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What Is (and Isn't) at Stake for Obamacare in the Hobby Lobby Case

The contraception mandate will not be axed completely; the Supreme Court has the power to narrow the rule's reach.

By Sam Baker
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The Supreme Court won't strike down Obamacare's contraception mandate, but a ruling for the law's challengers could still render the policy toothless for millions of women.

The justices are set to rule any day now in a challenge to the birth-control mandate, and any decision against the policy would have ripple effects far beyond the two companies that filed this lawsuit. Just how far, however, depends on how broadly the Court rules—and it has plenty of options.

No matter what happens, the Court won't strike down the entire mandate. The two companies that brought their challenge to the Supreme Court—Hobby Lobby and Conestoga Wood Specialties—haven't asked the justices to ax the entire policy.

The most sweeping option is a broad First Amendment proclamation that all corporations have a fundamental right to exercise religion, in this case by refusing to cover birth control in their employees' health care plans. This outcome would be almost a sequel to the *Citizens United* case on campaign finance laws and free speech. It would probably open the door for any company to challenge a slew of state or federal regulations, and would allow any corporation to avoid the contraception mandate—potentially affecting millions of women.

(Many employers, however, particularly large companies, probably wouldn't want to cut contraception coverage. It's a popular benefit and far cheaper than covering a pregnancy or a baby.)

But a sweeping First Amendment ruling might not be the most likely option, based on the questions Justice Anthony Kennedy asked during oral arguments and Chief Justice John Roberts's general preference for narrower decisions. The Court could easily go smaller if it sides with Hobby Lobby.

Both Hobby Lobby and Conestoga are closely held companies, controlled entirely or almost entirely by their owners. The libertarian Cato Institute suggested in a supporting brief that because these two companies are controlled by their owners, the Court could rule in their favor without setting a broader precedent that corporations in general can practice religion.

A decision limited to closely held corporations could be a way to skirt the outcome liberals fear most—a broad and explicit expansion of corporate personhood. But it would still allow a significant number of employers to exclude birth control from their health plans, affecting an untold number of female workers and their dependents.

"Look, it's going to be real. It will be [a] real number," said Louise Melling, deputy director at the American Civil Liberties Union, which has filed briefs defending the birth-control mandate.

Of course, the justices could also rule that the mandate is completely legal, in which case nothing changes and the world just keeps on spinning like it is now.

How did we get here, again?

The Affordable Care Act requires employers to include a set of preventive services in their employees' health care plans, if they offer health care benefits. At the advice of outside scientific experts, the Obama administration included FDA-approved contraceptives in the list of mandatory preventive services. Employers have to include all FDA-approved contraceptives in their health plans without any cost-sharing—such as co-pays and deductibles—for their employees.

The policy was met with a barrage of lawsuits, some filed by religious-affiliated employers and some by secular, for-profit companies such as Hobby Lobby, whose owners say the mandate violates their religious liberty under the First Amendment and a federal law called the Religious Freedom Restoration Act. They say they should be able to opt out of the coverage requirement, at least for certain products they find morally objectionable.