

FACT SHEET

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

December 2013

In the 2013-2014 term, the Supreme Court will review two cases challenging the Affordable Care Act's (ACA) guarantee that women receive health insurance coverage of birth control without cost-sharing. This benefit has been a tremendous step forward for women's health, and so far, over 27 million women have benefited from it.¹

In the 2013-2014 term, the Supreme Court will review two cases challenging the Affordable Care Act's (ACA) guarantee that women receive health insurance coverage of birth control without cost-sharing. This benefit has been a tremendous step forward for women's health, and so far, over 27 million women have benefited from it.

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 without cost-sharing – which means without deductibles or co-pays.² 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.³ They are making claims under the federal Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause of the First Amendment.⁴ In each case, bosses are trying to impose their religious beliefs on women and their families, denying women access to critical health care coverage and interfering with a woman's right to make personal health care decisions for herself.

During the 2013-2014 term, the Supreme Court will review two for-profit cases:

Conestoga Wood Specialties v. Sebelius. Conestoga Wood Specialties is a manufacturer of wood cabinet and specialty products with 950 employees. Because

the owners of Conestoga assert a religious objection to providing insurance coverage for emergency contraception and IUDs, the owners and the company claim that the birth control coverage requirement violates the company's and the owners' religious beliefs. A divided panel of the Third Circuit Court of Appeals rejected both the for-profit company's and its owners' challenges to the birth control coverage requirement.⁵ The court held, as the Sixth Circuit did in two separate cases brought by different employers,⁶ 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 to provide this insurance coverage to employees applies to the company, not the owners, it does not implicate the owners' religious exercise.

Sebelius v. Hobby Lobby Stores, Inc. Hobby Lobby Stores is a national arts and crafts store chain with over 13,000 employees. The owners of Hobby Lobby assert a religious objection to providing insurance coverage for emergency contraception and IUDs, so the owners and the company claim that the birth control coverage requirement violates the company's and the owners' religious beliefs. 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.⁷ 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.”⁸
- 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. Indeed, this separation between the company and its owners is the entire purpose of the corporate form. A company's owner cannot pick and choose when the corporation should be considered an entity separate from the individuals who own and run it and when it should not.
- The birth control coverage requirement says that the company's health plan for its employees must include birth control coverage – the requirement is not imposed on the individuals who own the company.

Even if a for-profit corporation could exercise religion, 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.

- Even if the Court were to find that a for-profit corporation can exercise religion, the birth control coverage requirement does not “substantially” burden that religious exercise. 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 or the company she works for.
- The company and the owner are not required to use birth control or to encourage their employees to use it.

- A boss's religious beliefs do not give him or her the right to determine how workers can use their health insurance, just as a boss's religious beliefs do not give him or her the right to require workers to spend their paychecks in particular ways.

Including birth control in employee health plans 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.⁹ Women also frequently use birth control to treat medical conditions unrelated to pregnancy prevention, including menstrual regulation, relieving menstrual pain, or treating endometriosis.¹⁰
- The high cost of birth control has meant that many women forgo consistent use of birth control and can lead to women using less effective forms of birth control.¹¹ For example, upfront costs for an IUD can range between \$500 and \$1,000.¹² A woman can pay up to \$60 per month for a brand-name birth control pill pack, patch, or ring, each of which also requires periodic visits to a health care provider at additional cost.¹³

Not including birth control in comprehensive health plans constitutes sex discrimination.

- Pregnancy is a condition unique to women, and the only forms of prescription birth control available are exclusively for women. Excluding prescription birth control from health insurance that otherwise covers preventive care unfairly disadvantages women by singling out for unfavorable treatment a health insurance need that only women have.
- Failure to cover birth control forces women to bear higher health care costs to avoid pregnancy, and exposes women to the unique physical, economic, and emotional consequences that can result from unintended pregnancy.
- The federal law against sex discrimination in employment, Title VII of the Civil Rights Act of 1964, has

been interpreted to require employers to include prescription contraceptive coverage in their health benefits for their employees if they offer an otherwise comprehensive health plan.¹⁴

- Three states – Michigan, Montana, and Wisconsin – have interpreted their state laws against sex discrimination in employment in the same way as Title VII, placing a contraceptive coverage requirement on covered employers in those states.¹⁵

Birth control coverage 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.¹⁶ The impact of these costs was exacerbated by women's lower incomes and the fact that women, particularly women of color, are more likely to be poor than men.¹⁷

Birth control coverage 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.
- 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."¹⁸ 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 21.¹⁹

The reach of the health care law reflects the fact that Congress determined that including coverage for birth control in employee health plans furthers compelling interests in women's health and women's equality.

