

## FACT SHEET

# The Birth Control Coverage Cases: For-Profit Businesses Are Suing to Deny Women Insurance Coverage of Birth Control

November 2013

*In the 2013-2014 term, the Supreme Court is expected to take up one or more cases challenging the Affordable Care Act's (ACA) guarantee that women receive health insurance coverage of birth control without cost-sharing. This has been a tremendous step forward for women's health, and so far, over 27 million women have benefited from it.<sup>1</sup>*

The birth control coverage requirement says that all new health insurance plans must cover all FDA-approved methods of birth control, sterilization, and related education and counseling at no cost-sharing.<sup>2</sup> Yet some bosses are using their own religious opposition to birth control to take this benefit away from the women who work for them. So far, over 40 for-profit businesses have challenged the birth control coverage requirement in federal court.<sup>3</sup> They are making claims under the federal Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause of the First Amendment.<sup>4</sup> In each case, bosses are trying to impose their religious beliefs on women and their families, denying women the right to make personal health care decisions for themselves.

On November 26, the Supreme Court is expected to take up one or more of the following three cases:

***Autocam v. Sebelius.*** Autocam includes Autocam Automotive, which manufactures parts for the transportation industry and Autocam Medical, which makes parts for the medical industry such as surgical implants and instruments, and medical device components. A unanimous Sixth Circuit Court of Appeals rejected both the for-profit corporations' and its owners' challenges to the birth control coverage requirement.<sup>5</sup> The court concluded that a for-profit corporation cannot exercise religion and that because the birth control coverage requirement is on the company, not its owners, the company's owners could not bring a challenge to the requirement.

***Conestoga Wood Specialties v. Sebelius.*** Conestoga Wood Specialties is a manufacturer of wood cabinet and specialty products. A divided Third Circuit Court of Appeals rejected both the for-profit corporation's and its owners' challenges to the birth control coverage requirement.<sup>6</sup> The court held, as the Sixth Circuit did, that a for-profit corporation cannot exercise religious belief within the meaning of RFRA or the First Amendment. The court also concluded that because the requirement applies to the company, not the bosses, it does not implicate the bosses' religious exercise.

***Hobby Lobby v. Sebelius.*** Hobby Lobby Stores is a national arts and crafts store chain with over 13,000 employees. In an en banc decision by a divided Tenth Circuit Court of Appeals, the court ruled in favor of Hobby Lobby, finding that the for-profit company can exercise religious beliefs under RFRA.<sup>7</sup> Applying the RFRA standard, the court concluded that the birth control coverage requirement substantially burdened the company's religious exercise and that it was neither justified by compelling state interests in women's health and equality nor was it the least restrictive means of advancing those interests.

**A for-profit corporation is not a "person" capable of religious exercise. And, the birth control coverage requirement applies to the company, not the individuals who own it.**

- A for-profit corporation cannot exercise religion on its

own. As the Third Circuit Court of Appeals explained, a for-profit company is a “for profit ‘artificial being, invisible, intangible, and existing only in contemplation of law’ . . . created to make money” that cannot “exercise such an inherently ‘human’ right.”<sup>8</sup>

- The law distinguishes between a corporation and its owners. Individuals decide to incorporate their business to take advantage of certain protections and to shield themselves from personal liability for actions of their company. Bosses cannot pick and choose when the corporate form acts as a shield and when it does not.
- The birth control coverage requirement says that the insurance plan of the company must include birth control coverage in employee health plans—the requirement is not imposed on the individuals who own the company.

### **The birth control coverage requirement does not amount to a “substantial burden” on the religious exercise of the for-profit company or the individuals who own it.**

- A boss’s religious exercise is not burdened, let alone “substantially” burdened by an employee’s personal decision to use birth control.
- Bosses are not required to use birth control or to encourage their employees to use it.
- The birth control coverage requirement simply means that a company’s health plan must include coverage for birth control (just like any other preventive service) – whether a woman decides to use that coverage is up to her, not her boss.
- A boss should not have the right to determine how workers can use their health insurance any more than he or she could claim to tell workers how to spend their paychecks.

### **Including birth control in employee health plans at no cost-sharing furthers compelling government interests in advancing women’s health and women’s equality.**

***Birth control coverage without cost-sharing promotes women’s health.***

- Birth control is highly effective at reducing unintended pregnancy – which can have severe negative health consequences for women and children.<sup>9</sup> Women also frequently use birth control to treat medical conditions unrelated to pregnancy prevention.
- The high cost of birth control – including cost-sharing requirements – has meant that many women forgo consistent use of birth control and has affected whether women use the most effective form of birth control that fits their circumstances.<sup>10</sup>

### ***Birth control coverage without cost-sharing closes gender gaps in health care.***

- Before the health care law, women paid substantially more for access to basic health care than men, due in part to the high costs of contraception.<sup>11</sup> This was exacerbated by women’s lower incomes and the fact that women, particularly women of color, are more likely to be poor than men.<sup>12</sup> Excluding coverage for birth control in employee health insurance makes it harder – or completely removes – women’s ability to receive this critical care.

