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A Guide to the Supreme Court's Review of the Contraceptive Coverage Requirement

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Shortly after the Department of Health and Human Services (HHS) announced the new federal rule that required all new private plans to cover prescribed FDA approved contraceptive methods without cost-sharing, a number of corporations sued claiming that this new requirement violates their religious rights. These lawsuits have worked their way through the Federal Courts and, on November 26, 2013, the Supreme Court agreed to hear two cases that involve for-profit corporations. The Court agreed to hear a case from the Tenth Circuit Court of Appeals, [which ruled in favor of Hobby Lobby](#), an Oklahoma-based chain of craft stores owned by a Christian family who claim that the contraceptive coverage requirement violates their company's religious freedom. The Court also agreed to hear a case from the Third Circuit Court of Appeals, which ruled against the corporation and its owners, finding that Conestoga Wood Specialties, a cabinet manufacturer, does not have religious rights. The Supreme Court decided to take these cases to resolve the conflict between these two decisions and other U.S. Courts of Appeals' rulings.

Over [forty](#) other lawsuits have been filed by for-profit secular corporations challenging the contraceptive coverage requirement. In addition, [over forty](#) religiously affiliated nonprofit corporations are also challenging the contraceptive coverage requirement claiming that the accommodation for religiously affiliated nonprofits is insufficient and still burdens their religious rights. It is likely that some of these nonprofit cases will request the Supreme Court to review these cases in future sessions. The oral argument for the *Hobby Lobby* and *Conestoga Wood Specialties* cases is scheduled to be heard in Spring 2014 and the decision will likely be announced in June 2014.

At the crux of these cases is a question that the Supreme Court has not previously addressed: Do for-profit corporations have protections under the [1993 Religious Freedom Restoration Act](#)¹ (RFRA)? If the Court finds that for-profit corporations have protections under the RFRA, *then* the Court will need to determine if it is a violation of the RFRA to require a business to provide insurance that includes coverage for contraceptives when that coverage violates the owners' personal religious beliefs. The Court will also consider whether the contraceptive coverage requirement violates the First Amendment's protection for free exercise of religion.² The corporations' owners have also asserted rights under the RFRA and the First Amendment. The Court will need to determine if the owners' rights are violated by a regulation imposed on the corporation.

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While the Court’s decision in *Hobby Lobby* and *Conestoga Woods Specialties* will have a direct effect on women’s access to contraceptive coverage, it may also have broader ramifications for civil rights protections in the workplace. This policy brief explains the issues raised by the cases pending, answers some key questions about the parties’ legal arguments and considers possible effects of the potential decisions.

BACKGROUND

In addition to expanding access to health insurance, the Affordable Care Act (ACA) requires new private plans to provide coverage for a broad range of preventive services that fall under four broad categories: evidence-based screenings and counseling, routine immunizations, childhood preventive services, and preventive services for women. Health plans with [grandfathered status](#) are not required to provide all of the benefits and consumer protections, including preventive health services, required of other health plans. Grandfathered health plans are plans that were in existence on March 23, 2010 and have stayed basically the same.

The preventive services for women that must be covered include [eight additional services](#), identified by an Institute of Medicine expert panel. These include screening for intimate partner violence, well woman visits, breastfeeding supports as well as prescription contraceptives and services, including all methods approved by the [Food and Drug Administration](#). In August 2011, HHS adopted these [recommendations](#), adding these eight services to the preventive services originally included in the ACA legislation. Initially, the rule requiring coverage of contraceptives included a very narrow exemption only for houses of worship³ that object to the contraceptive coverage requirement. In February 2012, this [rule](#) was modified, giving other religiously affiliated nonprofit employers such as hospitals and universities who hold religious objections to contraceptives a one-year “safe harbor” or grace period (until August 2013), during which they did not have to comply with the regulation.

