

# JUDGES & THE COURTS

## FACT SHEET

### **Singled Out: What the Supreme Court's Recent and Upcoming Decisions Could Mean for Women's Health and Economic Security**

December 2014

This Supreme Court Term, another challenge to the Affordable Care Act (ACA) will command attention due to its important implications for many who rely on the ACA for health coverage, but equally importantly, the Court will take up one or more cases focusing squarely on women's health and economic security. Earlier this year, the Supreme Court issued two rulings (*Hobby Lobby v. Burwell* and *McCullen v. Coakley*) that threaten to have a significant impact on both, in decisions that had the effect of singling out women's reproductive health needs for diminished legal protections. This Term, the Court will hear a pregnancy discrimination case (*Young v. UPS*), and another birth control coverage case may be ripe for review before the Term is out. A key question is whether in deciding these cases, a majority of the Justices will continue to dismiss women's health and economic security or will instead recognize that promoting women's reproductive health is critical to protecting women's equal opportunity to achieve and succeed.

#### **The Court's 2014 Decisions on Women's Reproductive Health**

##### ***McCullen v. Coakley***

In 2007, the state of Massachusetts enacted a law providing for a 35-foot buffer zone around reproductive health facilities, meaning that (with certain exceptions) individuals were prohibited from standing within 35 feet of these facilities. The law was enacted in response to complaints by police and reproductive health providers that a previous version of the law (which

prohibited approaching within 6 feet of another individual for the purposes of protesting or counseling within an 18-foot radius around the facilities) did not allow the police to adequately respond to a large number of protesters outside of clinics who harassed patients and clinic employees and hampered their access to the clinic. Clinic employees and patients in Massachusetts have experienced severe violence and harassment in the past, including a 1994 attack on a Brookline clinic that resulted in the murder of two people and the wounding of five others. In *McCullen v. Coakley*, anti-abortion activists challenged the 2007 buffer zone law, asserting it violated their First Amendment rights.

On June 26, 2014, the Supreme Court unanimously struck down the Massachusetts law (with five Justices joining the majority opinion and four Justices concurring). The majority opinion, written by Chief Justice Roberts, found that the law was not "narrowly tailored"—that is, that it restricted more speech than necessary to meet the state's asserted governmental interest in "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy related services"—and thus violated the First Amendment. Key to the Court's conclusion was its reasoning that the plaintiffs, so-called "sidewalk counselors," were not protestors and therefore that the buffer-zone limitations on their ability to speak quietly and in close proximity to patients exceeded the stated governmental goal of protecting public safety. The majority opinion, however, held that the state did have a compelling government interest in enacting the buffer zone, and that the buffer zone law was

“content neutral,” meaning that it did not impermissibly favor one set of speakers over another. Both of these holdings mean that other laws creating buffer zones at reproductive health clinics are not inherently unconstitutional.

That being said, the decision raises concerns about women’s access to abortion services, especially in the context of the unprecedented number of state laws being passed that restrict abortion services, in that it suggests some willingness to single out laws that protect women’s reproductive health for more stringent First Amendment review than other laws. For example, the Court distinguished the reproductive health buffer zone law from a 100-foot buffer zone prohibiting electioneering around polling places because “voter fraud and intimidation are difficult to detect.” For some reason, the Court explicitly rejected the idea that harassment, intimidation and threats at reproductive health clinics can be hard to detect. But harassment—including subtle intimidation—and violence at clinics can limit women’s access to abortion services. When it is harder to access this basic health care service, lower-income women feel the burden more. This decision thus potentially impacts both women’s health and economic security.

### ***Burwell v. Hobby Lobby Stores, Inc. and Conestoga Wood Specialties v. Burwell***

The ACA requires health insurance plans to cover all FDA-approved methods of birth control, sterilization, and related education and counseling without co-pays or other out-of-pocket costs. This provision was intended to further women’s health and equality by removing cost barriers that had led many women to forego consistent use of birth control or to use less costly, less effective forms of birth control. Soon after the requirement went into effect, employers began to file lawsuits claiming that the requirement violates their religious beliefs against birth control.

Over 70 for-profit companies have brought lawsuits in federal court challenging the birth control coverage requirement. The cases to reach the Supreme Court last Term were brought by Hobby Lobby, a nationwide crafts store chain with over 13,000 employees, and Conestoga Wood, a wood furniture manufacturer with nearly 1,000 employees.

On June 30, 2014, a deeply divided Supreme Court

issued a 5-4 decision in *Burwell v. Hobby Lobby Stores, Inc.* and *Conestoga Wood Specialties v. Burwell* that held that the federal Religious Freedom Restoration Act (RFRA) exempts certain closely-held for-profit corporations from complying with the ACA’s birth control coverage requirement if they have a religious objection to doing so. This leaves the women who work for these companies without a critical benefit in the health insurance they receive as compensation for their employment and pay for through their premiums. As Justice Ginsburg’s dissent makes clear, the decision has broad and alarming implications, and threatens significant harm to the women who work for these companies.

Justice Alito’s opinion for the majority held, for the first time, that certain closely-held family-owned for-profit businesses like Hobby Lobby and Conestoga Wood are “persons” capable of exercising religion and therefore can bring religious exercise claims under RFRA. The majority then concluded, also for the first time, that RFRA permits a for-profit business to deny its employees birth control coverage on the basis of the business’s religious beliefs, concluding that the birth control coverage requirement substantially burdened religious belief and was not the “least restrictive means” of forwarding compelling interests in public health and gender equality.

