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Obamacare Anti-Conscience Mandate at the Supreme Court

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Abstract

Under Obamacare, employers are required to pay for coverage of contraception, sterilization, and abortion-inducing drugs. While this mandate exempts formal houses of worship and their integrated auxiliaries, all other religious employers—hospitals, schools, social service organizations, and the like—and all for-profit businesses must comply or risk burdensome fines. Many employers believe that complying with this mandate would violate the tenets of their faith, but failure to adhere to the law could result in steep fines—in the case of one company, an estimated $1.3 million per day. In order to block the anti-conscience mandate, religious organizations and other private employers have filed over 90 lawsuits with more than 300 plaintiffs. The Supreme Court has agreed to review two of the for-profit cases later in the 2013–2014 term.

In February 2012, the U.S. Department of Health and Human Services (HHS) finalized guidelines requiring employers to pay for coverage of contraception, sterilization, and abortion-inducing drugs and granted a narrow exemption for certain religious employers. Many employers believe that complying with this mandate would violate the tenets of their faith, but failure to adhere to the law could result in steep fines—in the case of one company, an estimated $1.3 million per day.

In an effort to block the anti-conscience mandate, religious organizations and other private employers have filed over 90 lawsuits with more than 300 plaintiffs. The Supreme Court of the United States has agreed to review two of the for-profit cases later

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Key Points

- Under Obamacare, employers are required to pay for contraception, sterilization, and abortion-inducing drugs.
- While this mandate exempts formal houses of worship and their integrated auxiliaries, all other religious employers—hospitals, schools, social service organizations, and the like—and all for-profit businesses must comply with the mandate or risk burdensome fines.
- Many employers believe that complying with this mandate would violate the tenets of their faith, but failure to adhere to the law could result in steep fines—in the case of one company, an estimated $1.3 million per day.
- In order to block the anti-conscience mandate, religious organizations and other private employers have filed over 90 lawsuits with more than 300 plaintiffs.
- Americans do not forfeit their right to live and work in accordance with their faith simply because they go into business to provide for themselves, their families, and their employees.

in the 2013–2014 term. The Court will consider two questions:

- Does the mandate violate the First Amendment guarantee of the free exercise of religion?
- Who can exercise religion under the Religious Freedom Restoration Act?

The Anti-Conscience Mandate

In March 2010, Congress passed the Patient Protection and Affordable Care Act, better known as Obamacare, which forces employers to offer health insurance and expands the federal standards for what those health plans must cover. Those benefit standards, the details of which are largely left to the discretion of the Administration, include new mandates on preventive services that must be covered in qualified insurance policies and employee health plans without imposing any cost-sharing (deductibles or copayments) on the insured individuals. Non-exempted employers, secular or religious, are required to offer coverage that includes the services mandated under the health care law—or face significant federal fines.

In July 2010, the Department of Health and Human Services published an interim final rule implementing the preventive services mandate. That interim rulemaking noted that the Health Resources and Services Administration (HRSA) would later identify, per the statutory instructions, additional mandated preventive services specifically for women.[1]

In August 2011, HHS amended the interim final rule to include the HRSA "guidelines" for women's preventive services, one of which is "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[2] Those methods include drugs such as Plan B and ella and some intrauterine devices, which can cause an abortion very early in pregnancy. Many religious organizations, family businesses, and other employers have deeply held moral or religious objections to such life-ending drugs or contraception, yet the same HRSA guidelines also included a very narrow religious exemption that effectively applied only to formal houses of worship.

In February 2012, the Obama Administration finalized the preventive services mandate rulemaking, including the HRSA guidelines that all qualified health plans must include coverage of abortion-inducing drugs and devices, contraception, and sterilization. As of August 1, 2012, at the renewal of the employers' health plans, all private, for-profit employers offering qualified health care coverage were mandated to include these drugs, devices, and services in their health plans without any enrollee cost-sharing requirement.

Offering an employee health plan that does not include these mandated items can result in a fine of up to $100 per enrollee per day. Employers can choose to avoid the fine by dropping health care coverage altogether, but such a choice would not be without financial consequences. Under Obamacare, non-exempted employers with 50 or more full-time employees that do not provide health insurance will be forced to pay a fine of roughly $2,000 per year for each full-time employee beyond the first 30 workers who is not offered a health plan.[3]

Although the Obama Administration amended the original religious exemption to the mandate on July 2, 2013, the final exemption extends only to formal houses of worship and their integrated auxiliaries, such as church-run soup kitchens.[4] All other religious employers—hospitals, schools, social service organizations, and the like—and all for-profit businesses must comply with the mandate or risk burdensome fines.

