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D.C. Briefing on The Supreme Court and Contraceptive Coverage Legal and Policy Implications Kaiser Family Foundation March 11, 2014

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ALINA SALGANICOFF, PH.D.: Good morning, everyone. Welcome. I'm Alina Salganicoff, Vice President and Director of Women's Health Policy here at Kaiser Family Health Foundation. On behalf of the foundation, it's my great pleasure to welcome you here today.

We're also webcasting this briefing. I'd like to give a welcome to those of you who are watching online, and extend my sincere apologies to my colleagues on the west coast who are up at the crack of dawn to watch this webcast.

It will be archived very shortly after this session. If you're too tired to watch feel free to go back to bed, and you can watch this webcast in its entirety in about an hour and a half after the briefing.

We're here today to learn about two very important cases that are going to be deliberated by the Supreme Court. Two corporations and their owners; Hobby Lobby, a national chain of craft stores and Conestoga Wood Specialties, a cabinet manufacturer are objecting on religious grounds to including coverage for certain contraceptives in their health plans as is now required by the Affordable Care Act. As we're going to learn today, these cases have many broad implications, not only for health insurance coverage of contraception, but possibly for civil rights protections, religious rights, and corporate law.

While many of us in the health policy world have become very conversant in the many rules that govern how the ACA operates, this case really stretches our knowledge to areas in that are far beyond the health policy world, and that we as health policy wonks kind of know a little bit less about. At least, I'm going to admit that it really stretches my knowledge.

My efforts in understanding this case have made me think back to the days right after college when I was trying to think about how to further my studies in healthcare, and I was thinking about going to law school or business school, public health school. I couldn't really decide.

I was living in Philadelphia at the time with a roommate who was going to law school at the University of Pennsylvania. Honestly, I looked at the stacks of law review articles and those thickly bound volumes of textbooks that she had to read. I thought, oh, there is no way I'm going to make it through law school.

I quickly ruled out business school because I was interested in issues of poverty and health. I naively thought to myself, what can I learn in business school that could teach me about healthcare systems? That was not so smart. I opted to go to public health school. As I read impenetrable medical journal articles and public health articles, and studied late into the night reviewing advanced biostatistics, sometimes I questioned my decision at that time. But I've come to learn that in the field of health, one needs to have a good understanding and a good grounding on many disciplines.

Today, healthcare policy intersects with business, public health, medicine, policy, and law. Now, we're going to learn more even about religious rights.

Unfortunately, many of us have become super specialized. We're experts on Medicare. We're experts on Medicaid. We understand FDA approval policy. But we really need to have a good grounding on other highly specialized fields to understand how health policy and programs operate in the real world. And in this case, we need to have a better understanding of an aspect of constitutional law.

When I was thinking about what the Kaiser Family Foundation could contribute to this debate, I quickly realized that, while many in the legal community and advocates of women's rights and religious rights were laser-focused on these cases, the many in the health community really wanted to learn more about these debates and the possible implications of these cases more broadly to healthcare and to other issues.

I want to be clear at the outset. While, we, as individuals, have our perspectives and views of the cases in the Affordable Care Act including those of us on the podium—and I also want to be transparent that I did serve on the Institute of Medicine committee that made the recommendations for the preventive services for women that included FDA coverage of contraception and services—we are not here today to have a debate on the different sides of the cases, nor discuss the merits of the cases, nor of the ACA, nor are we here to pretend that we can read a crystal ball into how the Court will rule. Plenty of others are doing that at this time.

Our goal today is to shed some light on these cases which is consistent with the Kaiser Family Foundation's mission to provide information and analysis on health policy issues- not to take a position. We're here to learn more about the contraceptive coverage provisions and how they work, about the Religious Freedom Restoration Act or RFRA and how it's being applied to these cases. And to draw from experts to help us anticipate and consider the possible rulings and their implications, not only for the requirement that for-profit employers pay for insurance that includes contraception, but for healthcare more generally and for the larger issues of religious freedom and civil rights. To help us understand the cases, we're lucky today to have three great teachers, the experts here with us today.

First, Laurie Sobel who is a senior policy analyst at the Foundation, will give us the 101. She'll provide to us with an overview of the ACA's contraceptive coverage requirement, review how it works, how it's structured. And then, give us an overview of the issues facing the Court.

Laurie recently joined the Kaiser Family Foundation after serving as a senior attorney at Consumers Union for over a decade where her work focused on health policy issues. I think by the looks of Laurie's office, she has reviewed all 84 of the amicus briefs that were submitted in this case.

We will, then, hear from two constitutional lawyers, law professors. First, we will hear from Marci Hamilton, one of the nation's leading church state scholars and Paul R. Verkuil, chair in public law at the Benjamin N. Cardozo School of Law at Yeshiva University where she specializes in church-state issues and the dynamics of child sex abuse in institutional settings.

Professor Hamilton has written numerous books on religion and the Courts, and is considered to be a national expert on the Religious Freedom Restoration Act which is at the heart of this case. In the interest of time, I won't go through her full bio, but it is in the packet along with the bio of the other speakers.

We will then hear from Tom Goldstein who is a partner at Goldstein & Russell and known as one of the nation's most experienced Supreme Court practitioners, serving as counsel to roughly 10 percent of the Court's merit cases for the past 15 years. That's approximately a 100 cases in total, and personally arguing 31.

In addition to practicing law, Tom has taught Supreme Court litigation at Harvard Law School since 2004 and at Stanford Law School before that. Tom is also a co-founder and publisher of SCOTUSblog which some of you may also be following. It's a website devoted to coverage of the Supreme Court, and it's the only weblog to have ever received the Peabody Award.

Tom will help us put this case into context of other cases, and help us understand the possible outcomes and the implications of the case.

After the presentations, we'll have a short panel discussion, and then we're going to open up the mikes to the audience for questions. Without further ado, I'm going to turn now to Laurie Sobel.

LAURIE SOBEL, J.D.: Good morning. It's my pleasure to be here today. I'm going to start with explaining the contraceptive coverage requirement under the Affordable Care Act, what it is and who it applies to. And then, I will move on to the legal challenges that are before the Supreme Court.

First, I want to set the context for the contraceptive coverage rule. There are a lot of big changes in the Affordable Care Act, many which you're familiar with. Maybe some people in the audience have been lucky enough to keep their adult children up to age 26 on their health plans which is a big relief in this economy.

There's also many other things that people may have heard of. The ACA, now bans preexisting conditions, and prohibits gender rating, and for the first time, the federal government has set standards for what benefits must be included within plans.

I'm going to focus on the preventative services plans that are required to be covered within plans. The ACA requires coverage of a wide range of evidence-based preventative services with no cost sharing. The required preventative services include: US Preventative Services Task Force recommendations rated A and B, the Advisory Committee on Immunization Practices recommended Immunizations, Bright Future Guidelines for Children, as well as additional preventative services for women.

The specific preventative services for women were later identified by the Institute of Medicine expert panel and then these recommendations were adapted by the HSS. One of the eight preventative services recommended by the IOM committee is contraceptives. This particular recommendation has garnered a lot of attention and is the subject of the lawsuits now before the Supreme Court.

As Alina said, we're all being stretched beyond our original expertise. When I went to law school, I never dreamt that I'd be doing a presentation with a slide with the FDA-approved contraceptives, but here they are.