After some religious leaders called for a broader exemption, the Administration responded by modifying the [rule](#) again in July 2013 allowing religiously affiliated nonprofits to request an “accommodation.” This accommodation “protects certain nonprofit religious organizations with religious objections to providing contraceptive coverage from having to contract, arrange, pay, or refer for such coverage”⁴ instead requiring their insurers to bear the cost of employees’ contraceptive coverage. The accommodation is intended to release nonprofit religiously affiliated employers that oppose birth control from the requirement of paying for contraceptive coverage, and assure that the employees and their dependents are still able to obtain full coverage for contraceptives directly from the insurer as they are entitled to under the law. This “accommodation” is only available to “eligible organizations” meeting the criteria: 1) opposes providing for some or all of any contraceptive coverage on account of religious objections; 2) has nonprofit status; 3) holds itself out as a religious organization; and 4) self-certifies that it meets the first three criteria.⁵

No exemption or accommodation, however, is available to for-profit employers. All for-profit employers with fifty or more employees must provide the contraceptive coverage unless they are offering coverage through a [grandfathered](#) plan. Small employers (less than fifty employees) are not penalized for not offering health insurance to their workers. However, if a small employer does provide health insurance it must cover preventive services, including contraceptives for women.

Figure 1: Contraceptive Coverage Rules

What is required to be covered?	All FDA approved contraceptive methods, as prescribed, must be covered without cost-sharing. At least one version of each method must be covered, including brand-name versions if no generic option is available.
Who is required to cover contraceptives?	All new private health insurance plans offering prescription drug coverage. This includes all non-group, small and large group and self-funded plans. Grandfathered plans do not have to comply with this requirement or the other insurance reforms in the ACA.
Who is exempt from the contraceptive mandate or can request an accommodation?	Religious institutions defined as “houses of worship” are exempt. Women employees or dependents of those working for an employer which is exempt may not have insurance coverage for contraceptives if their employer has a religious objection to contraceptives. Religiously affiliated organizations that oppose providing contraceptive coverage due to religious objections, are nonprofit, and identify as a religious organization can request an accommodation. These organizations must self-certify that they are eligible organizations and will be granted an accommodation so they are not required to purchase contraceptive coverage, but employees and their dependents will still have access to contraceptive coverage through insurance companies or third party administrators without cost-sharing.
How do employees of organizations with accommodations obtain contraceptive coverage?	Insurance companies are required to cover the cost of contraceptives for employees of religiously affiliated organizations that have requested an accommodation at no cost to the employees or the employers. Third-party administrators of self-funded health plans must provide or arrange payments for contraceptive coverage for the workers of the employer requesting the accommodation and offset the costs of the contraceptive coverage by payment reductions in the fees paid to the federal exchange. ⁶

LEGAL CHALLENGES

Since HHS issued the regulation regarding preventive services for women, over eighty corporations have filed lawsuits challenging the contraceptive coverage requirement. Some of these corporations are challenging the requirement that they cover the full range of contraceptives while others are contesting providing coverage for emergency contraception, finding it to be objectionable because they believe it is an abortifacient, despite its classification as a contraceptive by the FDA. The legal challenges fall into two groups: those filed by for-profit corporations and those filed by nonprofit organizations. More than forty cases have been filed by for-profit corporations and their owners who are claiming that 1) the requirement that they provide health insurance coverage for their employees which includes contraceptives violates their constitutional rights under the First Amendment to free exercise, speech and association, and 2) they have been unjustly burdened under the Religious Freedom Restoration Act (RFRA). Religiously affiliated nonprofit organizations are also making claims under the First Amendment and the RFRA. The RFRA was enacted in 1993 to protect “persons” from generally applicable laws that burden their free exercise of religion.

FOR-PROFIT CORPORATIONS' LEGAL CHALLENGES

The two cases that will be reviewed by the Supreme Court pose a fundamental question whether the guarantee of the free exercise of religion applies to secular for-profit corporations. The for-profit corporations challenging the women's preventive health care requirements are owned by religious families who believe they are running their businesses in line with their faith, and their religious views impart to their businesses. Both the owners and the corporations are contending that their rights are violated under the RFRA and the First Amendment.

Hobby Lobby Stores, Inc. and Conestoga Wood Specialties, Corp.