Under the final rule, nonprofit religious organizations that are not already exempt may self-certify to a third-party administrator for an "accommodation," which supposedly allows employers to avoid directly

1. 75 C.F.R. § 41,726.
2. *Women's Preventive Services: Required Health Plan Coverage Guidelines*, U.S. Dep't of Health and Human Services, http://www.hrsa.gov/womensguidelines/ (last visited January 7, 2014).
3. Forcing employers to end the provision of health plans can also harm employees, who will lose a valuable benefit and be forced to purchase health insurance through an Obamacare exchange or elsewhere to avoid penalties under the health care law's individual mandate. Sarah Torre, "Obamacare's Preventive Services Mandate and Religious Liberty," The Heritage Foundation Issue Brief No. 3553, March 27, 2012, http://www.heritage.org/research/reports/2012/03/obamacares-preventive-services-mandate-and-religious-liberty.
4. 78 C.F.R. § 39,870.

paying for or providing health insurance coverage that violates their beliefs. However, along with the self-certification, the organization would have to provide a complete list (with identifying information) of the employees and dependents covered by its plan, thereby requiring the organization to initiate and facilitate the process of the third-party administrator's obtaining coverage for the contraceptive products, abortion-inducing drugs, services, and counseling for those individuals.

This accommodation is in effect a shell game, as a district court recognized when it granted preliminary relief in a recent challenge. The court held that although this accommodation would enable the plaintiffs to avoid directly paying for those portions of the health plan to which they object, it would merely shift the responsibility for purchasing such coverage to a secular source, which would "not absolve or exonerate them from the moral turpitude created by the 'accommodation.'"[5]

Obamacare v. the First Amendment and the Religious Freedom Restoration Act

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." The Supreme Court of the United States has held that the government may not require an individual to choose between complying with the tenets of his faith or the law. For example:

- In *West Virginia State Board of Education v. Barnette*, the Supreme Court ruled in favor of school-age Jehovah's Witnesses who, for religious reasons, objected to being forced to recite the Pledge of Allegiance and salute the American flag;[6]
- In *Sherbert v. Verner*, the Court declared that a state may not deny unemployment benefits to an individual because her faith prohibited her from working on Saturdays;[7] and
- In *Wisconsin v. Yoder*, the Court determined that a state may not force Amish parents to send their teenage children to high school against their religious convictions.[8]

The Court has repeatedly recognized that if there is a "fixed star in our constitutional constellation, it is that no official ... can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[9]

The Court has held, however, that a generally applicable criminal statute prohibiting the use of peyote did not violate the free exercise rights of individuals who use peyote for sacramental purposes.[10] In response to that decision, Congress passed the Religious Freedom Restoration Act (RFRA) to strengthen First Amendment protection—even against generally applicable laws. RFRA prohibits the federal government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" except where the government shows that the burden "is in furtherance of a compelling governmental interest; and [ ] is the least restrictive means of furthering that ... interest."[11] RFRA broadly defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[12]

Neither the First Amendment nor RFRA indicates *who* may exercise religion, and the Supreme Court has not directly addressed whether for-profit corporations may do so. The federal appellate courts

5. Zubik v. Sebelius, 2013 WL 6118696, *25 (W.D. Pa. 2013). In another challenge to this accommodation, Justice Sonia Sotomayor granted a temporary injunction on December 31, 2013, to the Little Sisters of the Poor, who would otherwise have been required to direct their insurer to provide coverage of abortion-inducing drugs and devices starting on January 1, 2014. In a subsequent order, the Supreme Court enjoined HHS from enforcing the mandate against the Little Sisters while their case is pending, provided that they state in writing to Secretary Sebelius that they are a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services. Little Sisters of the Poor Home for the Aged v. Sebelius, No. 13A691 (U.S. Jan. 24, 2014).
6. 319 U.S. 624 (1943).
7. 374 U.S. 398 (1963).
8. 406 U.S. 205 (1972).
9. *Barnette*, 319 U.S. at 642.
10. Employment Division v. Smith, 494 U.S. 872 (1990).
11. 42 U.S.C. § 2000bb-1(a)–(b).
12. 42 U.S.C. § 2000cc-5(7)(a).

have grappled with this question in deciding whether to allow for-profit corporate challenges against the anti-conscience mandate to proceed. As these challenges reach the Supreme Court, the main issue before the justices is whether a closely held, family-owned, for-profit corporation can exercise religion.