This is what we're talking about when we say that the ACA requires all FDA-approved contraceptives for women. It's important to know that these are for women not for men. These include barrier methods, hormonal methods, emergency contraception, implanted devices, and sterilization. As you can see from the slides, some of these contraceptives are quite expensive and the cost has been a barrier for some women. Almost of one-third of women would change their current method of contraceptive if cost was not an issue.

Keep in mind, all these cost are multiplied by 30 years. Roughly, the span of a woman's reproductive years. If an employer does not include the contraceptive services within their plan, then women are left with the choice, either to pay for themselves, if they can afford it; go without it; or pay for a less expensive and less effective method of contraceptive.

What's included? It's all of the methods that were on the previous slide at no cost sharing. That's important to keep in mind. This is the first time that it's no cost sharing, and that's for all preventative services, but we're just talking about contraceptives here. It includes counseling, insertion and removal, and all of the follow up in management are included. The doctor's visits that are needed for follow up management, those are all included within the no cost sharing.

Which plans have to cover the preventative services without cost sharing? It's all new private plans. These are all in the small group, individual group, and large group. There is an exception for grandfathered plans. These are plans that were in existence in March of 2010, when healthcare reform was originally passed, and have not made any substantial changes since that time. The goal of this rule is to basically have all plans covering preventative services. The exception for grandfathered plans is meant to be just a transition and it's anticipated that those plans will dwindle down to a very few and eventually none over time.

Employers who do not cover all the preventative services can be fined $100 per day for each person enrolled. That's quite a significant fine. I'll go into detail about that fine later on, but I just wanted to flag that for you as that is the penalty for not including all preventative services within a plan from an employer.

There are some exemptions and accommodations for some nonprofits. I'm going to walk you through this piece by piece. This rule was developed over time and is quite confusing. Try and stay with me. I’m going to go slow.

First, we have nonprofit houses of worship. These are churches, synagogues, and mosques. If these employers object to the contraceptive coverage, they are exempt. They do not need to provide the contraceptive coverage, and their employees and dependents do not have a guaranteed right to the coverage.

Next, we have nonprofit employers. The first group of the nonprofit employers are religiously-affiliated nonprofit employers. These are your religious hospitals and colleges. If these employers object to providing the contraceptive coverage, they can get an accommodation. This accommodation was crafted with the idea in mind that it would remove the employer from the obligation of providing the contraceptive coverage while still guaranteeing the coverage to the employees and their dependents.

This is distinct from the first group. The first group, the employees and their dependents do not have a right to the coverage. In this group, the employees and their dependents will still get the coverage. It just removes the employer from providing the coverage. To be eligible for the accommodation, you have to be a nonprofit, religiously-affiliated organization which has a religious objection to providing the contraceptive coverage. You have to self-certify and provide that self-certification to your insurer or third party administrator if you're self-insured. That, then, places the burden on the insurer or third party administrator for providing the contraceptive coverage directly to the employees and their dependents.

There are also religiously-affiliated nonprofits that have no objection. In fact, most religiously-affiliated nonprofits have no objection to the contraceptive coverage. If they have no objection, the contraceptive coverage is mandatory and there is no accommodation for that group. Same for the secular nonprofits. If the accommodation is not available to them, and the contraceptive coverage requirement is mandatory for that group.

Lastly, we have for-profit employers which are the subject of the lawsuits before the Supreme Court. In this group there are no exemptions and no accommodations. The contraceptive coverage is mandatory. Did everyone follow all that?

This requirement has been at the center of a wave of litigation. There's been over 90 lawsuits. Almost exactly evenly split between nonprofit and for-profit corporations. These are employers that are claiming that the contraceptive coverage violates their religious rights. Some of them are objecting to all contraceptive coverage, while others are focused on specific contraceptive coverage, usually emergency contraceptives and IUDs, which they believe cause an abortion therefore, it violates their religious rights. It's worth to note that the FDA has classified all of those devices and drugs as contraceptives. For the nonprofit employers that are suing, they're contending that accommodation doesn't adequately satisfy their needs. And that this requirement, even with the accommodation, burdens their religious rights.

Now, we get to the cases that are before the Supreme Court. It's worth to know that the nonprofits are still working their way through the Court mostly because those rules came out later, and so they're behind the for-profit cases. The two cases that are before the Supreme Court are two for-profit, privately-held, closely-held for-profit corporations.

The first is Hobby Lobby. They're owned by the Green family. They're Protestants of Oklahoma. They have 13,000 employees. They feel that the contraceptive coverage violates their religious rights. They object to emergency contraceptives and IUDs. Conestoga Wood Specialties is owned by the Hahn family, Mennonites of Pennsylvania. They similarly object to emergency contraceptives. Both owners and corporations are suing based on violation of the Religious Freedom Restoration Act and the First Amendment.

I promised I would get back to the penalties. I think this is worth spending a minute on to explain that the penalty is much higher for failing to provide one service such as contraceptives this would apply for any preventative service, but the subject of the lawsuit is contraceptives- then it would be for failing to provide insurance at all. It's a $100 per day per enrollee for not providing contraceptives, whereas if the corporations in these cases chose not to provide insurance at all, it would be $2,000 per employee per year.

Both Hobby Lobby and Conestoga Wood Specialties claim that it would violate their religious beliefs to not provide insurance coverage for their employees, because they believe they have to take care of their employees. The column on the right is not available to them, as the way they put it, because they are obligated by their religion to take care of their employees.

When you do the math, the fine for not providing contraceptive coverage is $475 million per year for Hobby Lobby. Where if they didn't provide insurance at all, it'd be $26 million per year. For Conestoga Woods, the fine for not providing contraceptives is nearly 35 million. Whereas the fine for not providing insurance at all is nearly 2 million.

At the heart of this case is the Religious Freedom Restoration Act. I'm going to just provide the 101. We have the true expert, Professor Hamilton, here. It's a little bit scary to be doing this with the expert sitting on the panel. But I will try my best to provide the 101, and she will go into much more detail about this law.

Under the Religious Freedom Restoration Act, the federal government may not substantially burden a person's free exercise of religion unless the government has a compelling interest that they're meeting in the least restrictive means. Warning, we're going to get into a legal analysis. We will break this down as much as we can.

The first question in this case which the Supreme Court is just looking at for the first time, is the for-profit employer a person capable of religious exercise? That's a big question and a big door to open. The owners are contending that their personal religious views also belong to the corporation and are indistinguishable from its owners. And therefore, the owners are burdened by an action required by the corporation.

What this means is the mandate is required on the corporation. The religious views belong to the owners. The owners are contending that the corporation both has the their religious views and that the owners are burdened by anything that the corporation is required to do.

If the answer to Question Number 1 is yes, then the Court will move on to Question Number 2; are the corporations or the owners substantially burdened? That's where we get back to the penalties I just went through. The corporations in these cases are claiming that they have either the choice to provide the contraceptive coverage or pay a very hefty fine.

The government, on the other hand, is contending that the use of the contraceptives is far removed from the employers. They're providing insurance coverage that, then, would require an independent action by the employee or the dependent to go and get that contraceptive coverage and use it. It's no different than providing salary where you provided money, and your employees can go buy whatever they want. Those are the two sides of that question.

Then we move on to the third and fourth questions which are really looked at together; does the government have a compelling interest that's meant in the least restrictive means?

