

10-10-2014

Why the Supreme Court beard case matters

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Recommended Citation

Dawinder S. Sidhu, *Why the Supreme Court beard case matters*, Constitution Daily (2014).
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Why the Supreme Court beard case matters

By Dawinder Sidhu

Constitution Daily
October 10, 2014

The first week of the Supreme Court's new term featured *Holt v. Hobbs*, a case that pits a state prison system, which prohibits inmates from growing facial hair, against one of its inmates, who seeks to grow a half-inch beard for religious reasons.

The Background

In 2011, Gregory Holt, an inmate in the Arkansas Department of Correction ("Department"), sued several Department officials, including director Ray Hobbs, alleging that the Department's no-facial hair policy violates the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA"). This statute provides that a prison may not impose a substantial burden on an inmate's religious freedom, unless the prison can show that the burden furthers a compelling interest and is the least restrictive means to advance that interest.

Both the federal district court and the federal appeals court ruled in favor of the Department officials. Holt submitted a handwritten petition for certiorari to the Supreme Court, which agreed to review the case.

Why Holt Matters

The universe of people who should pay attention to Holt is large and should include anyone who cares about religious freedom for themselves or their fellow man; the relationship between Congress and the Supreme Court; whether prisons can and should operate as specialized spaces free of meaningful judicial oversight; or *Burwell v. Hobby Lobby* (in which the Supreme Court held that closely held for-profit corporations owned by individuals who object on religious grounds to contraception may not be forced to include certain contraceptive coverage in their employee insurance plans).

First, the scope of religious freedom, as Luke Goodrich of the Beckett Fund notes, affects every person who desires to exercise his or her faith without government interference or involvement. This helps explain why a number of faith groups and organizations that promote religious freedom filed briefs in Holt.

Second, Congress expressed in RLUIPA its interest in protecting the religious practices of the institutionalized. Holt therefore tests whether and to what extent the Court is willing to give effect to that commitment. Third, courts are not inclined to second-guess prison officials' justifications for their prison policies, as the officials are

best suited to manage and minimize problems in what is a rather peculiar and relatively dangerous environment. The challenge becomes how the courts may defer to prison officials' specialized expertise, while at the same time give meaning to a statute designed to safeguard inmates' religious freedom.

Fourth, Holt, the first major religious freedom case to be considered by the Justices since *Hobby Lobby*, may help answer whether the Court's vision of religious freedom reaches beyond the powerful or the religiously mainstream. Of course, the Supreme Court has protected the religious freedom of minority religious communities. *Gonzales v. O'Centro* (ruling in favor of a religious sect based in Brazil that used a controlled substance in sacramental tea) and *Church of the Lukumi Babalu Aye v. Hialeah* (ruling in favor of adherents of the Santeria religion, which engaged in animal sacrifice as part of their religious services) are good examples of this broad, inclusive conception of religious freedom. But context matters. Following the Supreme Court's 2014 decisions in *Town of Greece v. Galloway* (in which nearly all the adherents and the invocations were Christian), *Hobby Lobby* (Christian business owners), and *Wheaton College v. Burwell* (Christian educational institution), however, some claimed that these decisions were indicative of the Court's special solicitude to "powerful entities" and "Christians." Indeed, Justice Ginsburg questioned, in her *Hobby Lobby* dissent, whether the Court was ready to recognize the religious practices of "Jehovah's Witnesses," "Scientologists," "certain Muslims, Jews, and Hindus," and "Christian Scientists, among others." A ruling against Holt would fuel these doubts.

A case involving a half-inch of hair therefore raises very serious issues related to a first-order right, our constitutional structure, judicial checks on prisons, and perceptions of the Court's selective interest in religious freedom.

The Case

The threshold issue under RLUIPA — whether Holt's religious freedom has been substantially burdened by the Department — is easily surpassed. Holt cannot grow a beard, as required by his faith, precisely because of the Department's no-beards policy.

The Department faces an uphill climb in proving the policy is the least restrictive way to further a compelling governmental interest. The Department argues that its policy "remov[es] an important hiding place for contraband" and "facilitate[s] the identification of inmates who wish to engage in violence or escape."

A significant problem for the Department is that at least 40 states and the federal Bureau of Prisons have identical penological interests in eliminating contraband and facilitating quick identification, but do not resort to no-facial hair policies. The Department's counsel, David Curran, asserted at argument that Arkansas is "unique." As a general matter, unusual problems may justify unusual solutions.

But, as Chief Justice Roberts pointed out, Curran did not provide the Court with any basis for the view that Arkansas is "different." To make matters worse, as Justice

Breyer observed, “there’s not a single example in any State that allows beard policies where somebody did hide something in his beard.”

The second critical flaw in the Department’s argument is that it already allows facial hair for medical reasons, and do not have a half-inch restriction for hair on one’s head, which ostensibly could hide contraband or be altered to evade identification.

The Outcome

From the argument, it appears that the Justices are poised, perhaps unanimously, to reverse the lower courts and hold that the Department’s no-beards policy violates RLUIPA. The only outstanding question is exactly how the Court will rule.

If the Court were to broadly construe the governmental interests, the Court may find that the Department has compelling interests with respect to contraband and identification. “The more abstract the level of inquiry, often the better the governmental interest will look,” Judge Neil Gorsuch wrote in another RLUIPA case.

But his Tenth Circuit panel ultimately concluded, as should the Court, that such generalized declarations of compelling state interests are insufficient for purposes of RLUIPA. Instead, the Court may recognize a compelling state interest only when the prison officials have proven that facial hair has — to borrow a term from a Fourth Circuit panel that included retired-Justice O’Connor in a similar case — “implicated” a compelling state interest. In *Holt*, the absence of any examples of problems with beards supports the conclusion that the state’s interests lie dormant insofar as they relate to hair.

The Court will likely rule that, even assuming that the Department has compelling reasons for its policy, there are other means available that would not be as restrictive of inmates’ religious grooming practices. These would include, as Justice Alito suggested, requiring inmates to comb through their hair, in which case contraband would be loosened and exposed, and as Justice Scalia suggested, mandating photographs of inmates before and after they may grow their hair. The medical exemptions themselves seem to undermine the Department’s contention that the no-facial hair policy is necessary to advance its compelling interests.

The Justices seemed to agree that *Holt*’s case was “easy,” but also seemed to struggle with fashioning a general standard that would apply to subsequent cases involving longer beards or full beards. One possible rule is that an inmate may not be prohibited from growing hair for sincerely held religious reasons, unless a prison is able to show that the inmate has, in a manner related to his hair, given rise to the contraband or identification interests that justify the policies. This rule would permit prisons to regulate an inmate’s facial hair when there is evidence that the inmate has activated the justifications for the policies, would not result in a situation in which the past or current misconduct of another inmate may lead to the loss of religious freedom for all other current and future inmates, and would give deference to the prisons when they can make a showing that compelling state interests have been implicated by the inmate’s actions.

A decision is expected in early spring.

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