The Challengers and the Lower Court Decisions

Over 90 suits have been filed challenging the coercive Obamacare mandate as a violation both of the First Amendment's guarantee of the free exercise of religion and of RFRA. Roughly half of the challenges were brought by nonprofit religious organizations, including health care providers, dioceses, schools, and charities; for-profit companies brought the other half. In November 2013, the Supreme Court agreed to review two cases brought by for-profit family businesses.

The federal appellate courts that have issued decisions have reached a range of conclusions: Some have found that the corporation itself cannot exercise religion, while others have concluded that corporations and the families who own and operate them deserve First Amendment protection. Who are the challengers, and how have the appellate courts decided their cases so far?

Conestoga Wood. Conestoga Wood Specialties is a closely held, family-owned corporation in Pennsylvania with 950 employees that manufactures kitchen cabinets. The owners, the Hahns, run Conestoga Wood according to their Mennonite faith, which includes offering an employee health plan aligned with those values. The anti-conscience mandate, however, forces Conestoga Wood to provide and pay for coverage of abortion-inducing drugs and devices—despite the Hahns' religious objections. Conestoga Wood faces fines of up to $95,000 per day for sticking to their deeply held beliefs and not complying with the mandate.

The Hahns sued to enjoin implementation of the mandate, arguing that it violates their free exercise of religion in violation of the First Amendment as well as RFRA. The federal district court denied their motion for a preliminary injunction, finding that a for-profit corporation cannot exercise religion and, further, that the anti-conscience mandate did not substantially burden the Hahns' religious exercise.

The Hahns then appealed to the U.S. Court of Appeals for the Third Circuit, which denied their request for a temporary halt to the mandate. The Third Circuit noted that for-profit businesses are "artificial being[s], invisible, intangible, and existing only in contemplation of law" and could not exercise "an inherently 'human' right" like the free exercise of religion.[13]

The court acknowledged that some businesses may exercise religion: Religious organizations and churches enjoy free exercise protection because they are "means by which individuals practice religion."[14] A for-profit corporation, the court reasoned, could not exercise religion "apart from its owners."[15] However, as a dissenting judge argued, drawing a distinction between businesses based on their "profit motive[s]" flies in the face of reason and, in fact, has been rejected by the Supreme Court in other First Amendment cases.[16]

The court also rejected the notion that a corporation is an "instrument through and by which [the owners] express their religious beliefs,"[17] finding instead that the Hahns chose to create an entity with "legally distinct rights and responsibilities."[18] Just as the Hahns' claims may not "pass through" Conestoga Wood, the court concluded, the Hahns' claims based on a legal duty imposed on Conestoga Wood were not likely to succeed.

The Hahns subsequently petitioned the Supreme Court for a writ of certiorari, asking the Court to review whether the anti-conscience mandate violates their rights or the rights of their closely held for-profit corporation. The Supreme Court granted this petition for certiorari on November 26, 2013, and will hear oral argument on March 25, 2014.

13. Conestoga Wood Specialties Corp. v. Sebelius, 724 F.3d 377, 383–85 (2013).
14. *Id.* at 386.
15. *Id.* at 385.
16. *Id.* at 399 (Jordan, J. dissenting).
17. *Id.* at 387 (citing EEOC v. Townley Engineering & Manufacturing Company, 859 F.2d 610, 619 (9th Cir. 1988)).
18. *Id.* at 387–88.

Hobby Lobby. Hobby Lobby Stores and Mardel Christian and Education Stores are closely held family businesses headquartered in Oklahoma. Hobby Lobby has grown from a 300-square-foot garage to over 500 arts and craft stores in 41 states and employs more than 13,000 people. Mardel is a chain of 35 Christian bookstores with nearly 400 employees. The owners of both of these businesses, the Green family, are committed not only to serving their customers and employees, but also to investing in communities through partnerships with numerous Christian ministries.

The Greens seek to operate their businesses in accordance with Christian principles, which includes closing all their locations on Sundays and offering an employee health care plan that aligns with their Christian values. They do not wish to provide and pay for coverage of four drugs and devices mandated by the government, and the failure to comply with this mandate could subject Hobby Lobby and Mardel to a total of up to $1.3 million per day ($475 million per year). Alternatively, they could drop the employee health insurance plan and pay a combined fine of $26 million per year.