The government is contending that its compelling interest is in promoting public health, gender equality, and health insurance, and women's autonomy. The corporations are contending that the government cannot have a compelling interest because of all the exceptions. You might remember we talked about that there were grandfathered plans, that there's exemptions and accommodations for nonprofit religious organizations, and that small business are not required to provide health insurance at all. But it's worth to note that if they do provide health insurance, they are required to provide the same package of benefits that large group employers are required to provide.

As the Court works its way through each of these decisions, obviously, each answer will shape the decision that the Court will make ultimately. While this case started as part of the ACA and preventative service for women, the ramifications can go well beyond that. Obviously, the first impact will be whether women will have the access to contraceptive coverage. Then, within the healthcare context, if for-profit employers are allowed to have religious objections, we could see other religious objections for other healthcare services including vaccinations, blood transfusions, infertility treatments, psychiatry treatments and drugs, or in some cases, health insurance altogether.

Beyond healthcare, there's some talk that this could affect how employers are subject to civil rights laws. Some of you might have followed that in the last few weeks the governor of Arizona vetoed a bill that was passed by the legislators which would have allowed corporations to deny services to certain people based upon the owners of the corporation's religious beliefs. This case could have impact on those types of laws. Fourteen other states have considered similar laws to that Arizona bill.

In addition, there's employment and housing laws set up to protect people based upon discrimination on the basis of gender, national origin, and pregnancy. The outcome of this case could affect how those laws are implemented in the future as well. I'll stop there and let Marci take up the 500 course on the Religious Freedom Restoration Act.

MARCI A. HAMILTON, J.D.: Good morning. Thank you so much, Alina and the Kaiser Family Foundation, for organizing this and for inviting me. I think it is critical that those outside the legal universe come to understand exactly what we're dealing with the Religious Freedom Restoration Act and its state offshoots.

To summarize, the only thing I want you to walk away with today that is critical for Americans to understand what we're dealing with is the following:

RFRA does not mirror the First Amendment. We are not talking about constitutional rights. We are talking about extreme religious liberty. We are not talking about anything that the Supreme Court has ever held is a right under the constitution. The most glaring part of that is the least restrictive means test, which is in there, is the most extreme choice. I'll explain that as we go on.

You just need to be very, very careful in understanding what is this law. Let me start out. Just in terms of the big picture, the First Amendment. What does the First Amendment protect? It clearly protects the right to believe. The right to believe is the only right in the entire constitution that is absolutely protected.

The government in the United States may not tell anybody what to believe. It doesn't matter what it is. We could not have the kind of law in Germany that prohibits denying the holocaust. In the United States, we have an experiment which is the most successful in history of protecting belief. That's absolutely protected. No government interest will justify that.

The right to religious speech is highly protected. The government has a very difficult time regulating speech that is religious in nature. But the right to religious conduct can be governed. Why? Because of this hierarchy, right. Belief does not hurt other people. Speech is much less likely. But conduct is what can harm other people.

The entire United States experience is based on the views of John Locke and John Stewart Mill, both of whom when you take their thinking together, the rule is that as Americans we have rights, but we cannot harm others. The reason that the Free Exercise Clause, which governs religious conduct does not create an absolute right and it does not create a strong right, is because of the potential of conduct to harm others. The government may regulate acts in a way that it cannot regulate believe and speech.

I have a quote there from Thomas Jefferson, "The legitimate powers of government reach actions only and not opinion." This has been in the very basics of constitutional experience. Here's 200, 300, 500, however you want to label it. My students would say, it's just every day.

Here is what we need to understand. When you start with the First Amendment you need to look objectively at what the Supreme Court has ruled. Then, we'll figure out how RFRA adds to it and how it changes it. Once you understand the differences, you can more clearly understand why it is all of a sudden that the fruits of RFRA are so extreme. How is it that a for-profit corporation like Hobby Lobby with 3.3 billion in annual revenues, 23,000 employees—they shaved it in their briefs—with 595 stores; how could a company that sells arts and crafts supplies think it has a right to religious liberty? The opening is RFRA and the opportunity that RFRA provides.

And the same question is, how could businesses in the 10 states that considered it recently think they have a right to refuse service based on gender, or race, or sexual orientation? The answer is in what this new doctrine has created.

Let's start with ordered liberty. This is a standard phrase the Court uses in a wide range of liberty cases. It's called Ordered Liberty because absolute protection of anything other than belief is anarchy. The leading case is Employment Division v. Smith which accurately summarized the preceding cases unlike the rhetoric that's brought forth by religious lobbyists and some law professors. And the other leading case is Church of the Lukumi Babalu Aye.

If you take those two cases together at the Supreme Court, the believer in these cases must always prove that there is a substantial burden on their religious conduct. They cannot come in and say a de minimis burden, any burden. It has to be substantial in order to use any law to challenge. That's the first thing.

But once it switches over, if you have a neutral generally applicable law; in other words, a law that applies to everybody doing the same thing. A neutral generally applicable law, which is not discriminatory, is constitutional. It's subjected to rationality review.

This is how I explain it to my students. How do you know if a law passes rationality review? And the answer is if you don't die laughing when you read the law, it's constitutional. The vast majority of laws are subjected to rationality review because of the requirement that the Court defer to the legislative process in law making. The exceptions are what we get into in constitutional law.

If it's not neutral or generally applicable, that means if it's discriminatory; or if it treats some secular person better than religious persons, not generally applicable, in that circumstance, it ramps up. And the Court says, you know what, those are the markers that we think that tell us that there us that there is a constitutional violation, and so we're going to look more closely. We're going to drop the deference to the government. We're going to look more closely if it's discriminatory or if it's not generally applicable. And in that case, the Court applies the Court's strict scrutiny.

The Court's strict scrutiny all the way to Lukumi, which is the most recent free exercise case, is that the government must prove it has a compelling interest which is in interest of the highest order; and the government must prove narrow tailoring. What that means is not that the government has to prove that this is the best possible law for this claimant. All the government has to show is that the interest the government has here; avoiding gender discrimination, reducing cost of healthcare nationally. It has to show that those interests and the means they chose requiring it in healthcare plans fit well together.

That is the Court's doctrine. It's been the Court's doctrine from the beginning. Those who advocate that the Court has used this so-called least restrictive means test aren't reading the cases. That is not what any of the cases say. In the most recent case, Church of the Lukumi Babalu Aye, seven members of the Court did not use least restrictive means for strict scrutiny.

That's critical. It's so dense. It's legalese. But the beauty of RFRA for those in favor of it, is that the vast majority of Americans can't figure it out. That for example, the gay rights groups that were fighting RFRA in 2000. RFRA's declared unconstitutional in '97. It was my case at the

Supreme Court. It completely felled the statute. Everybody knew that.

They went back to Congress and said, give it back to us. Congress said, nope, nope. We've heard from people this thing is a little troublesome. Gay rights group said, you cannot possibly do this. We will be discriminated against. Congress listened, but then the gay rights group blinked and said, but you can apply it to federal law, 'cause we don't have any rights in federal law. Just don't apply it to any state law.

The gay rights groups blinked along with along with the civil rights groups in 2000, and that's why we have a federal RFRA. We've a federal RFRA because the legalese trips even the most knowledgeable up.