### ***Birth control coverage without cost-sharing furthers women’s equality.***

- A woman’s ability to control whether and when she will become pregnant significantly improves her social, educational, and economic opportunities.<sup>13</sup>

### **Limited exemptions from the birth control coverage benefit do not undermine the government’s compelling interests in women’s health and women’s equality.**

- The Supreme Court has rejected the argument that having limited exemptions to laws like the birth control coverage requirement means that the government lacks a compelling interest.<sup>14</sup>
- *Grandfathered health plans* are only temporarily exempt from some ACA rules, including the birth control coverage benefit. Once an individual or group health plan loses its grandfathered status by making routine changes – such as to benefits, cost-sharing or employer-contribution terms – it must comply with the birth control coverage requirement. Over time, virtually all health plans will lose their grandfathered

status.

- *Employers with fewer than 50 employees* are exempt from providing any health insurance to their employees. However, if a small business provides insurance to their employees, it must provide coverage that includes birth control.

### **The birth control coverage rule is the “least restrictive means” of advancing the government’s interests in women’s health and women’s equality.**

- The purpose of the birth control coverage requirement was to include birth control within the framework of the existing health insurance system, so that it could be seamlessly and efficiently incorporated as part of preventive health care.
- Alternatives to the birth control coverage requirement presented by the for-profit companies challenging it are infeasible and less effective than including birth control in existing health insurance. These so-called alternatives suggest that birth control be covered through a publicly-funded program or by providing tax credits to birth control manufacturers or women who decide to use birth control. Each requires that birth control be carved out of employee health insurance and provided separately. As recognized by a judge on the Seventh Circuit Court of Appeals, “[c]arving out from the standard insurance coverage . . . a type of healthcare that a panel of experts have determined to be vital to the health needs of women, and saying it must be provided for separately, reinforces the very disparities that motivated [the requirement].”<sup>15</sup>

### **The birth control coverage requirement is constitutional under the First Amendment.**

- The Supreme Court has held that neutral, generally applicable laws do not violate the Free Exercise Clause of the First Amendment, even if they happen to burden the exercise of religion.<sup>16</sup>
- The birth control requirement does not target a particular religion or religious practice. Its objective was to advance women’s access to recommended preventive services, which serves important public health goals, and to remedy the disparity between men’s and

women’s health care costs, furthering gender equality.

- The limited exemption to the birth control coverage requirement for churches and other houses of worship does not undermine the requirement’s neutrality or general applicability. Rather, it further demonstrates that the requirement does not target religion.<sup>17</sup>

### **A decision allowing bosses to use their religious beliefs to deny their employees birth control coverage may not stop there. It could give bosses the ability to impose their religious beliefs on their employees for other reasons, denying employees access to important health care services and the protections of civil rights laws.**

- The health care law requires coverage of other preventive services and essential benefits. Allowing a boss to refuse to provide birth control could open the door to religious objections to other health care services. For example, a boss could raise religious objections to immunizations, HIV screening, counseling for sexually transmitted infections, maternity care or, to *any* medical care, denying employees access to critical health services.
- It could also give bosses the ability to use their religion to deny employees important rights and protections guaranteed by other laws. In the past, for example, religion has been used to discriminate on the basis of race.<sup>18</sup> A decision in favor of the for-profit companies could allow a boss to cite religious objections to get out of complying with minimum wage or equal pay laws.<sup>19</sup> It could allow a boss to fire a pregnant employee because of a religious objection to sex outside of marriage. A boss could also assert religious objections to same-sex couples’ relationships and refuse to hire someone based on their sexual orientation.

For-profit corporations are using religion to challenge the birth control coverage requirement in court. But true religious freedom gives everyone the right to make personal decisions, including whether and when to use prescription birth control based on their own beliefs and what is best for the health and the well-being of their families.

