’s ability to practice his religion. In *Hobby Lobby*, the Supreme Court simply assumed the federal government had sufficient reasons for requiring contraceptive coverage. In *Holt*, it will likely agree with the department’s position that the “no-beard policy enhances prison safety and security by removing an important hiding place for contraband and by facilitating the identification of inmates who wish to engage in violence or escape.”

On their own, however, these reasons don’t seem to be enough to satisfy RLUIPA. The regulations will also have to pass the statute’s “least restrictive means” test: The government must meet its goals in the way that best preserves religious liberty. This was also the sticking point in *Hobby Lobby*. In that case, the government had already made exemptions for religious nonprofit organizations, which undermined its argument that religious exemptions could not be made for certain for-profit corporations. *Holt* involves a similar situation: Arkansas’s prisons already offer medical exemptions to their grooming policies, which makes it difficult to argue that religious exemptions are not possible. As a federal appeals court wrote in *Fraternal Order of Police v. City of Newark*, which concerned Newark’s police-department grooming policies, “We are at a loss to understand why religious exemptions threaten important city interests but medical exemptions do not.” The decision was written by then-Judge Samuel Alito, author of the *Hobby Lobby* opinion.

Plus, the vast and growing majority of states—and the Federal Bureau of Prisons—allow inmates to grow beards, for reasons both religious and secular. Why are these jurisdictions able to fulfill their operational needs without limiting the religious rights of their inmates, while Arkansas can’t? This split among the states—with most

adopting permissive grooming policies, and others on the more restrictive end—may help explain why the Supreme Court was interested in taking this case.

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With respect to the policies of other jurisdictions, Arkansas responds that its prisons have special circumstances that require special policies. This reasoning is problematic. Theoretically, a prison could use a single inmate's prior misconduct as an ongoing excuse to abridge the religious practices of all inmates. Indeed, Arkansas's brief opens with a reference to an inmate, Latavious Johnson, who killed a correctional officer with a "shank." But this incident says nothing about the relationship between the "shank" and beards, or between Johnson and Holt.

Similarly, Arkansas has told the Court that Holt has not been well-behaved during his time in prison. Holt, it says, has made violent threats and was "caught holding a knife against a fellow inmate's throat following a religious dispute." Arkansas's argument is intuitively appealing: Through his behavior, Holt himself has activated the very safety and security justifications for the restrictive grooming policies. But the cited incident does not appear to have anything to do with his facial hair; in practice, this seems like thin evidence.

Arkansas also may note that, historically, courts have acknowledged that prisons are best situated to assess what policies are necessary and therefore have deferred to prisons. In *Fisher v. University of Texas*, the Court recently faced a similar question and held that courts may defer to the government's reasons for its policies (the ends), but that courts cannot defer to the specific ways in which the government has decided to address those reasons (the means). The Court should adopt a similar approach in Holt. Otherwise, a court that defers to prisons on both the ends and the means questions operates as a rubber stamp, forgoing its judicial responsibility to meaningfully verify that prisons do not unduly restrict religious freedom.

There is ample reason for the Court to protect Gregory Holt's religious liberty, much as it did the religious beliefs of the business owners in *Hobby Lobby*. For the Court to set aside Holt's claim would be to reinforce the perception that religious freedom is reserved for the powerful or majoritarian faiths, and leave this first-order right in an unacceptably precarious, ad hoc state.