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# Health Care Law's 'Contraception Mandate' Reaches the Supreme Court

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# Health Care Law's 'Contraception Mandate' Reaches the Supreme Court

On March 25, the Supreme Court will hear oral arguments in two cases challenging regulations arising from the Affordable Care Act (ACA) of 2010 (sometimes referred to as "Obamacare"), which requires many employers to include free coverage of contraceptive services in their employees' health insurance plans. Both cases – *Sebelius v. Hobby Lobby Store*s, *Inc.* and *Conestoga Wood Specialties Corp. v. Sebelius* – involve challenges by for-profit businesses whose owners object to the mandate on religious grounds.

A separate series of cases involving challenges to the contraception mandate by religiously affiliated nonprofits also is working its way through the federal court system. While one or more of those lawsuits may soon reach the high court, they are different from the *Hobby Lobby* and *Conestoga* cases, which concern only for-profit businesses.

## How did these cases arise, and how did they reach the Supreme Court?

Regulations arising from the ACA require many employers to include free coverage for contraceptive services in their employees' health insurance plans. The regulations entirely exempt churches and provide religiously affiliated nonprofits, such as hospitals and charities, an alternative mechanism for ensuring that their employees are covered. But those accommodations do not extend to for-profit employers who may also object, for religious reasons, to providing their workers with some or all kinds of artificial birth control.

The owners of a number of these businesses – including arts-and-crafts retail chain Hobby Lobby and cabinet-maker Conestoga – sued the federal government, claiming that the 1993 Religious Freedom Restoration Act (RFRA) entitles them to some form of relief from the mandate based on their religious objections.

In the case of Hobby Lobby, a federal district court ruled in 2010 that the company is not entitled to an exemption from the mandate. But that decision was later reversed by the 10th U.S. Circuit Court of Appeals, which ruled in favor of Hobby Lobby. Conestoga also filed suit in federal district court and was denied relief. Unlike Hobby Lobby, Conestoga then lost its appeal (in a decision by the 3rd Circuit). Both losing parties petitioned the Supreme Court for review, and on Nov. 26, 2013, the high court agreed to hear the two cases at the same time.

## What is the Religious Freedom Restoration Act, and why is it so important in these cases?

The Religious Freedom Restoration Act was enacted by the U.S. Congress in 1993 in response to a 1990 Supreme Court decision, *Employment Division v. Smith*. In *Smith*, the court dramatically changed the way it assesses laws and government actions that may impose a burden on religious practice. Prior to the decision, an individual or group would be entitled to an exemption from a law that burdened a religious practice unless the government could show that enforcement of the law furthered a "compelling government interest," such as protecting public safety, and that this interest could not be advanced without imposing the burden. *Smith* dispensed with the compelling interest test and, in its place, required the government to show only that the law in question did not discriminate against religion and that it advanced a "legitimate government interest," a much less rigorous standard that could include virtually any public policy goal.

The 6-3 *Smith* decision prompted an outcry from religious groups and others, who claimed that the ruling would essentially gut religious liberty protections contained in the First Amendment to the U.S. Constitution. Congress responded by passing RFRA, which attempted to restore the pre-*Smith*, "compelling interest" standard. The statute directs courts to exempt any party who can show that the challenged law or government action substantially burdens his or her religious practice, unless the government shows that the law advances a compelling interest that cannot be achieved without imposing the burden on the person's free exercise of religion.

In 1997, a lawsuit challenging RFRA (*City of Boerne v. Flores*) reached the Supreme Court, which struck down the law as applied to state and local governments. The decision rests on the principle of federalism: Congress does not have the power to impose the standard on state and local governments but is free to impose it on the federal government.

Because most religious accommodation cases involve state law, the court's decision in *City of Boerne* has resulted in relatively few subsequent cases involving RFRA claims. However, the *Hobby Lobby* and *Conestoga* cases involve the contraception mandate, which arises from a federal law. Before RFRA can be used to test the constitutionality of the mandate, the high court must first determine whether the 1993 law protects for-profit businesses.

## What arguments do the Hobby Lobby and Conestoga companies make?

The owners of both companies say they are devout Christians who oppose abortion. These owners do not want to provide their employees with emergency contraception because they believe such methods not only prevent pregnancy but also can work after conception, destroying embryos.

The arguments put to the Supreme Court by Hobby Lobby and Conestoga largely rest on the claim that RFRA protects the religious liberty of for-profit businesses. To begin with, they say, Congress did not explicitly exclude businesses from coverage when it passed the statute in 1993. Indeed, the statute claims to cover "persons," a word courts usually interpret to include nonprofit and for-profit entities as well as individuals. Furthermore, the two companies contend, there is no reason to exclude for-profit businesses from RFRA's coverage. No one disputes that RFRA covers nonprofit entities, such as a religiously affiliated private school, so why, they ask, should such coverage disappear for a for-profit organization simply because it operates under a different tax structure?