There's one case at the Supreme Court in 1972 in which the Court departed from the doctrine I just described. It is the only case in which the Court departs from the doctrine. Here the Court says in a case involving whether or not Amish children must be required to be educated under the Compulsory Education Laws. Do the parents have a constitutional right to take their children out at 14 rather than 16?

Yoder says they've proven the substantial burden, and we will impose our strict scrutiny, compelling interest test on the government, and a narrow tailoring requirement. We will impose that on the state of Wisconsin. In Wisconsin v. Yoder, if you read the decision, the decision itself is a love letter to the Amish. They can do no wrong. They are good, upstanding citizens. We can trust them to let them take the kids out and not educate their children, because they're upstanding citizens.

This is an outlier case. It's the only case where we've a neutral generally applicable law, a compulsory education law that applies to everybody in which the Court says, we're going to second guess the legislature. In my view, it is the Court's worse decision. I'll be writing on that soon, but that is the outlier. It's all by itself.

You have over 200 years of doctrine. You have one case in which this is applied, and now we get RFRA. 1990 Supreme Court decides the Peyote case. In a shocking development, drug counsellors were fired for using illegal drugs.

If you're in the religious liberty universe in the ivory tower and you first hear those facts, you start calculating, well, what's the interests? What's at stake? And then, you have corporations, professors come up to you and go, Marci, drug counsellors, illegal drugs. It was in their contract. They can't use illegal drugs. Well, oh, that's a good point. Okay, alright. They lost.

When they lost, under the doctrine the Court had applied all the way through religious groups led by some unfortunately misguided law professors went to Congress and demanded RFRA. In the heady universe of drafting RFRA, what they did is they said to Congress, every case has been decided under the following standard until this one, until Employment Division v. Smith.

Three years of hearings, every single case has applied a compelling interest test, and a least restrictive means test to every neutral and generally applicable law.

It's just false. It's demonstrably false. But Congress falls for it. Who doesn't want to be the savior of religious liberty? Apparently, every member of Congress.

RFRA is passed. What does RFRA say? RFRA is a new concoction. It says neutral generally applicable law used to be deference from the courts. RFRA walks into the picture. Neutral generally applicable law absolute no deference to the lawmakers. Instead now, the Court say, is there a compelling interest in the part of the government? And is this the least restrictive means for this religious believer.

Least restrictive means means that the Court is being asked whether or not this law was shaped for this particular believer, and if the government had had this particular believer in front of it, what would the law have been to accommodate them. It is a huge increase in the power of the religious claimant to trump any neutral generally applicable law.

I'm sure I'm way overtime as usual, but I know. Let me just close up by saying, one, the RFRA legislative history is quite clear. If you go back, I testified many times. Most of it seared to my memory, unfortunately. But what the members said on both sides of the aisle, on both sides of the debate, for-profit corporations are not, in their nature, religious believers.

That's in the legislative history. They were never intended to be covered. It is shocking to see the Hobby Lobby argument for those of us who have been in the trenches on this. That doesn't mean the Court will rule that way. That just means what the legislative history says.

And finally, it's my expectation, since I deal in many, many medical neglect cases that the next wave, if this goes in favor of Hobby Lobby, will definitely be the vaccinations. I think that will be the next forefront. Thank you.

ALINA SALGANICOFF, PH.D.: Great. Thank you, Marci. Now, Tom. Thanks.

TOM GOLDSTEIN, J.D.: So, can I actually call up Laurie's deck?

ALINA SALGANICOFF, PH.D.: Pull up Laurie's deck? Yeah, we have full technology to do that.

TOM GOLDSTEIN, J.D.: Fantastic.

LAURIE SOBEL, J.D.: That's the right slide.

TOM GOLDSTEIN, J.D.: Well, thank you, all, so much. And thanks, of course, to the foundation for bringing us together to talk about these important cases. My job, I think, is to pull together the first two set of points that were made to you about the framework for the legal argument and how it might play out under RFRA.

I think the cases are unpredictable. They're unpredictable because what you ultimately think about the case is, really depends a lot on what you think of the interests at stake. If you think of this as a case in which essentially a very small family business is being required to fund abortion—just to put it on the most stark terms—and you are one who believes that abortion is a fraught religious issue, then you're going to be much more sympathetic to the claimants in the case.

If on the other hand, you view this as a claim by for-profit company—and there are lots of big for-profit companies—that it does not want to pay for basic contraception services, and you view contraception as a public health question, then, you're going to be a lot less sympathetic to the claim.

And the reality is that while we can put all the flow charts in the world up on screens—and we do—that a lot of this and a lot of Supreme Court decision making is more gestalt than that. It's more bottom-line oriented. We like to think of the Justices as purely objective looking at the text of the constitution and of a statute like RFRA, of the regulations implementing the Affordable Care Act, and we want to believe that there's an objectively right answer.

I will tell you that the people on both sides of this litigation believe that there is an objectively right answer, and that is they're right and the other side is wrong. That happens a lot in hard cases. It is going to be the case, I think, that the Justices having those different frames of reference for the case, are going to have very different takes on who should win and who should lose.

There is the confounding part of the case that we ought not lose sight of from the lawyer side of things. That it is a case about the companies here, Hobby Lobby, and the statute, RFRA. The Justices did go out of their way to also make the case about the owners of the companies and their personal constitutional rights.

While it's absolutely true as Marci says, that the focus on this case is on the statute, RFRA. It is unavoidable that the Justices will have to figure out what it means that the owners of the companies assert that their personal religious liberty is being infringed.

As we think about exactly what it is that the Justices might do, there's going to be the threshold question, hey, this statute, RFRA, says it applies to a person. Does a company, a closely-held company qualify as a person? I think that the Court, to avoid all the great difficulties that will come with the ruling in Hobby Lobby and Conestoga's favor is likely set to say that the answer to that question is no.

Because while the Justices will take a look at the case and say, I personally may feel that this question of providing access to Plan B relates to individual religious liberty and to the liberty of the owners of the company. The Court is going to have to write an opinion. That opinion is going to have to govern a lot of cases later.

I want to come back to this point of what I think they'll decide about persons, because you've got to figure out, if the companies win, what then? What of the next 50 cases that are going to be filed, as Marci suggests, about vaccinations? As Laurie suggest, about gay rights? And whether a company can say, closely-held companies, a small photography shop has a certpetition at the Supreme Court right now that says, I believe that requiring me to provide photography services for gay weddings violates my personal, individual religious liberty and the religious liberty of my photography shop. What will that mean? And so on, and so on, and so on.

You can look back across history, and when you look at religious liberty claims, you really do see two things. Overwhelmingly, you see claims of sincere invocations of religious liberty that are objectively reasonable and fair. You see people of religious conscience who have had their rights infringed on. But you also see deeply troubling claims like my religion says that I should not have to deal with people who are not white.

The problem is kind of evolutionarily across the history of our society, what are we going to think in 25 years of the claim that I have a religious right not to serve homosexuals, not to provide a particular kind of contraception to women. It's very hard to identify limits on the legal claim here, because while this is a case about emergency contraception and IUDs, there's no intrinsic reason that it has to be that way.

There are claims by religious, the non-profit organizations in particular, there's a case involving the Little Sisters of the Poor that are much more broadly about providing contraception at all. There is going to be this deep concern that if the Court were to rule for the claimants here, the lower courts are going to face an array of still more expensive, more troubling claims by for-profit businesses.