The Supreme Court is reviewing the legal challenges brought by Hobby Lobby Stores Inc. and Conestoga Wood Specialties, Corp. The Green family, Protestants of Oklahoma, owns Hobby Lobby, a national chain of craft stores, and Mardel, a chain of book stores. The Greens contend they operate their businesses in line with their faith and that their religious beliefs prohibit them from providing health insurance coverage for Ella and Plan B (emergency contraceptives) and IUDs. Hobby Lobby currently operates 514 stores in over 41 states, and has 13,240 employees. Mardel, Inc. has 35 stores in 7 states and has 372 full-time employees. The Tenth Circuit ruled on [June 27, 2013](#) that Hobby Lobby is likely to succeed on the merits of the RFRA claim. Conestoga Wood Specialties Corporation is a for-profit corporation owned by the Hahn family, practicing Mennonites of Pennsylvania. Conestoga manufactures cabinets and has 950 full time employees. The Hahn family opposes providing insurance coverage for Plan B and Ella. In this case, on [July 26, 2013](#), the Third Circuit ruled against Conestoga Wood Specialties and the Hahn family.

Five federal circuit courts have issued rulings on the RFRA and constitutional challenges brought by the owners and the corporations: the Third, Sixth, Seventh, Tenth, and D.C. Circuit.⁷ (See Appendices A and B) Like the [Third Circuit](#), the [Sixth Circuit](#) also ruled that the corporation has no religious rights, and the owners could not challenge the law on their own. However, in line with the [Tenth Circuit](#), the [DC Circuit](#) ruled that the owners, but not the corporation, were likely to succeed on the merits. The [Seventh Circuit](#) ruled that both the corporation and the owners were likely to succeed on the merits of the RFRA challenge. After the Supreme Court rules on *Hobby Lobby* and *Conestoga Woods Specialties*, the lower courts will apply this decision to the other pending cases.

The Religious Freedom Restoration Act of 1993, which the corporations claim is violated by the contraceptive coverage requirement, was intended to protect people from laws that burden their exercise of religion. In other words, the Act requires the government to show the law in question, in this case the requirement that plans include coverage of all prescribed FDA approved contraceptives, furthers a "compelling interest" in the "least restrictive means" when it "substantially burdens a person's exercise of religion."

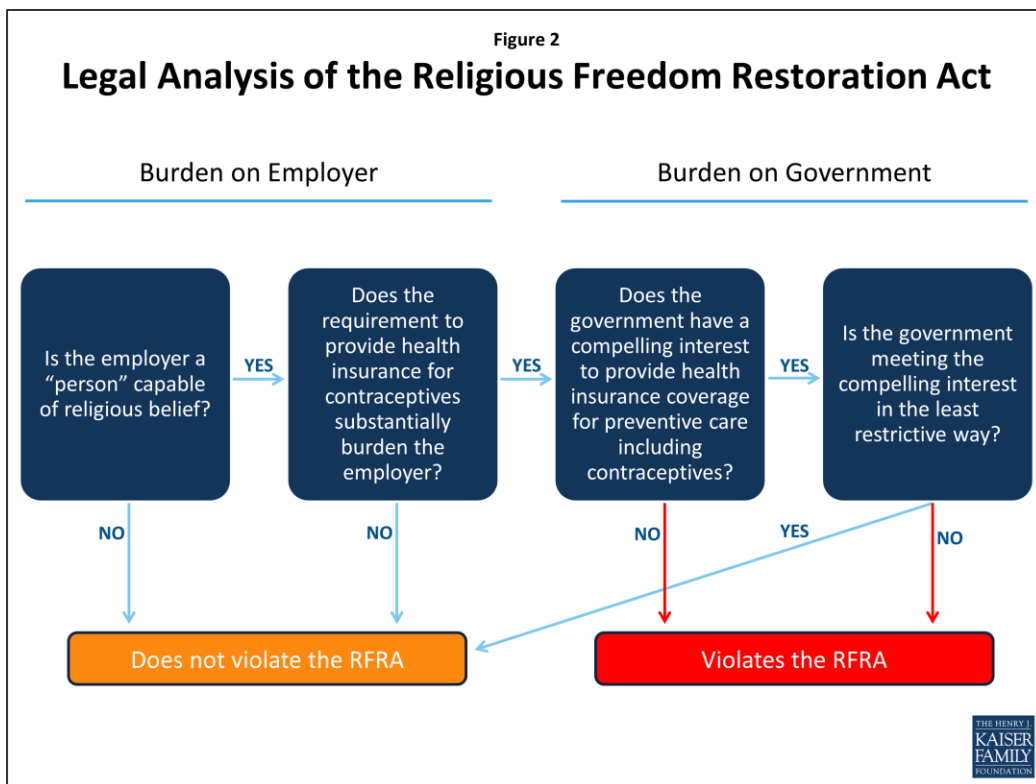
The Court must consider a series of threshold questions in deciding whether the contraceptive coverage requirement is in violation of the RFRA (Figure 2). The first threshold question that must be met in these cases is: Can a for-profit corporation be defined as a "person" capable of religious expression under the RFRA? The owners of the corporations are contending that their personal religious views also belong to the corporation. In addition to claiming the corporation is burdened, they are asserting that the owners are substantially burdened by the government's requirement that the corporation, which they own, provide contraceptive coverage to their workers. They are arguing that the corporation is indistinguishable from its owners, and therefore the owners are burdened by action required by the corporation because it violates their personal religious rights. The