Hobby Lobby and Mardel challenged the anti-conscience mandate in federal court under RFRA and the Free Exercise Clause and asked for a preliminary injunction to avoid paying the crippling fines while their case is pending. The district court and a two-judge panel of the U.S. Court of Appeals for the Tenth Circuit both denied preliminary relief. Hobby Lobby and Mardel then filed an application for emergency relief with the Supreme Court (considered by Justice Sonia Sotomayor), which also denied relief.

The full Tenth Circuit, however, agreed to reconsider the request for a preliminary injunction and issued a sweeping decision in favor of the plaintiffs. The Tenth Circuit determined that for-profit businesses, just like individuals, can engage in religious exercise because they are "persons" for the purposes of RFRA. Since that statute does not define "person," the court looked to the Dictionary Act, which defines a "person" for purposes of federal law to "include[ ] corporations ... as well as individuals."[19]

The court concluded that there was no reason to grant constitutional protection for a business's political expression (as the Supreme Court did in *Citizens United v. Federal Election Commission*[20]) but deny such protection for religious expression. Comparing Hobby Lobby's and Mardel's predicament to that of a kosher butcher forced to follow a law mandating non-kosher butchering practices, the court stated that there was "no reason why one must orient one's business toward a religious community to preserve Free Exercise protections."[21]

Having determined that Hobby Lobby and Mardel may advance these claims, the court found that the anti-conscience mandate imposed a substantial burden on the plaintiffs' exercise of religion under RFRA. Indeed, the court stated that it would be "difficult to characterize the pressure as anything but substantial" since Hobby Lobby and Mardel faced a choice between compromising their beliefs or paying ruinous fines.[22] The court determined that the government's asserted compelling interests for the mandate (public health and gender equality) did not justify the burden placed on Hobby Lobby and Mardel and that the government did not show how granting an exemption to the plaintiffs for four methods of contraception would undermine those interests.

Following the Tenth Circuit's decision, the case returned to the district court, which granted a preliminary injunction. The government asked the Supreme Court to review whether RFRA permits a for-profit corporation to "deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation's owners." The Supreme Court granted this petition for certiorari and consolidated it with Conestoga.

Autocam. Autocam Corporation and Autocam Medical, LLC, are two Michigan businesses that make auto parts and medical devices. Operated by the Kennedy family, there are 14 facilities with

19. 1 U.S.C. § 1.

20 558 U.S. 310 (2010).

21. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1135 (2013).

22. *Id.* at 1140.

1,500 employees worldwide. The Kennedys run their businesses in accordance with the teachings of the Roman Catholic Church and object to offering an employee health care plan that includes abortion-inducing drugs and devices, contraception, and sterilization.

Autocam sued HHS, arguing that they were required to choose between obeying the federal mandate, thereby violating their religious beliefs, or paying an estimated $19 million in fines per year. The district court denied Autocam's motion for preliminary relief, concluding that Autocam's claim was unlikely to succeed on the merits because the connection between the purchase and use of the contraceptive drugs and procedures is too remote and attenuated to constitute a substantial burden on their free exercise.

The U.S. Court of Appeals for the Sixth Circuit agreed that a preliminary injunction was unwarranted, noting that the Kennedys could not advance these claims because typically, "shareholders ... cannot bring claims intended to redress injuries to a corporation."[23] Since the anti-conscience mandate created a legal obligation on Autocam—not on the Kennedys—only Autocam may assert those claims. The court then determined that while Autocam had standing, a for-profit corporation cannot advance a RFRA claim because it is not a "person."

Autocam petitioned the Supreme Court for review, asking whether a secular, for-profit corporation is a "person" that can exercise religion and also whether owners may individually advance free exercise claims based on violations of their ability to operate their businesses according to their beliefs. The Court has not acted on this petition and is likely to hold it pending the outcome of the Conestoga Wood and Hobby Lobby cases.

Gilardi. The Gilardi brothers own Freshway Foods and Freshway Logistics, closely held corporations that process, package, and transport fresh produce. They are headquartered in Ohio and employ 400 individuals in 23 states. The Gilardis seek to operate their companies in accordance with their Roman Catholic faith, which includes attaching signs on their trucks stating, "It's not a choice, it's a child" to promote their pro-life views and offering an employee health care plan that aligns with their values.