If we put to the side how they might bail out by saying that they are not persons, one threshold question that gets skipped over quickly in this case is, if is there even an impingement upon the for-profits, closely-held companies right in any way at all? And that turns on the fact that as one of the slides that Laurie put up mentions, you don't, as a company in the United States, have to provide insurance.

The theory of the case here is that the government is making me provide insurance. The regulations say that the insurance has to coverage for emergency contraception. That violates religious liberty. But in point of fact, you can decide not to provide insurance and pay effectively a $2000-tax per employee.

Also, if you were an employer at the time the ACA was adopted, you could have stuck with grandfathered plan and not been subjected to this mandate at all. The Court could say, look, because you aren't even required to provide the insurance, but rather to provide the tax, this is not an infringement on anybody's liberty.

In addition, they may look at scans at the theory of religion that's involved here. As described, remember, the theory of the plaintiffs is, I have a religious obligation to provide insurance, just not this kind of insurance. That is to say, I want to include 99-percent of what's in the plan, but this not this 1-percent.

The Court may conclude that may ask a little bit much of an ordinary system of insurance in the United States to require it to be tailored so specifically to your religious needs. If they do decide that there is a mandate here that infringes on a religious liberty, the question is going to be, how much of a burden is it?

And this is Point Number 3, does the government have a compelling interest? Here, too, I think, for the Justices it's ultimately going to be a value judgment. What you think of this question? There are going to be members of the Court. You can imagine that Justice Ginsburg who was involved in gender-related issues for her entire professional career before she became a judge.

There are going to be justices who'll likely take a view of the contraception mandate including what might be regarded by some as the detail of providing emergency contraception as a foundational point of women's health. The government couldn't possibly have a higher interest than in providing this form of protection for women. And there are going to be other people who take the view that this is a detail. That the objection here is to a particular form of contraception coverage and the women can provide it themselves.

Do I think that a majority of the Supreme Court is going to say that there is a compelling governmental interest here? I think that the answer is probably yes, but that it will be extremely close. If this is a cousin of the abortion debates in the Supreme Court right now, the Court is five to four in favor of permitting substantial regulations of abortion. That test will probably come back to the Supreme Court next year in a case from Texas. But I think that the Court, likely, will take the view that this is an important interest.

The biggest fight is probably going to be about Number 4 on this chart which is, is it meeting in the least restrictive way? This is closely related to the question of, okay, what about all the exceptions? You can frame the argument as either, is it a compelling interest if you let a lot of people not do it? Or you can frame it as, well, you're not doing it in tailored way.

I think your first reaction at looking at the statute is that this is Swiss cheese. Because small businesses don't have to provide this coverage if you have less than 50 employees. And there are a variety of other exemptions including the grandfathered exemptions.

I think that's a bit of an optical illusion. I think when you study the statute, it's substantially more coherent than it seems at first blush. That is, it's true that if you are an employer and you have fewer than 50 employees, you don't have to provide insurance coverage at all, but neither do the big companies either. They have to pay the $2000. If the small company does provide insurance it is subject to this set of standards; it has to provide the contraception care.

With respect to the grandfathering rule, this is a transitional provision. As Laurie says, it's intended so that everybody didn't have to adaopt all of the new coverage standards immediately, but there was an understanding, and it's worn out that 10-percent more plans every year would engage in some change that would subject them to the new requirements of the ACA. And I think the Court will view the efforts to accommodate churches and religious nonprofits as not suggesting that the government isn't serious about pursuing this interest.

I suppose in the end what I think is that the government has so many ways out in the case; from the idea that RFRA doesn’t apply to companies, to the idea that it's not a burden, to the idea that it is a compelling interest that's narrowly tailored. Given that the government likely starts out at least three votes in its favor, then I think it's more likely than not to come out ahead in this cases.

If they don't—just to pause on that briefly—I think that that the Court, while it's true and a significant point that the legal principle that's invoked by the plaintiffs here, has some potentially startling implications for what one might claim as a religious liberty. And it's very hard to have an opinion that says this is a case about providing emergency contraception. We're not going to adopt the rule that doesn't apply to vaccination or discriminating against gays.

The difficulty with writing a legal opinion that says this far and no further is that the Court has been very concerned about not making judgments about what is a sincere religious belief or not. They don't want to be in the business of saying, yes, you really believe that you shouldn't have to provide emergency contraception care, but that doesn't extend to condoms or it doesn't extend to vaccination or whatever. They just don't feel themselves confident, and probably thankfully so, to evaluate those.

I think what the Court would do is write an opinion that says in these other areas—vaccination, discrimination against minorities and protected classes—the government there does have a compelling interest that's narrowly tailored. They will not want the opinion to open up kind of Pandora's box to a lot of claims that they're not sympathetic to, but there, no doubt, would be a huge amount of litigation about it.

It think the government's likely to win, but that it will be like we had a close case at the Supreme Court.

ALINA SALGANICOFF, PH.D.: Alright, thank you. Well, biostatistics is starting to look a little simpler to me now. Thank you, that was really terrific. I'm still trying to process this, and I feel like I've been doing quite a lot of reading about this issues.

One of the issues that I actually wanted to probe was where you finished off which is around how narrow could this opinion be crafted in terms of the implications? Is it all or nothing? Do we walk through each of those doors? Do they stop at a certain point in the whole thing? I mean, this is more of a process issue in terms of how it's structured.

TOM GOLDSTEIN, J.D.: Sure, it's a process question. Well, first, if you are ever asked the questions as I just have been, could the Supreme Court do X? The answer is always yes. Supreme Court can do anything it wants and frequently does.

If you were to ask, in the ordinary course, if the Supreme Court majority wanted to say, we don't think these plaintiffs win because companies don't have rights under RFRA. The majority would stop there as to the companies claims. But the individuals also claim rights under RFRA, and also under the Free Exercise Clause.

There's a reasonable prospect of coming out with just a little, not very significant opinion. The narrowest opinion is probably the companies don't have RFRA rights, and the individuals rights aren't implicated because the individuals aren't required to do anything. If they go beyond any of those things, then they're going to go through this cascade of issues.

MARCI A. HAMILTON, J.D.: I think they won't have to do very much with respect to the individuals largely because of the Entrenched Law in the corporate sphere that owners, and board members, and shareholders, their values don't pass through the corporation. There's no values pass-through.

I think the amicus brief that was filed by corporate and criminal law professors in support of the government was one of the best ones that was filed in explaining to the Court. This is what the Court hates the most. Just like a vampire and garlic. If you say to the Court, you are going to unintentionally overturn centuries of law, like corporation law, they don't like that. That's scares them.

I think that the individuals' claims probably drop off because of that. They have an easy out on that. Then, it just becomes the corporation in front of them. I honestly think, if the groups that were trying to get this for-profit idea in to the RFRA context, they would have done a lot better if they hadn't gotten Hobby Lobby there; 3.3 billion, a 135 on the Forbes' list—it's huge—and 23,000 employees. It's very hard.

If you're the name Hobby Lobby, don't you think it's your neighborhood store? I did. Until I did the research. I said to my research assistants, where are they? Utah, Arizona?

TOM GOLDSTEIN, J.D.: Everywhere.

MARCI A. HAMILTON, J.D.: Yes, everywhere. Five hundred and ninety-five stores and growing. I think that there may have been a misstep here in choosing Hobby Lobby as your standard bearer. They would have been better off with a little tiny Hobby Lobby. That would have been a lot more sympathetic.