courts must consider if the corporation or the owners are substantially burdened by this provision of the ACA. The corporations are asserting that they are left with a choice to provide the “objectionable” coverage or pay a hefty fine. If the corporation can show that it is substantially burdened, then HHS must demonstrate that it is furthering a *compelling government interest in the least restrictive means*.

In these cases, the

government is asserting that its compelling interest is in 1) safeguarding the public health, 2) promoting a woman’s compelling interest in autonomy and 3) promoting gender equality.⁸ Lastly the government must show it is meeting the compelling interest in the *least restrictive means*. The plaintiffs contend, on the other hand, that the government cannot have a compelling interest when it does not apply this requirement equally to all employers, effectively exempting those with less than fifty employees that do not provide health insurance, grandfathered plans, and some religious organizations (houses of worship and religiously affiliated nonprofits that are eligible for an accommodation). They also argue there are less restrictive ways to accomplish the same goals including: “Provide a tax credit to employees who purchase emergency contraceptives with their own funds; Directly provide the drugs at issue or directly provide insurance coverage for them through the state and federal health exchanges; Empower willing actors – for instance, physicians, pharmaceutical companies or various interest groups to deliver the drugs and sponsor education about them; Use their own resources to inform the public that these drugs are available in a wide array of publicly-funded venues.”⁹

Under the First Amendment claims that are being made under these two cases, the Court must determine if a for-profit corporation can “exercise religion.” The plaintiff corporations, Hobby Lobby and Conestoga Wood Specialties, are offering two ways that corporations can exercise religion: 1) directly relying on the Supreme Court’s recent decision in *Citizens United v. Fed. Election Comm’n*¹⁰ holding that “the Government may not suppress political speech on the basis of the speaker’s corporate identity,” and thus striking down a law restricting corporate political donations; and 2) under a “passed through” theory which assumes the corporation is an extension of the beliefs of the owners of the corporation.¹¹



Nonprofit Organizations' Legal Challenges

While the Supreme Court is hearing two cases that involve for-profit corporations, [forty-one](#) nonprofit organizations have also filed cases challenging that the “accommodation” made by HHS is not sufficient. The nonprofits argue that when the insurer separately contracts with an employer’s workers to cover contraceptives at no cost, it remains part of the employer’s plan and is financed by the employer. While the nonprofit religious corporations may be able to demonstrate that they can “exercise religion” under the RFRA, the nonprofit corporations must then demonstrate that the regulation, even with the “accommodation,” substantially burdens their exercise of religion. Just as in the cases brought by for-profit corporations, if the nonprofit corporation can show that it is substantially burdened, *then* the government will then have the burden to show that the contraceptive coverage requirement is a “compelling interest” that is met in the “least restrictive means.”

