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## High Court Considers Obamacare's Contraception Mandate

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Earlier this week the Supreme Court heard oral arguments in the most significant lawsuit to be brought against Obamacare since the challenges to the individual mandate and the Medicaid expansion: the challenge brought by craft store Hobby Lobby against the contraception mandate, which once again pit attorney Paul Clement against Solicitor General Donald Verrilli. A recap of the oral arguments is [here](#) , and the complete transcript is [here](#).

On its face, this is an argument about the extent to which religious freedom applies to corporate for-profit entities. The Obama Administration already has widely exempted religious non-profit organizations from the contraception mandate – though that could be temporary, of course – but it has refused to budge against Hobby Lobby's objection to just four of the 20 mandated forms of contraception deemed essential health benefits by HHS. Though you might not know this if you paid attention to the traditional media:

To survive a challenge under RFRA, the government must demonstrate a “compelling governmental interest” and employ the “least restrictive means” of furthering that interest. That's why a great deal of coverage, and indeed the government's own briefing, is devoted to claiming that birth control is an unmitigated good and direly needed by women who will somehow be unable to get it if religious businesses aren't forced to provide it.

This claim is complete bunk. First, the vast majority of businesses provided contraception coverage for their employees before the mandate became effective and continue to do so now that it has. Only a small number of businesses, most of which are not very large, are seeking an exemption based on their religious belief. Second, Sec. Sebelius has already exempted 190 million people from the contraception mandate, either because they work for non-profit corporations or because their plans were “grandfathered” when Obamacare became effective.

In short, when 190 million people are purposefully exempted from a law, there can be no argument that it is aimed at a compelling purpose. Providing broad exemptions intended to go on in perpetuity demonstrates that the contraception mandate is the opposite of compelling.

Cato's Ilya Shapiro writes on the frustrating challenges involved [here](#):

Despite the parade of horrors invoked by Justice Sotomayor regarding religious objections to blood transfusions and vaccines, at least five justices seemed to recognize that religious-liberty claims are meant to be adjudicated on a case-by-case basis – maybe six given Breyer’s lukewarm and infrequent interjections.

The government fared even worse on its position that for-profit corporations can’t assert religious-exercise interests in the first place. Even Justice Kagan recognized that under certain circumstances, for-profit enterprises may engage in religious activity. While Cato’s amicus brief argued that this “standing” issue is purely academic anyway – the individual corporate owners feel the mandate/fines regardless of who is exercising religion or bringing lawsuits – I count seven votes for getting past this threshold issue.

As I left the argument, I had a bit of spring in my step, even as the snowstorm that greeted me lacked any spring whatsoever. The Court is likely to stop this callous, arbitrary, and needless bending of the will of a small religious minority to the federal grindstone. But alas that’s just this case; the more that the government expands and takes over areas properly left to civil society, the more clashes of conscience will result. Today it’s religious belief, tomorrow something else, but all these liberty-destroying mandates come with the collectivized territory.

The Hobby Lobby case and the results of other challenges to the contraception mandate could be legally and politically significant in determining the level of protection offered by religious freedom post-Obamacare. But they also could be significant in another arena: the ability of businesses run by religious people or families to offer insurance coverage. The easiest path for Hobby Lobby to escape this mandate is to simply drop coverage for its tens of thousands of employees and shift them to the subsidized exchanges or to Medicaid coverage, where taxpayers will pay for the contraceptives their employers have moral objections to providing. In the long run, this could lead to a situation where religious employers choose to become non-profit organizations to avoid the mandate, or choose to not offer health insurance coverage in order to avoid compromising their deeply held moral views.