Hobby Lobby and Conestoga next argue that the situation at hand easily meets both major parts of RFRA's test required for an exemption to the challenged law or government action. First, they say, the ACA's contraception mandate imposes "a substantial burden" on their free exercise of religion. Traditionally, courts have left it to the parties bringing suit to determine when a government action burdens their right to freely exercise their religion. In this case, both companies say, the substantial burden arises from the health law's requirement to provide a number of drugs and devices that the owners of both Hobby Lobby and Conestoga believe can end life *after* conception. As a result, they say, the requirement directly conflicts with their religiously based opposition to abortion. In addition, they say, the government will impose ruinous financial and other penalties on them if they do not comply. Moreover, Hobby Lobby and Conestoga say, the companies are burdened even though they are not directly paying for their employees' contraception because by purchasing their employees' insurance, they are still the ultimate source of the contraceptives.

Having argued that the government's action imposes a substantial burden on the free exercise of their religious beliefs, the two companies next reject the idea that the contraception mandate advances a compelling public policy interest. Hobby Lobby and Conestoga point out that the government has already exempted thousands of religious groups and others from the mandate. How, the companies ask, can the government assert that it has a compelling interest in enforcing the contraception mandate when it leaves so many employees uncovered? In addition, Hobby Lobby and Conestoga argue, even if the government is advancing a compelling interest, it clearly is not doing so in the way that imposes the least restrictions on the companies' free exercise of religion, as RFRA requires. In this case, they say, the government could advance its interest in a less restrictive way by directly paying for contraception coverage. Or it could extend to for-profit businesses owned by religious individuals the same exemption offered to religious nonprofits.

## What arguments does the government make?

Like Hobby Lobby and Conestoga, the government rests its case on its understanding of RFRA. But the government argues that the statute does not protect for-profit corporations such as Hobby Lobby and Conestoga – or even individuals acting in their capacity as owners or managers of these businesses. To begin with, the government says, there is no tradition of courts extending religious liberty protections to businesses or their owners, as courts have done with other protections, for example, speech rights. Nor, the government asserts, is there any indication that Congress intended RFRA to cover for-profit businesses, and there are significant prudential reasons to exclude businesses from this kind of coverage. Specifically, the government says, granting religious liberty rights to a business would inevitably impose burdens on its employees, who may not share the owner's beliefs. In addition, courts would be forced to determine which companies are sufficiently "religious" to qualify for such protections, a task not well-suited to judges who generally are not theologians or religion experts.

Even if RFRA does apply, the government contends, the contraception mandate does not rise to the level of being a "substantial religious burden" (which is required if the law is to apply) because the companies are significantly removed from an employee's decision to use contraception. After all, they point out, Hobby Lobby and Conestoga do not directly provide contraception services to their workers. Instead, they offer their employees health insurance that covers a huge array of medical services, including birth control. In addition, any decision to use birth control rests with the employees, not the insurance providers or the companies.

Finally, the government argues, the mandate advances a compelling government interest because it is part of a comprehensive reform of the nation's health care system, and granting the companies an exemption would deprive some Americans of important benefits provided by that reform. In this case, many women would not receive free contraceptive services, thwarting an important public health goal for the government – that all women have adequate access to effective birth control. As for RFRA's requirement that the mandate be enforced in the least restrictive way possible, the government argues that any alternative to the insurance mandate would mean upending the ACA's health care model (which revolves around employment-based health insurance) and replacing it with something different, a highly impractical option, according to the government.

## What might be the broad significance of this case?

If the government prevails and the Supreme Court holds that RFRA does not cover for-profit entities or their owners or managers, the decision would immediately end all religious-liberty-based challenges to the contraception mandate by for-profit businesses. It also would bar

businesses from invoking RFRA in lawsuits challenging other laws. Such a ruling would not, however, have any impact on the pending challenges to the contraception mandate by religious nonprofit organizations.

If, however, the high court holds RFRA does apply to for-profit businesses but rules in favor of the government either because it decides the contraception mandate does not impose a "substantial burden" on the businesses' religious exercise, or that the mandate furthers a "compelling governmental interest," the decision would almost certainly impact those challenges to the mandate filed by religiously affiliated nonprofits. Indeed, a ruling by the court that the mandate does not impose a "substantial burden" on these businesses could make it difficult for religious nonprofits to show that the mandate substantially burdens them.

And a decision by the court that the government has a compelling interest in furthering the contraception mandate would insulate it from future RFRA challenges to the mandate from both for-profit and nonprofit entities. In addition, such a ruling also might indicate that the court has adopted a more relaxed standard in applying the "compelling interest" test. This, in turn, could lead to more decisions for the government in future religious accommodation cases.

If the court rules in favor of Hobby Lobby and Conestoga, the decision would likely open the door for businesses to invoke RFRA in a wide range of challenges to federal statutes and regulations. For instance, one bill now pending in Congress that would almost certainly invite such challenges is the Employment Non-Discrimination Act, which would include sexual orientation among the protected characteristics in workplace discrimination cases. A decision in favor of Hobby Lobby and Conestoga might give for-profit employers a strong foundation to raise religious objections to hiring gays and lesbians or to providing the same-sex spouses of employees with the same benefits extended to opposite-sex spouses.

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