What they could say is, anything this big, they're out. We'll hold to a later day whether a truly small family-owned, closely-held corporation in a tiny circumstance might have a claim. That's really the Court's signature with handling these issues.

ALINA SALGANICOFF, PH.D.: Great, thank you. Yeah, I have been thinking a lot about the corporate interest as well. One of the issues that I've been a little bit puzzled about as the non-lawyer on the panel here is, people have been speaking around the Citizens United case which did give corporations the same political free speech rights as individuals. Are there other issues that may address similar issues that may relate to this extending kind of individual rights to corporations?

TOM GOLDSTEIN, J.D.: Well, the companies' best precedent that they point to is Citizens United which famously holds that corporations have a right to expend money, participate in electoral campaigns, overturning the prior law.

The Court has generally said that companies don't have those rights. A famous example is the Fifth Amendment right against self-incrimination. A company can't withhold providing papers for a criminal trial. There are lots of individual rights that don't apply to companies.

The best explanation of the difference may well be, when you're talking about free speech, the point isn't so much that the company has a free speech right to talk, but that the public has a free speech right to listen and to hear what it is that people in the corporate form are expressing, so that everybody can get the benefit of it.

I think the justices will really hesitate before adapting any kind of broad rule that companies do have constitutional rights, because things go a little bit haywire then. Now, there are rights that they do probably have. First Amendment right is an example. It's very unlikely that you can take a company's property without compensation, for example. There are things that intuitively are rights that you would be able to hold.

As Marci said, it's a system of belief. We just generally don't think of companies as believing things as opposed to exhibiting a form. I'll also just say, obviously, we have a conservative majority in the Court. Conservatives tend to care quite a bit about maintaining the corporate form and its importance. That is, it is very important to separating liability, that you can't sue someone for something a company that their affiliated with did. It matters a lot to them to keep that a reality.

ALINA SALGANICOFF, PH.D.: Okay, then the other thing, just to follow up on the intersection between these cases under recent state policy efforts like in Arizona, and how that connects with the state laws; will we see in some states a wave of more state laws depending on the outcome of this case? What could be the response to this?

MARCI A. HAMILTON, J.D.: Right. Well, I'm not sure the outcome of this case is going to make a big difference for the states, because the state RFRAs are governed by their own state constitution and their own laws. This might open some doors, but wouldn't be the precedent.

It's actually very hard to keep track. I actually had my student team start a website, rfraperils.com, because you can't keep track otherwise. There are dozens of stories a day.

Virginia, right now, has a Conscience Clause which is waiting for signature by the governor which permits genetic counsellors to discriminate on the basis of religion. If you don't believe in a gay couple having children, in Virginia, you're going to be able to say sorry, I'm not going to help you.

It's proliferating across the country, and now that it’s become public- when those are under the table, they're very easy to get passed, and even when they're above the table. I mean, today, the House is going to be, without debate, voting on an amendment to the Affordable Care Act that would permit children of faith healing parents not to have coverage.

We have an explosions in these kinds of laws. I fully expect to see them speed up because the opposition is growing. They need to get as many in as possible as the opposition built. So, yes, we're going to see a lot more.

Are we going to see more that involve discrimination on the basis of sexual orientation? Yes, but I see them splintering. Colorado just had a bill that permitted students to obtain funds from university for their group even if they discriminate against homosexuals. That bill was killed by the gay rights activists. We're seeing an explosion of these kinds of bills in every state.

TOM GOLDSTEIN, J.D.: As I said, two things about the question of about whether this case will be important to those laws. It's absolutely true that RFRA, of course, applies to the federal government for the reasons Marci has given. The stakes are a little bit higher here, because the Court did agree to decide the individual First Amendment, Free Exercise rights of the owners of the company. It may well be that the Court says something that's significant there, at least with respect to people who are operating in the corporate form; if you have a medical clinic doing genetic counselling, for example.

There is the real prospect of the Supreme Court doing something here that has, just on its phase, a lot to do with whether those laws are constitutional or not. And conversely, whether you have a constitutional right not to be subjected to neutral anti-discrimination laws.

The second thing is that even if the Supreme Court only were to write about RFRA, sometimes on this big fraught social issues, you have to listen to the music more than the individual notes. What the Supreme Court does here has a significant signaling effect to society.

The justices are regarded as neutral arbiters of social principles. In 1986, in Bowers v. Hardwick, when the justices wrote an opinion upholding sodomy laws, for example, that, I think, the data would show had a real buttressing effect for those who were hostile to homosexuals. Conversely, when the Supreme Court and a couple of decisions and opinions by Justice Kennedy went in the other direction, overruling that decision, striking down laws that discriminated against gays, that also an effect of moving society. So too with the Windsor decision from a couple of years ago on same sex marriage.

What the Court says here about whether it is, that you have a right of conscience to not provide these services, will I think probably resonate through the culture to some extent, and say to people who aren't fervently of one view or the other, this is the neutral way to approach these questions.

If the justices were under RFRA to hold that there is a right not to provide this form of contraception coverage on the ground that it is an issue of conscience, that will say to the country that these issues of conscience are very important and they ought to be respected. I think, as a consequence, you could have spillover effects just from the theme of the opinion.

ALINA SALGANICOFF, PH.D.: Great.

MARCI A. HAMILTON, J.D.: I'm going to disagree. I think, it's more likely you get backlash. I think Bowers energized the gay rights community and that's why you ended up with Lawrence v. Texas. I also think that we're at a tipping point now with respect to the RFRAs.

The RFRAs looked all good on their surface. Who would ever be opposed to religious freedom in the United States, right? They look like apple pie. They're wonderful. But when they start to show their possible outcome, you can't forget they're statutes. It's capable of repealing a statute. It's capable of cutting it back. For example, how would you defund RFRA? You would take out the attorney's fees provisions possibilities.

What I'm hearing from a wide array of constituencies is that where as they were willing to take back seat on RFRA when they didn't see that it was hitting their own interests. Now, they see it upfront hitting their own interests, now they're mobilized; block any new RFRAs, scale back any RFRAs, and criticize it in the public square.

If the Court were to say an expanse decision saying that businesses have conscience rights. I think what you'll see is a backlash as opposed to a following. In a little bit like the story of Roe v. Wade. Roe v. Wade spurred the opposition more than anybody. That's why we have the doctrine we have today.

I think it's worth watching. But I don't think the courts can be a leader on a statute. It can be a leader on constitutional rights. If it reached a constitutional rule, that would be different and it could. But if it just limits itself to the federal statute, it's a statutory interpretation that is capable of being repealed, retracted, and criticized.

If it turns out that Hobby Lobby and others have a right under federal statute to create health plans that disable women and discriminate on the basis of religion, I think what you'll see is a massive move in order to get Title VII exempted from RFRA. You'll start seeing RFRA as kind of a Swiss cheese.

There's a lot at stake here. This is the culture war. This is the heart of the culture war right now. I think it's not over by a long shot as to whether these rights will control the future or not, because as I say it's a statute. It's not the constitution.

ALINA SALGANICOFF, PH.D.: Laurie.

LAURIE SOBEL, J.D.: I just wanted to comment on the difference on the reaction. In Arizona, in the week between when the legislature passed the bill and the governor vetoed it, there was an outcry from the corporate community in Arizona including the Chamber of Commerce along with many large corporations.