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- 1 Skopec, Laura and Benjamin D. Sommers, Abstract of ASPE Issue Brief: Seventy-One Million Additional Americans are Receiving Preventive Services Coverage Without Cost-Sharing under the Affordable Care Act (March 2013) at [http://aspe.hhs.gov/health/reports/2013/PreventiveServices/ib\\_prevention.cfm#\\_ftn6](http://aspe.hhs.gov/health/reports/2013/PreventiveServices/ib_prevention.cfm#_ftn6).
- 2 For more information about the birth control benefit, please see Nat'l Women's Law Ctr., *Preventive Services, Including Contraceptive Coverage, Under the Health Care Law*, <http://www.nwlc.org/preventive-services-including-contraceptive-coverage-under-health-care-law>.
- 3 For more information about the cases challenging the birth control benefit, please see Nat'l Women's Law Ctr., *Overview of the Lawsuits Challenging the Affordable Care Act's No Cost-Sharing Contraceptive Coverage Benefit*, <http://www.nwlc.org/overview-lawsuits-challenging-affordable-care-act%E2%80%99s-no-cost-sharing-contraceptive-coverage-benefit>.
- 4 RFRA provides that the federal government must not "substantially burden a person's exercise of religion" unless the burden furthers "a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1 (2012). The Supreme Court has held that neutral, generally applicable laws do not violate the Free Exercise Clause of the First Amendment, even if they happen to burden the exercise of religion. See *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990) (internal quotation marks omitted). The for-profit cases are proceeding on the RFRA claims.
- 5 *Autocam Corp. v. Sebelius*, No. 12-2673, --- F.3d ---, 2013 WL 5182544 (6th Cir. Sept. 17, 2013).
- 6 *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 724 F. 3d 377 (3d Cir. 2013).
- 7 *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. June 27, 2013).
- 8 *Conestoga Wood Specialties*, 724 F.3d at 385 (citation omitted).
- 9 INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 103-104 (2011), available at <http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx>.
- 10 See, e.g., Guttmacher Inst., *A Real-Time Look at the Impact of the Recession on Women's Family Planning and Pregnancy Decisions* 5 (2009), available at <http://www.guttmacher.org/pubs/RecessionFP.pdf> (finding that, to save money, women forewent contraception, skipped birth control pills, delayed filling prescriptions, went off the pill for at least a month, or purchased fewer birth control packs at once).
- 11 Shelia D. Rustgi et al., The Commonwealth Fund, *Women at Risk: Why Many Women Are Forgoing Needed Health Care*, 1 (2009), available at <http://www.commonwealthfund.org/Publications/Issue-Briefs/2009/May/Women-at-Risk.aspx> ("Compared with men, women require more health care services during their reproductive years (ages 18 to 45), have higher out-of-pocket medical costs, and have lower average incomes.").
- 12 Women earn, on average, just 77 cents for every dollar earned by men. See DeNavas-Walt et al., U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2011*, 7 (2012), available at <http://www.census.gov/prod/2013pubs/p60-245.pdf>. For every dollar earned by white, non-Hispanic men, African American women earn just 64 cents, while Hispanic women earn just 55 cents. Nat'l Women's Law Ctr., *FAQ About the Wage Gap*, 2 (Sept. 2012), available at [http://www.nwlc.org/sites/default/files/pdfs/wage\\_gap\\_faqs\\_sept\\_2012.pdf](http://www.nwlc.org/sites/default/files/pdfs/wage_gap_faqs_sept_2012.pdf).
- 13 Access to birth control has contributed to an increase in women's wages and women's increased participation in the workforce. For example, one study found that "the Pill-induced effects on wages amount to roughly one-third of the total wage gains for women in their forties born from the mid-1940s to early 1950s." Martha J. Bailey et al., *The Opt-In Revolution? Contraception and the Gender Gap in Wages* 26-27 (May 13, 2012), available at [http://www-personal.umich.edu/~baileymj/Opt\\_In\\_Revolution.pdf](http://www-personal.umich.edu/~baileymj/Opt_In_Revolution.pdf). That same study estimates that approximately 10% of the narrowing of the wage gap during the 1980s and 31% during the 1990s can be attributed to access to oral contraceptives prior to age 21. *Id.* at 27. Another study concludes that the advent of oral contraceptives contributed to an increase in the number of women employed in professional occupations, including as doctors and lawyers. See Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. POL. ECON. 730, 759-62 (2002).
- 14 *United States v. Lee*, 455 U.S. 252, 261 (1982).
- 15 *Korte v. Sebelius*, 12-3841, 2013 WL 5960692, \*64 (7th Cir. Nov. 8, 2013) (J. Rovner, dissenting).
- 16 *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).
- 17 *O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1160-62 (E.D. Mo. 2012).
- 18 See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (Christian school arguing that prohibiting race segregation would burden its religion).
- 19 See, e.g., *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990) (church-run school claimed compliance with equal pay and minimum wage provisions would violate its religious beliefs and interfere with internal church governance).