National Family Planning & Reproductive Health Association

March 2014

The Supreme Court and the ACA's Contraceptive Coverage Requirement: Top 4 Things You Should Know

The Affordable Care Act (ACA) requires insurance plans—including those sponsored by an employer—to provide all FDA-approved contraceptive methods, without copays or other cost-sharing. Certain religious institutions, such as churches and mosques, are exempt from the requirement. Religiously affiliated nonprofits were given an accommodation by the Obama administration, allowing them to opt out of directly arranging or paying for contraceptive coverage if they sign a form certifying that such coverage violates their religious beliefs; in such cases, the insurance plan must offer the coverage directly to enrollees without cost-sharing.

Over the last several years, more than 90 cases[i] have been filed by for-profit companies and nonprofit organizations challenging the ACA's contraceptive coverage requirement on religious grounds. On March 25, 2014, the US Supreme Court will hear oral arguments in two of the for-profit cases: *Sebelius v. Hobby Lobby Stores, Inc*. ("*Hobby Lobby*") and *Conestoga Wood Specialties v. Sebelius* ("*Conestoga Wood*"). This document examines the background of the legal challenges to the contraceptive coverage requirement and the key issues involved in the court's review.

1. What Are *Hobby Lobby* and *Conestoga Wood* About?

More than half of the legal challenges to the contraceptive coverage requirement have been filed by for-profit companies. In November 2013, the Supreme Court selected two of these cases—*Sebelius v. Hobby Lobby Stores, Inc*. and *Conestoga Wood Specialties v. Sebelius*—for review from the Tenth Circuit Court of Appeals and Third Circuit Court of Appeals, respectively.

Hobby Lobby is an Oklahoma-based for-profit company that runs a national chain of craft supply stores, with more than 13,000 employees in 41 states. The company is owned by the Green family, which argues that it operates Hobby Lobby in line with the family's Protestant faith and that the Greens' religious beliefs prohibit them from providing insurance coverage for emergency contraception and IUDs.[ii] Conestoga Wood Specialties is a Pennsylvania-based for-profit corporation that manufactures cabinets, with 950 full-time employees. The company is owned by the Hahns, a Mennonite family that opposes providing insurance coverage of emergency contraception.[iii]

In *Hobby Lobby*, the Tenth Circuit ruled in favor of the company, finding that the company can exercise religious beliefs under federal law and that the contraceptive coverage requirement violated the company's rights.[iv] In *Conestoga Wood*, the Third Circuit ruled against the company, rejecting the company's claims that the requirement violates its rights under federal law and the US Constitution.[v]

2. What Issues Will the Supreme Court Consider?

In agreeing to hear Hobby Lobby and Conestoga Wood, the Supreme Court agreed to hear claims under both a 1993 federal law—the Religious Freedom Restoration Act (RFRA)—and the First Amendment to the US Constitution. It should be noted that, in many ways, these arguments can and may overlap in the court's analysis; however, for the sake of clarity, this document will analyze the RFRA and First Amendment issues separately.

The RFRA was designed to protect people from laws that burden their free exercise of religion. The law prohibits the government from **substantially burdening** a "person's" exercise of religion unless the burden furthers a **compelling governmental interest** and is the **least restrictive means** of furthering that interest.[vi] Before the court can address whether the contraceptive coverage provision meets the requirements of the RFRA, it must first decide whether for-profit corporations can be defined as "persons" under the RFRA, and thus whether for-profit companies can "exercise religion." The Supreme Court has never ruled on whether a corporation engaged in strictly commercial activity can have religious beliefs.[vii]

If the court finds that corporations are people under the RFRA, and that the ACA's contraceptive coverage requirement is a substantial burden on the corporations' exercise of religion, then the court's analysis moves to the aforementioned questions of compelling governmental interest and least restrictive means. In both cases, the government asserts that it has multiple compelling interests, including public health and gender equality.[viii] The companies in the two cases argue that there cannot be a compelling governmental interest when the requirement is not applied equally to all employers (noting exemptions for religious institutions and the accommodation for religiously affiliated nonprofits).[ix] The companies further argue that even if there is a compelling interest, there are less restrictive means of accomplishing the same goal, including that the government can achieve its contraceptive access goals through other "readily available means" like Title X.[x]

