

JURISPRUDENCE

If Corporations Are Christians

Companies are claiming personhood to block Obamacare's contraception mandate.

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NOV 21, 2013 • 4:41 PM

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Hobby Lobby is one of several companies that argue that the Obamacare contraception mandate violates religious freedom.

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In New Mexico, it's against the law for a business to turn down a client on the basis of sexual orientation. So when Elane Photography rejected a request to

photograph Vanessa Willock's 2006 commitment ceremony with Misti Collinsworth, Willock filed a complaint with the New Mexico Human Rights Commission.

Elane Photography is owned and run by Elaine and Jonathan Huguenin, who say they believe marriage is only between a man and a woman because of their faith as Christians. They claimed they weren't discriminating against Willock because their objection was to same-sex marriage; they would be fine with taking photos of gay people in another setting. The Human Rights Commission didn't buy this rationale for refusing to take the photos; it fined Elane for violating the state anti-discrimination law. With help from conservative legal aid groups, the business fought the case to the New Mexico Supreme Court, which in August upheld the fines.

Here's the catch: Elane petitioned this month for U.S. Supreme Court review, and the case could get mixed up in the fight over the contraception mandate in Obamacare. So far, the federal appeals courts have split over whether the Affordable Care Act infringes on the religious freedom of corporations by requiring them to provide health insurance that includes coverage for contraception. Obamacare is losing 2-3. If the Supreme Court takes up this issue and grants religious rights to corporations, companies like Elane will be able to argue that laws like New Mexico's protection against discrimination violate a company's freedom of religion. And paradoxically, that could add up to less religious freedom, not more.

Before the contraception mandate cases, as one federal appeals court noted, no one had ever asked whether for-profit corporations that aren't organized around religion—in other words, are not places of worship or other organizations with religious purposes—even have religious freedom rights. That's because corporations have legal "personhood" only for limited purposes: Most famously, thanks to *Citizens United*, the Supreme Court gave them that label so they can spend unlimited amounts of money on political advocacy (as long as they don't directly fund candidates).

This ruling in *Citizens United* has been fodder for comics because, to state the obvious, corporations are not people with independent thoughts, feelings, and beliefs. That's part of why the 3rd and 6th U.S. Circuit Courts of Appeals rejected the claims of corporations that don't want to follow the contraception mandate in Obamacare. Those courts also ruled that the owners of those companies don't have a freedom of religion claim of their own, because the mandate does not obligate them as individuals to do anything.

The U.S. Court of Appeals for the District of Columbia Circuit, on the other hand, stopped enforcement of the contraception mandate while the owners of a closely held prepared-foods company pursue their religious freedom claims. By ruling that way, the court was saying the co-owners of Freshway Foods, the brothers Francis and Philip Gilardi, are likely to win their case. And two other federal appeals courts, the 10th and 7th Circuits, found directly that corporations are "people" under the Religious Freedom Restoration Act and thus also entitled to court orders stopping enforcement of the contraception mandate.

This circuit split is widely believed to mean that the U.S. Supreme Court will take up the issue. If so, the court should consider the practical consequences of granting religious rights to corporations. Judge Ilana Diamond Rovner laid it out in her dissent from the 7th Circuit's ruling striking down the contraception mandate: Suppose a business owner is a Christian Scientist and rejects conventional medicine in favor of prayer or a Jehovah's Witness who oppose blood transfusions. Does that mean this owner should be able to refuse to fund vaccinations or blood transfusions? If secular corporations have religious rights, then Obamacare's guarantee of comprehensive care could turn into Swiss cheese.

It's not just the contraception mandate that's at stake. Right now, civil rights law assures that your employer can't legally fire you for practicing your religion or compel you to practice hers. But if corporations have religious rights, what happens if, as Rovner also suggested, a Southern Baptist employer declines to give the time off provided by the Family and Medical Leave Act to a gay male employee expecting the birth of a child by surrogacy? The company could claim that forcing it to recognize same-sex couples and their families—or pay substantial penalties in a lawsuit—violates its free-exercise rights under the Religious Freedom Restoration Act. To respect the employer's religious rights, the courts could decide that the way for an employee to preserve *his* rights is to quit his job.

This would eviscerate traditional civil rights laws and defang new ones, like the Employment Non-Discrimination Act, which just passed the Senate and would forbid discrimination nationwide on the basis of sexual orientation or gender identity. In the past, courts have not accepted religious-freedom arguments for firing a white employee over an interracial friendship or refusing to hire or promote non-Christians. If corporations have religious rights and the contraception mandate is a “substantial burden” on those rights, decades of decisions like these could be at risk. Workers with beliefs different from those of their employers would clearly be the losers.

As Rovner pointed out, the First Amendment's guarantee of religious freedom was written in part because Colonial Americans felt monarchs should not tell people how to worship. By giving religious rights to corporations, the Supreme Court could give that power to their owners instead. That can't be right.

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