In an opinion that focused primarily on the interests of employers and corporations, the rights and interests of women were largely absent. In fact, the majority refused to engage in any discussion of the important role that birth control plays in women’s lives. Instead, it took care to explain that legal requirements to provide other health care services, like immunizations, were not automatically invalidated by its decision, thus treating birth control differently from other basic preventive health care services and suggesting that it was less worthy of coverage than these other services.

Like *McCullen*, the *Hobby Lobby* decision has ramifications both for women’s health and economic security. This decision puts the health of the women employees at some for-profit companies at risk by allowing their bosses to deny them insurance coverage for critical health services, drugs, and devices. Without insurance coverage, women may not be able to afford the health care they need. Losing this critical coverage and being forced to pay out-of-pocket thus directly

impacts women’s economic stability. In addition, this decision allows employers to treat their female employees worse than their male employees, by limiting the health insurance benefits that women receive as part of their compensation—but not those received by men.

Since the *Hobby Lobby* decision, the Obama Administration has proposed new rules that would require closely-held for-profit businesses that object to providing birth control coverage to inform the U.S. Department of Health and Human Services (HHS) of their objection, thus allowing HHS to take steps to ensure that birth control coverage will be provided to employees by the third-party insurance provider without cost to the business or the employees. It remains to be seen whether these rules will ultimately be implemented in such a way that obstacles are not placed in the way of women seeking birth control coverage. It also remains to be seen whether these rules too will be challenged as violating the religious rights of companies.

## The Court’s Upcoming Women’s Health Cases

### *Young v. U.P.S.*

In 2006, Peggy Young, a pregnant UPS delivery driver in Landover, Maryland, was instructed by her medical provider to avoid heavy lifting during her pregnancy. UPS routinely accommodated employees who needed light duty because they had a disability or an on-the-job injury or when they lost their commercial driver’s license because of a medical condition—or even because of a D.U.I. conviction—but it forced Young to take a leave of absence for the rest of her pregnancy. As a result, she lost her wages and her health insurance coverage. Young sued UPS, but two lower courts ruled against her, finding that the company’s refusal to accommodate medical needs arising out of pregnancy when it accommodated the medical needs of other workers with similar limitations in ability to work did not constitute pregnancy discrimination.

The Pregnancy Discrimination Act (PDA) requires employers to treat pregnant workers the same as they treat those who are “similar in ability or inability to work.” The question at the heart of Young’s case is whether an employer who accommodates the medical needs of non-pregnant employees (as it often must pursuant to the Americans with Disabilities Act,

for example) is required to extend the same type of accommodations to pregnant workers with similar medical needs. The plain language of the statute and the legislative history confirm that Congress intended the PDA to require employers to provide the same treatment to those whose ability to do their job is affected by pregnancy as they provide to those whose ability to do their job is affected by disability, illness, or injury.

If the Court instead concludes that, contrary to the plain language of the PDA, an employer may deny pregnant women the accommodations it affords to workers injured on the job or to workers who have non-pregnancy-related disabilities, employers will be empowered to adopt rules that have the effect of “singling out” pregnant workers with medical needs for accommodation for lesser treatment than is provided to workers with medical needs arising out of disease or injury. This result would be directly contrary to the PDA, which was adopted for the express purpose of preventing employers from treating workers affected by pregnancy worse than workers similarly affected by illness or injury. And in real terms, when employers feel empowered to deny temporary accommodations to those pregnant workers who need them, women are faced with a choice no one should have to make—between losing their paycheck at the moment their families’ expenses are increasing or risking their health and the health of their pregnancies. Women in low-wage jobs are particularly likely to work in physically demanding positions with little flexibility and thus are particularly likely to experience the potentially grave economic and health consequences of denials of accommodation. If the Court adopts a reading of the PDA that permits such harms to be visited on pregnant workers, it will be particularly ironic in the wake of last Term’s decisions, which created new obstacles for women seeking birth control or abortion.

*Will the birth control coverage requirement return to the Court?*

This Term, another case challenging the ACA’s birth control coverage requirement could reach the Supreme Court. The Supreme Court’s decision in *Hobby Lobby* did not put an end to the lawsuits challenging the health care law’s requirement that insurance plans include birth control coverage without cost-sharing. *Hobby Lobby* dealt with for-profit companies challenging the birth control requirement,

and did not address the questions raised by the lawsuits brought by religious non-profit organizations. The non-profit organizations are in a different position than the for-profit companies, since the federal government has already taken steps to “accommodate” non-profit organizations’ religious beliefs. A religious non-profit organization need only certify to its insurance company or to the federal government that it wants to opt out of the requirement to provide birth control coverage, and the insurance company will then provide the benefit directly to the female employees. But non-profit organizations are claiming that this paperwork requirement that they certify their religious objection to providing birth control itself violates their religious beliefs, because it initiates a process that will lead to employees receiving birth control coverage (from a third party). One or more of these cases is likely to reach the Supreme Court.

### **A “Blind Spot” on Women’s Health?**

As Justice Ginsburg agreed in a recent interview, the Court’s decision in *Hobby Lobby* last Term raised concerns that some of the Justices may have a “blind spot” when it comes to women. This Term, women will be watching to see whether in *Young v. U.P.S.*, and, potentially, a second contraceptive coverage case, a majority issues decisions that once again single out women’s reproductive health for lesser legal protections, or whether these cases give the Justices the opportunity to fulfill Justice Ginsburg’s hope that, “if the court has a blind spot today, its eyes will be open tomorrow.”