The Gilardis sued in federal court, alleging that the anti-conscience mandate violates the free exercise of their religion, and also sought a preliminary injunction. The district court denied injunctive relief, finding that they had not shown that the anti-conscience mandate substantially burdens their religious exercise.

On appeal, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit held that the anti-conscience mandate burdens the Gilardis' religious exercise under RFRA (rebuffing the "shareholder standing rule") but rejected their companies' claims because there was "no basis for concluding a secular organization can exercise religion."[24] Since the Freshway companies could not assert claims, the court reasoned, it was "obvious ... the right belongs to the Gilardis."[25] The court noted that while free exercise protection "should not be expunged by a label," the Supreme Court has yet to acknowledge that secular corporations enjoy such a right.[26] The court remanded the case to the district court with instructions to reconsider granting preliminary relief.

The Gilardis petitioned the Supreme Court for review, asking whether a closely held corporation operated according to the religious beliefs of its owners can exercise religion under RFRA. The Court has not yet acted on this petition.

K&L Contractors and Grote Industries. The Korte family owns an Illinois-based construction company with 90 employees (70 of whom receive health insurance through a union). The Grote family runs an Indiana-based company that manufactures vehicle safety systems. They have more than 1,100 employees worldwide, with about 460 in the United States. Both families seek to operate their companies according to their Roman Catholic faith, so they object to providing and paying for a health insurance plan that covers abortion-inducing drugs and devices, contraception, and sterilization. Their failure to comply with the contraception mandate

23. Autocam Corp. v. Sebelius, 730 F.3d 618, 622 (2013).
24. Gilardi v. U.S. Dept. of Health and Human Services, 2013 WL 5854246, *6 (2013).
25. *Id.* at *7.
26. *Id.*

subjects K&L Contractors to $730,000 and Grote Industries to $17 million per year in fines.

Both families and companies filed suit, alleging violations of RFRA and the Free Exercise Clause, among others, and both were denied preliminary relief by district courts. The U.S. Court of Appeals for the Seventh Circuit temporarily enjoined enforcement of the anti-conscience mandate against these companies pending appeal.

The cases were consolidated, and the Seventh Circuit held that the Kortes and Grotes—as well as their companies—may challenge the mandate. The court reasoned that the owners "have a direct and personal interest in vindicating their individual religious-liberty rights" that is independent from their companies' rights.[27] Like the Tenth Circuit in *Hobby Lobby v. Sebelius*, the court determined that for-profit corporations are "persons" under RFRA and can exercise religion because there is "nothing inherently incompatible between religious exercise and profit-seeking."[28] The court found that the mandate "essentially force[s] the Kortes and Grotes to choose between saving their companies and following the moral teachings of their faith."[29]

Having held that the owners and companies may assert RFRA claims, the court then determined that the anti-conscience mandate substantially burdens their religious exercise. While the government argued that the mandate is too attenuated to constitute a substantial burden on the free exercise of religion, the court pointed out that this "focuses on the wrong thing—the employee's use of contraception—and addresses the wrong question—how many steps separate the employer's act of paying for contraception coverage and an employee's decision to use it."[30] The court maintained that "[n]o civil authority can decide" whether providing the mandated coverage "impermissibly assist[s] the commission of a wrongful act" in violation of church teaching.[31]

The court further highlighted that the government did not make *"any* effort to explain how the contraception mandate is the least restrictive means of furthering its stated goals of promoting public health and gender equality."[32] The court reversed and remanded to the district courts with instructions to enter preliminary injunctions against enforcing the mandate against these companies.

Conclusion

The anti-conscience mandate forces family businesses to provide health insurance plans that cover abortion-inducing drugs and devices, contraception, and sterilization. Many employers believe that complying with this mandate would conflict with the tenets of their faith. Consequently, these employers face the choice of paying steep fines or violating their faith. The First Amendment and the Religious Freedom Restoration Act protect the free exercise of religion, and the many family-run businesses challenging the anti-conscience mandate argue that they deserve protection too.

The Supreme Court has agreed to review two challenges brought by Hobby Lobby and Conestoga Wood. It will consider whether family-run businesses can exercise religion and, if so, how such a ruling would affect the anti-conscience mandate. Americans do not forfeit their right to live and work in accordance with their faith simply because they go into business to provide for themselves, their families, and their employees.

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27. Korte v. Sebelius, 2013 WL 5960692, *9 (2013).
28. *Id.* at *21.
29. *Id.* at *23.
30. *Id.* at *24.
31. *Id.*
32. *Id.* at *26.