In these cases, it's been notable that there haven't been many for-profit corporations submitting amicus briefs. There are some, but they tend to look like the plaintiffs.

They looked like Hobby Lobby and Conestoga Woods in that they're privately-held, for-profit corporations with owners with strong religious views.

The Women's Chamber of Commerce as well as the Gay Chamber of Commerce submitted amicus briefs in favor of the government. They have large corporations as members, but there hasn't been any direct input from Fortune 500 for-profit corporations that are not closely-held that are on the stock market.

MARCI A. HAMILTON, J.D.: I was most entertained in Arizona by the opposition by Major League Baseball and the National Football League. When they come in and say, we're not playing in Arizona anymore, that was the end. Jan Brewer slept well. She didn't even need to think about it anymore.

ALINA SALGANICOFF, PH.D.: We are clearly in the midst of many culture shifts and many of them quite seismic. I'd like to open it now to the audience. If you have questions, there are two—Tiffany and Victoria, and Susan in the front there.

SARAH HUTCHINSON: Hi, I'm Sarah Hutchinson. I'm with Catholics for Choice. I was interested when you were talking about the exemption for the houses of worship you said, that the employees don't have a right to that coverage in those cases. If you could talk a little bit about the balance of religious liberty between the individuals who own the corporations and the individuals who are employees that work for them, and whether the Court will address or can address the need for protection of the employees' religious liberty rights to use contraception and have equal access to the contraception coverage?

LAURIE SOBEL, J.D.: For the assumption underlying that is that most people employed by churches, and synagogues, and mosques are going to share the religious views of the employer. That's why that group was exempt.

In the case within RFRA, part of the compelling interest includes the third parties, which are the employees and their dependents, to have access to contraceptive coverage. So that's one way that the Court can look at the third parties. There are others that think that RFRA doesn't apply when there is a burden on third parties. One of those people is sitting next to me, and I'll let her elaborate.

MARCI A. HAMILTON, J.D.: Well, it certainly applies under the First Amendment, but whether it applies under RFRAs and other issue, I thought the Court did a disservice to the country by taking a case so quickly. I know that it was concerned about the pile up of money, but I think we can see that Hobby Lobby could have gone with a savings account and covered it.

The key issue in this case is, in my view that these companies—if you're over 50 employees, you're governed by Title VII. You may not discriminate on the basis of religion unless you are a religious corporation under Title VII. None of these companies are religious corporations. They lost when they originally asked for an exemption under Title VII. They lost that battle. Then they lost for the exemption under the ACA. Now, they're in court asking for it under RFRA.

The women in these corporations have a right under Title VII to sue for the discrimination in the healthcare plan based on gender—this is only for women—and on religion. All of these corporations are prohibited from hiring based on religion. They couldn't turn away a Muslim. They can't turn away a non-believer. They have to hire based on a religion-blind basis.

In that circumstance what's going on is the owners is saying to the employees my religious faith determines your medical care and what's going to be covered. That is a huge leap. Then, the question, well, why isn't anybody sued? Well, nobody sues under Title VII unless they wanna lose their job. This is not going to be a popular move on the part of an employee against their employer. They wait.

All of those potential lawsuits are waiting in the wings. If Hobby Lobby and Conestoga Wood win, then there are cases that will be lining up in which women will be arguing there's discrimination on the basis of gender and religion. If they lose, they don't have to. That's the big picture.

LAURIE SOBEL, J.D.: It's notable to just mention that in the Notre Dame case which is one of the nonprofit cases- the students have intervened as a party in those cases and are represented.

TOM GOLDSTEIN, J.D.: When it comes to the rights of the women, they're all defined by statute and by regulation. The Pregnancy Discrimination Act has been interpreted so as to not permit employers to exclude certain forms of contraception. There is a right to receive the contraception care in insurance. That it can't be excluded because it's a form of discrimination against women.

If it weren't for RFRA and if it weren't for the First Amendment right of religion, then the women would have the right by law to receive the coverage. The difficulty is that we have this intersecting statutes. RFRA is a super weird law. It sits on top of all the other laws.

Even though we have the Pregnancy Discrimination Act, and even though we have the Affordable Care Act, Congress passed this very unusual statute that says, I look across all of the US code which fills a gazillion different volume and is impossible to understand. And every single law in there, unless it's expressly exempted from RFRA as Title VII could be, then RFRA wins. There's that.

Then, the administration looked at the Affordable Care Act, looked at religious nonprofits like actual churches, looked at religiously affiliated nonprofits like the Little Sisters of the Poor and said, gosh, this is hard. We're going to have to try to come up with something that makes sense. There are no great answers here.

What they said is, look, if you're a church, we get it. You're not going to have to provide insurance that includes emergency contraception. If you are affiliated, but not a church, here's the deal. Your female employees need to be able to get this coverage, but we won't make you pay for it. The insurer will actually cover it.

Those organizations are unsatisfied with those accommodations. There are other fights that are out there. The nonprofit affiliated companies say that it violates their religious rights to even certify this; that they should be exempt which triggers the employees' ability to get the insurance through some other means.

These issues are fraught. They are very much in the forefront of our culture war. But the employees don't have constitutional rights here so far that sit on top of the statute. That is, it is going to be up to Congress that determines these things or the Administration in making these attempted accommodations.

ALINA SALGANICOFF, PH.D.: Susan had a question there, next.

SUSAN WOOD: Hello, Susan Wood. I just have a question about the slippery slope and particularly the vaccine question. It was mentioned that, possibly, there could be a narrow ruling that said just this, but the other reasons have a more compelling interest of government or a larger public health interest, and therefore we wall off all these other civil rights. Those things we can wall off from this kind of decision.

I'd like to hear a little bit more about that possibility, but also how strong- can you wall off all those things? Or would that slippery slope still be there?

MARCI A. HAMILTON, J.D.: The slippery slope is definitely there. If you'll notice what is said, is that it is not going to be difficult to show that the government has a compelling interest in vaccinations, in blood transfusions in the list, the whole list actually. This is why I highlighted it during my talk. The kicker is least restrictive means for this believer.

It is one thing to say that the government must have been very careful to make sure that it narrowly serve its interest. It's another thing to say it has to be the least, the least restrictive means for this believer. Under least restrictive means, I don't think the government has an easy time of it, even with like blood transfusions. I think they're going to have a hard time.

If the tests were ordinary strict scrutiny, the government would be in much better position. But under the RFRA standard which essentially is concocted, the government's burden is very difficult. I litigate a number of cases in this arena. In particularly involving religious land use.

It turns out the compelling interest is, now, pretty easy to show. Least restrictive means is what gets everybody. It's just very, very hard to prove. I think that's our problem. There is another problem with the vaccination question. That is that the Court has repeatedly held the conscientious objection from more has to extend beyond beliefs that are not just religious. It must go to beliefs that take the role in the person's life that are like religious beliefs.

Vaccinations are objected to across the country on a wide range of bases. If we have this wide range of objections to vaccination, and wouldn't this save companies a tremendous amount of money that you wouldn't have to vaccinate all the children in the business, I think that the Pandora's box is not just religious claimants, but we're going to have philosophical claimants trying to argue that it's unconstitutional to apply this principle only to religious believers. It should be applied to believers who have beliefs that are like religion.