Many of the nonprofit plaintiffs filed their cases before July 2013 when the final regulation was issued providing the “accommodation,” but some of the nonprofits re-filed after the regulation was finalized. Therefore, these cases are not as far along in the court system as the cases brought by for-profit corporations and are not currently before the Supreme Court.¹² It is likely that some of these nonprofit cases will petition the Supreme Court for review after they make it through the U.S. Courts of Appeals, as was done by the for-profit corporations.

BROADER RAMIFICATIONS

If the Supreme Court finds that for-profit secular corporations have religious rights or the business owners’ religious rights are burdened by a regulation imposed on the business, the implications of this ruling will likely affect contraceptive coverage for many women, and also go far beyond contraceptive coverage. They could affect employer requirements regarding employees’ health insurance benefits as well as the scope of employee protections against discrimination. A decision in favor of the corporation would mean women’s access to contraceptives would be dependent on the religious views of the owners of her employer. In the health care context, employers could ask for other exemptions based on their religious beliefs. Some business owners may have religious beliefs that conflict with blood transfusions, vaccinations, infertility treatments, psychiatry treatment and drugs, and health insurance all together.

Beyond health care, a decision allowing for-profit secular corporations an exemption from a law based on religious beliefs could have implications for the interpretation and enforcement of laws ranging from civil rights to fair housing protections. The Supreme Court’s decision in the cases of *Hobby Lobby* and *Conestoga Wood Specialties* will likely be announced in June 2014, but given the litigation that nonprofit corporations have filed and that are working their way through the courts, this may not be the final word of the Supreme Court on the contraceptive coverage requirement and the religious rights of corporations.

APPENDIX A

Selected cases where the Court of Appeals found neither the corporation nor the owners have protected rights

Lawsuit	Owners	Type of Business	Request	Decision
<p><i>Conestoga Wood Specialties Corp. v. Sebelius</i></p> <p>Filed 12/4/2012</p>	<p>Hahn family, Mennonites of Pennsylvania</p>	<p>Conestoga manufactures wood cabinets and has 950 full time employees.</p>	<p>Hahns object to providing health insurance coverage for Plan B and Ella.</p>	<p>Third Circuit found that neither the for-profit corporation nor the owners have religious rights under the RFRA or under the First Amendment.</p>
<p><i>AutoCam Corp. v. Sebelius</i></p> <p>Filed 10/8/2012</p>	<p>Kennedy family, Roman Catholics of Michigan</p>	<p>AutoCam, a high-volume manufacturing for automotive and medical industries, with 14 facilities worldwide and 661 employees in the U.S.</p>	<p>Kennedys object to providing health insurance for all contraceptives, sterilization, related education and counseling.</p>	<p>Sixth Circuit¹³ found that AutoCam is not a “person” capable of “religious exercise.” The Court also denied the Kennedys’ legal challenge because they are not being required to act.</p>

APPENDIX B

Selected Cases¹⁴ where the Court of Appeals found the corporation or owners have protected rights