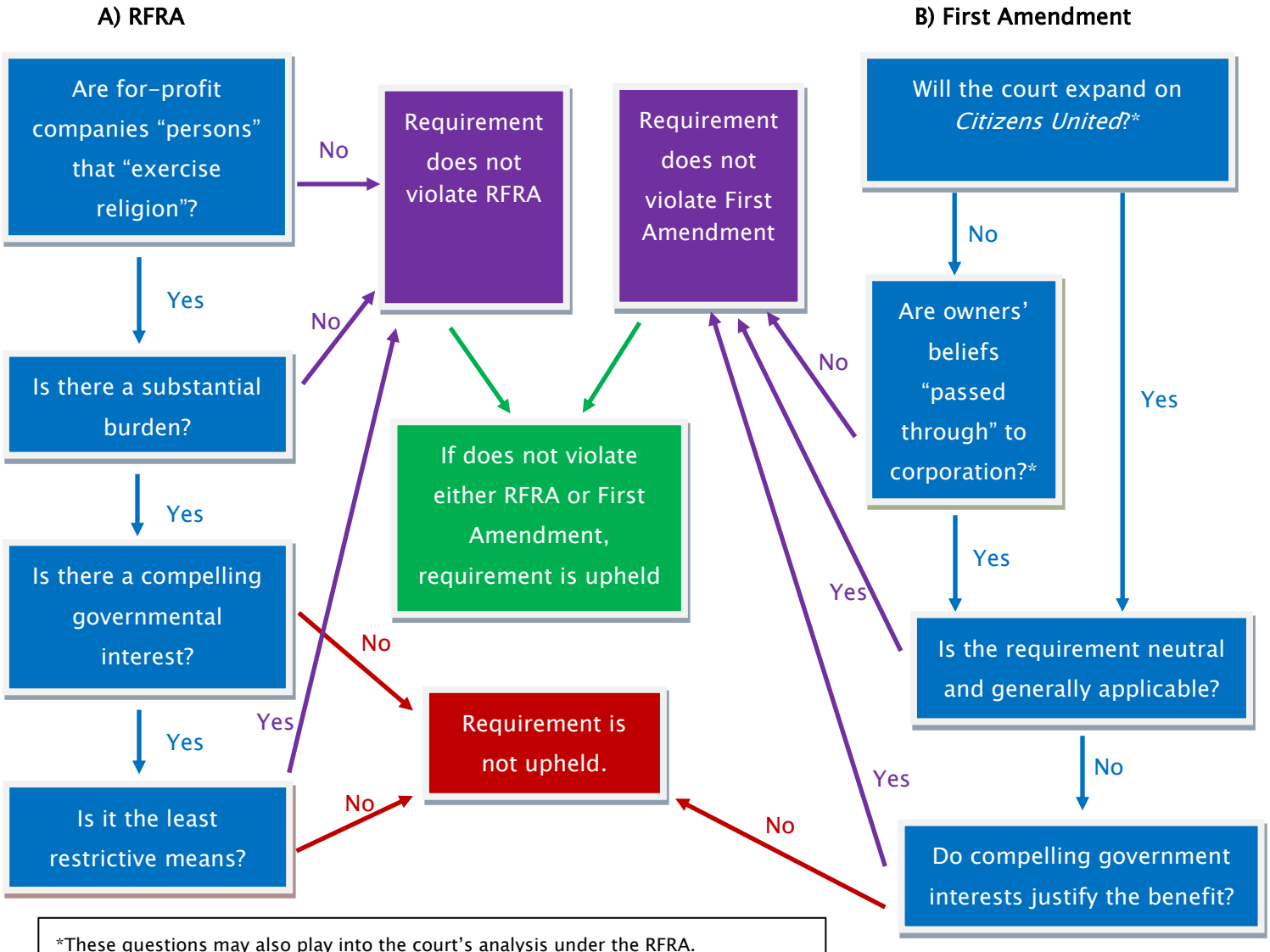
Along with the RFRA claims, the Supreme Court will also hear arguments under the First Amendment, which along with protecting "the freedom of speech, or of the press," also prohibits Congress from making laws "prohibiting the free exercise" of religion.[xi] Here, the companies offer two ways in which the court can determine that for-profit corporations can "exercise religion." The first would expand on the Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*, which in essence held that corporations have First Amendment freedom of speech rights. The second would accept the "passed through" theory, which argues that the corporation can exercise religion because the corporation is an extension of the beliefs of its owners.[xii] If the court finds that corporations can exercise religion, then it will assess whether the contraceptive coverage requirement is a neutral, generally applicable law[xiii] and, if not, whether a compelling governmental interest justifies the requirement.[xiv]

To date, five federal circuit courts have ruled on these issues, focusing almost entirely on the RFRA claims,[xv] and the results have been mixed. Similar to the Tenth Circuit's decision in *Hobby Lobby*, the DC and Seventh Circuits have allowed companies to refuse to cover contraception in their employees' health plans.[xvi] However, like the Third Circuit in *Conestoga Wood*, the Sixth Circuit ruled that a corporation is not a "person" under the RFRA, and the company's owners could not challenge the contraceptive coverage requirement because they were not burdened by the requirement.[xvii] Additionally, the Third Circuit also rejected the *Conestoga Wood* First Amendment claims.[xviii]

3. How Might the Court Rule?

As with most cases, there are a number of factors that will weigh in the court's ultimate ruling. The court was asked to rule on the contraceptive coverage requirement as it applies to for-profit corporate employers, not to strike down the contraceptive coverage requirement in its entirety. Although it is possible that the court could reach the fuller question of the requirement's legality, it is considered unlikely. It is also unlikely that the court's ruling would apply beyond for-profit employers, meaning that the separate line of legal challenges from non-profit employers currently working their way up through the courts could still one day reach the Supreme Court. Finally, although the court is widely expected to rule on the requirement as it applies to all FDA-approved contraceptives, it is worth noting that the court took two cases where the owners' religious objections were to specific contraceptives they believe to be "abortifacients" as opposed to providing coverage of all contraceptives.[xix] Beyond these factors, because the court is hearing challenges under both the RFRA and the First Amendment, the decision-making process is likely to be complicated, with overlapping issues and analysis. The following flow chart attempts to outline the key questions the court will likely need to answer to reach its decision.