We've already seen that in the doctrine. It's not a far step. I think the slippery slope's pretty steep, and that the Court cannot reach a decision without having to at least address what it means in the future for the slippery slope.

ALINA SALGANICOFF, PH.D.: Tom did you have?

TOM GOLDSTEIN, J.D.: Well, I mean the first series of points are that it's very difficult to draw a principled line which is not a problem for the Supreme Court. Though here's a question, can you draw a line? Can you write a sentence that says, this far and no further; and they can. Whether how much it will hold up, how coherent it will be, is another matter.

I'm a little less persuaded that the spillover goes not just to other religious claims, but to other philosophical claims. It is the Religious Freedom Restoration Act. I think that courts would be very hesitant to say that statute, then turns around and says, if you have a strong belief that vaccination is philosophically bad.

I will say that it is not an open and shut case, however, because what is religion, right? What kind of course set of beliefs? What defines a religion? And even if you and I in a conversation might well be able to come up with ourselves with some kind of guiding principles, courts hate doing that.

The statute is of, as Marci has suggested, extraordinary sweep. The justices, I think, will look at this case and say, gosh, even if I am sympathetic here, what comes next? Can I really manage a system in which I have opened so many doors?

One thing we have to step back and realize is that the beliefs here of the folks who are in Hobby Lobby and Conestoga are, I believe, absolutely sincere and very serious. This is not in any way, shape or form, made up. That is going to be tremendously consequential to several members of the Court who think this really is in the teeth and the face, and requires them to violate core tenants of their faith. That is a feeling, a thrust, a point that's very consequential in the Supreme Court.

For those reasons, I think that several members of the Court will really struggle with the cases.

ALINA SALGANICOFF, PH.D.: Great. Question in the back.

MARK SHERMAN: Mark Sherman with the Associated Press. Two quick questions. One is, can someone explain why the fines are not out of whack? Also, does the potential for leftover bad feelings from the Court’s consideration of the Healthcare

Law in 2012, as well as the ongoing partisan fighting over the law - does that figure to play any role in this case?

LAURIE SOBEL, J.D.: I'll try my best to explain why the penalties are not out of whack. I've come to the conclusion which I'm not sure is correct or not, is that it's meant to incentivize employers to provide the full range of what's required within their health insurance plans if they're going to provide health insurance.

If they provide health insurance and are missing one service, it'd be difficult for those employees to then go to the exchange in their state to then go get other insurance. Whereas if they don't provide insurance at all, that penalty is meant to make up for the cost that would, then, be provided on the exchange for those employees. I think that's how those penalties are set up. It's just to make sure that if employees are getting insurance through the workplace, that their getting all preventative services.

TOM GOLDSTEIN, J.D.: I think when we talk about the penalties, we have to be clear on which penalty we're talking about. If you talk about the penalty that says, if you provide insurance and you don't provide these forms of contraception, you are going to pay bankrupting amounts of money.

I think it is hard to deny that the penalties are out of whack. They are essentially just a prohibition. They aren't penalties. They make it impossible functionally for a company to say, I want to provide insurance and not include this coverage. I think the law ought to be regarded in that fashion.

Now, if you think about the distinct set of penalties for not providing insurance at all, which is an option. If this is really core question of conscience, if this is at the foundation of your religious beliefs, you have to look at every alternative that the government is giving you. The government is saying to you, if you don't want to provide insurance then you're going to pay $2000 per employee which is what's indicated is intended to subsidize, in effect, the participation of the employees in the exchanges individually when don't have employer-provided coverage.

That doesn't seem to be remotely out of whack. In fact, it is probably less than what most of the employers would pay towards insurance.

ALINA SALGANICOFF, PH.D: Considerably.

TOM GOLDSTEIN, J.D.: Yes. Though it's complicated, because of what is tax-deductible to the employee. That is, if your employer provides your insurance coverage, it's generally not going to be regarded as ordinary income to you. The employee will value the health insurance a lot more than the $2,000.

But we may well see employers in the future making a non-religious, but purely economic choice that says, look, it's better off for me to pay the 2,000 bucks. I don't think there's a serious argument that that is disproportionate. It falls back as Laurie indicated to the argument which is just a little hard to navigate by these closely-held for-profit companies that they have a religious obligation to provide insurance that doesn't include these forms of contraception.

I don't think it's ultimately a point about the penalties being too big.

MARCI A. HAMILTON, J.D.: Let me just add one quick thing on this. Just to get the big picture straight. There's no constitutional argument against the penalties. There's no takings argument. There's no equal protection argument. There is no constitutional argument. The Court will defer and use very low level scrutiny with respect to a normal business regulation.

The only reason the question comes up is in the calculations of RFRA. Once RFRA comes into the picture, it gives the courts an on-trade question every policy decision that the government makes with respect to any statute that can be said to substantially burden religion.

Are the penalties unconstitutional? Absolutely not. There's no argument at all. Are they a violation of RFRA? I think, probably not. I think it’s more important for the public to understand the reason you have the Supreme Court assessing whether penalties for failure to pay health insurance - Why would the Supreme Court get into that business? What do they know about that? And the answer to that question is only because of RFRA. RFRA opens the door for the Court to second guess the policy decisions. It is a very odd statute for that purpose.

TOM GOLDSTEIN, J.D.: Do answer this. Do really quickly the second half of this question -

ALINA SALGANICOFF, PH.D.: Of the ACA, yes.

TOM GOLDSTEIN, J.D.: Right. With respect to whether or not this case carries with it echoes of the Obama Care, ACA foundational challenge, the Court is pretty good about being forgetful, so that the justices don't carry with them the kind of anger and angst. You look at the Court post Bush versus Gore that it was functioning at all is a miracle.

I do think that nonetheless, there is a felt sense in conservative libertarian communities that the statute as a whole is incredibly intrusive and very anomalous, very unusual. That the world would be a better place if the government didn't control all of these things.

I think for more conservative members of the Court, there is a backdrop of a sense of this is very unusual and therefore more likely to be unlawful. On the other hand, for the left of the Court, there is more of a felt sense that this was debated, over a course of decades essentially, by the Congress which came to judgments about what necessary coverage was and how to achieve it, and therefore exceptional deference is owed. I just wouldn't think that there are bad feelings in the Court that will influence the outcome.

MARCI A. HAMILTON, J.D.: Let me just add one quick point. It reminded me. In my amicus brief to the Court on why RFRA is unconstitutional, one of the arguments that I made was it violates the Establishment Clause to give these entities a second bite at the public policy apple.

Why is it that when they lose with Title VII, and they lose with the Affordable Care Act, and they lose with trying to get President Obama to give them the right to cross the board— you remember the very public debate between the bishops and President Obama- they lose all those political fights. What RFRA does that it opens the door for them to have a second bite of the public policy apple simply because their religious.

I think that's a violation of the Establishment Clause and the separation of church and state. As usual, Mark opened a lot of questions.

ALINA SALGANICOFF, PH.D.: Well, unfortunately, our time has come to a close. I hope you've learned more and this will help you interpret what you're going to be reading and many of you writing about with the upcoming case. The oral arguments are in just a couple of weeks on March 25th. We're expected to get a ruling probably at the very end of this session, we would anticipate. I think today this has highlighted really how many different perspective and issues are raised by this case. I thank you, all, for your participation today. Thank you.

[END RECORDING]