Lawsuit	Owners	Type of Business	Request	Decision
<p><i>Hobby Lobby v. Sebelius</i></p> <p>Filed 9/12/2012</p>	<p>Green family, Protestants of Oklahoma</p>	<p>Hobby Lobby is a national chain of craft stores with over 500 stores in over 41 states and over 13,000 employees; Mardel is a chain of book stores (also owned by the Green family) with 35 stores in 7 states and 372 full- time employees.</p>	<p>Greens object to providing health insurance coverage for Ella, Plan B, and the IUDs.</p>	<p>Tenth Circuit¹⁵ held that Hobby Lobby and Mardel are likely to succeed on the merits of the RFRA claims. The majority opinion did not address the Green family legal challenge or any of the claims under the First Amendment.</p>
<p><i>Korte & Luitjohan Contractors Inc. v. Sebelius</i></p> <p>Korte and Luitjohan Filed 10/9/2012</p> <p><i>Grote Industries v. Sebelius</i></p> <p>Filed 10/29/2012</p>	<p>Korte family, Catholic of Illinois (own 87% of stock of Korte and Luitjohan Contractors, Inc.) Grote family, Catholic of Indiana</p>	<p>Korte & Luitjohan Contractors, a construction company in Illinois has 90 full time employees, 70 of whom belong to a union that sponsors their health-insurance plan. Grote Industries, Inc. a manufacturer of vehicle safety systems based in Indiana. Grote industries has 1,148 full time employees.</p>	<p>Both families oppose providing health insurance coverage for all contraceptives, and sterilization. The Korte family is willing to provide coverage for limited situations where the drugs are being prescribed with the intent to treat certain medical conditions.</p>	<p>Seventh Circuit found both the corporations and the owners can challenge the law under the RFRA.</p>
<p><i>Gilardi v. Department of Health and Human Services</i></p> <p>Filed 1/24/2013</p>	<p>Gilardi family, Roman Catholic of Ohio (owns Freshway Foods and Freshway Logistics)</p>	<p>Freshway Foods and Freshway Logistics - food are processing companies based in Ohio and employ about 400 employees.</p>	<p>Gilardis oppose all forms of contraceptives and sterilization.</p>	<p>DC Circuit found that corporations cannot “exercise religion” but owners have religious rights under the RFRA.</p>

ENDNOTES

¹ [U.S.C. § 2000bb et. seq.](#)

² U.S. Const. Amend. I, Free Exercise Clause: “Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof.”

³ [45 CFR § 147.30 \(B\)](#): “For the purposes of this subsection, a “religious employers” is an organization that meets all of the following criteria: (1) The inculcation of religious values is the purpose of the organization; (2) The organization primarily employs persons who share the religious tenets of the organization; (3) The organization serves primarily persons who share the religious tenets of the organization; and (4) The organization is a non-profit organization described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986 as amended.”

⁴ Federal Register, Vol. 78, No. 127, July 2, 2013 at page 39873

⁵ 26 CFR § 54.9815-2713A; 29 CFR § 2590-2713A; 45 CFR § 147.31

⁶ A participating issuer offering a plan through a Federally-facilitated Exchange may qualify for an adjustment in the Federally-facilitated Exchange user fee for payments made for contraceptive services for employers that self-certified for the accommodation. *Adjustments of Federally-Facilitated Exchange User Fees*: 45 CFR § 156.50(d) and 156.80(d).

⁷ In two cases, the Eighth Circuit has granted preliminary injunctions pending appeal but without much discussion of the issues: [O'Brien v. U.S. Department of Health and Human Services, Annex Medical, Inc. v. Sebelius](#)

⁸ [Brief for the Appellees \(HHS\) for Hobby Lobby case in 10th Circuit Court of Appeals filed March 13, 2013](#), at pages 33-40.

⁹ [Hobby Lobby brief appealing to the 10th Circuit Court of Appeals filed February 11, 2013](#) at page 47.

¹⁰ *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310, 365 (2010).

¹¹ See [Conestoga Wood Specialties brief in Third Circuit Court of Appeals filed March 15, 2013](#), at pages 23 and 33. See [Hobby Lobby brief in Tenth Circuit Court of Appeals filed February 11, 2013](#) at pages 33-4.

¹² On December 2, 2013, the Supreme Court denied certiorari for *Liberty University v. Lew*. Liberty University filed a lawsuit challenging other aspects of the ACA before the final regulations on the contraceptive coverage requirement were issued. Liberty University added the challenge to the contraceptive coverage requirement late in the litigation process.

¹³ The Sixth Circuit ruled the same way in [Eden Foods Inc. v. Sebelius](#).

¹⁴ In two cases, the Eighth Circuit has granted preliminary injunctions pending appeal but without much discussion of the issues: [O'Brien v. U.S. Department of Health and Human Services, Annex Medical Inc. v. Sebelius](#).

¹⁵ The Tenth Circuit issued similar decisions in [Armstrong v. Sebelius](#) and [Newland v. Sebelius](#).