Two Potential Lines of Inquiry for Central Question: Can For-profit Companies "Exercise Religion"?



*These questions may also play into the court's analysis under the RFRA.

4. What Could the Court's Decision Mean?

A ruling in favor of the contraceptive coverage requirement as it applies to for-profit employers would be a tremendous victory for all women, regardless of their insurance status. Along with protecting the coverage of the more than 27 million women already benefiting from the provision, a favorable ruling would help offset the cost of caring for those who remain uninsured and will help to ensure the continuity of the family planning safety net for those who need it most.

A ruling against the requirement could have far-reaching implications. A decision that allows for-profit business owners to impose their religious beliefs on their employees would substantially burden the ability of employees and families to access the health, social, and economic benefits of contraceptive use. It may also have consequences well beyond contraception, depending on the grounds on which the court bases its decision and the scope of its ruling.

---

[i] American Civil Liberties Union, "Challenges to the Federal Contraceptive Coverage Rule," February 13, 2014, https://www.aclu.org/reproductive-freedom/challenges-federal-contraceptive-coverage-rule.

[ii] Laurie Sobel and Alina Salganicoff, "A Guide to the Supreme Court's Review of the Contraceptive Coverage Requirement," Kaiser Family Foundation, December 9, 2013, http://kff.org/report-section/8523-contraceptive-coverage-requirement-legal-challenges/.

[iii] Ibid.

[iv] National Women's Law Center, "Status of the Lawsuits Challenging the Affordable Care Act's Birth Control Coverage Benefit," accessed February 18, 2014, http://www.nwlc.org/status-lawsuits-challenging-affordable-care-act%E2%80%99s-birth-control-coverage-benefit.

[v] Ibid.

[vi] 42 U.S.C. § 2000bb.

[vii] Lyle Denniston, "Court to rule on birth-control mandate (UPDATED)," *SCOTUSblog*, November 26, 2013, http://www.scotusblog.com/2013/11/court-to-rule-on-birth-control-mandate/#more-201103.

[viii] Laurie Sobel and Alina Salganicoff, "A Guide to the Supreme Court's Review of the Contraceptive Coverage Requirement."

[ix] Ibid.

[x] The amicus brief prepared by the National Health Law Program, to which NFPRHA signed on, specifically rebuts this point and addresses why the ACA's contraceptive coverage requirement matters not only for women with insurance but also for those without who rely on the family planning safety net. http://www.healthlaw.org/publications/browse-all-publications/nelp-supreme-court-amicus-brief-in-sebelius-v-hobby-lobby#.UughjhatslJ?utm_source=Defend+Birth+Control+Coverage+in+Supreme+Court+Brief+&utm_campaign=Emily+Retirement&utm_medium=email

[xi] US Constitution, Amendment 1.

[xii] Laurie Sobel and Alina Salganicoff, "A Guide to the Supreme Court's Review of the Contraceptive Coverage Requirement."

[xiii] The Supreme Court has generally held that laws that are neutral and generally applicable do not violate the Free Exercise Clause of the First Amendment, even if they burden some "persons'" exercise of religion. National Women's Law Center, "The Birth Control Coverage Cases: For-Profit Businesses Are Suing to Deny Women Insurance Coverage of Birth Control," December 2013, http://www.nwlc.org/sites/default/files/pdfs/bc_cases_factsheet_12-19-13.pdf.

[xiv] National Women's Law Center, "Status of the Lawsuits Challenging the Affordable Care Act's Birth Control Coverage Benefit."

[xv] National Women's Law Center, "The Birth Control Coverage Cases: For-Profit Businesses Are Suing to Deny Women Insurance Coverage of Birth Control," December 2013, http://www.nwlc.org/sites/default/files/pdfs/bc_cases_factsheet_12-19-13.pdf.

[xvi] National Women's Law Center, "Status of the Lawsuits Challenging the Affordable Care Act's Birth Control Coverage Benefit."

[xvii] Laurie Sobel and Alina Salganicoff, "A Guide to the Supreme Court's Review of the Contraceptive Coverage Requirement."

[xviii] National Women's Law Center, "Status of the Lawsuits Challenging the Affordable Care Act's Birth Control Coverage Benefit."

[xix] Robert Barnes, "Supreme Court to review contraceptive coverage mandate in health-care law," *The Washington Post*, November 26, 2013, http://www.washingtonpost.com/politics/supreme-court-to-review-contraceptive-coverage-mandate/2013/11/26/e9627f5a-56bc-11e3-8304-caf30787c0a9_story.html.