- Virtually all individual and group health plans are already or will soon be required to include birth control coverage. Health plans that are not "grandfathered" must comply with all ACA rules, including the birth control coverage benefit. "Grandfathered" plans are temporarily exempt from some ACA rules, including the birth control coverage benefit, to give plans time

to transition into compliance with the ACA. Once a health plan loses its grandfathered status by making routine changes – such as to benefits, cost-sharing or employer-contribution terms – it must comply with all ACA rules, including the birth control coverage requirement. Over time, virtually all health plans will lose their grandfathered status and be required to include birth control in their coverage.

- Nearly all employers that provide health insurance to their employees must provide coverage that includes birth control. Although the ACA says small businesses with fewer than 50 employees do not have to provide any health insurance to their employees, if a small business provides insurance to their employees, it must provide coverage that includes birth control.

The birth control coverage requirement 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 the existing health insurance system. These for-profit companies suggest that the government provide free birth control to anyone who wants it or provide 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]."²⁰

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 some individuals' religious exercise.²¹

- The birth control requirement does not target a particular religion or religious practice. Its objective is 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.
- Twenty-eight states require coverage of birth control.²² The highest courts in both California and New York rejected Free Exercise challenges to these laws, holding that the laws were neutral and generally applicable and advanced the dual governmental interests in women's health and women's equality.²³
- Other laws that advance gender equality have likewise been upheld against Free Exercise challenges. For example, a federal appellate court held that an employer violated Title VII and the Equal Pay Act by offering health insurance only to "heads of households"—which the employer defined as single persons and married men, not married women.²⁴ The court rejected the employer's claim that these laws violate the Free Exercise Clause finding only a minimal burden on religion, if any, and that any burden was nonetheless justified by the government's compelling interest in eliminating gender-based employment discrimination.²⁵
- 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.²⁶

A decision allowing bosses to use their religious beliefs to deny their employees birth control coverage would likely not stop there. Such a decision would likely give bosses the ability to impose their religious beliefs on their employees, denying employees access to other important health care services and the protections of civil rights laws.

- The health care law requires coverage of many preventive services and a wide variety of essential benefits. Allowing a boss to refuse to cover birth control

could open the door to religious objections to covering other health care services. For example, based on his or her religious objections, a boss could refuse to allow a for-profit company to provide its employees coverage for immunizations, HIV screening, counseling for sexually transmitted infections, maternity care or, any medical care, denying employees access to critical health services.

- Allowing bosses to deny employees' a legal right in the name of the bosses' religion could also give bosses the ability to use their religion to deny employees important rights and protections guaranteed by other laws. Religion has been used to justify discrimination on the basis of race and sex.²⁷ 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.²⁸ It could allow a boss to fire a pregnant employee because of a religious objection to sex outside of marriage.

For-profit corporations are using religion to challenge the birth control coverage requirement in court. But true religious freedom gives everyone, no matter who they work for, the right to make personal decisions, including whether and when to use birth control, based on their own beliefs and on what is best for the health and the well-being of their families.

THE BIRTH CONTROL COVERAGE CASES: FOR-PROFIT BUSINESSES ARE SUING TO DENY
WOMEN INSURANCE COVERAGE OF BIRTH CONTROL • FACT SHEET

- 1 Laura Skopec & 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) available at http://aspe.hhs.gov/health/reports/2013/PreventiveServices/ib_prevention.cfm
- 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).
- 5 *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013).
- 6 *Eden Foods, Inc. v. Sebelius*, 733 F.3d 626 (6th Cir. 2013); *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th 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 Rachel K. Jones, Guttmacher Inst., *Beyond Birth Control: The Overlooked Benefits of Oral Contraceptive Pills* (Nov. 2011), available at <http://www.guttmacher.org/pubs/Beyond-Birth-Control.pdf>.
- 11 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).
- 12 Planned Parenthood Federation of American, "The IUD at a Glance," <http://www.plannedparenthood.org/health-topics/birth-control/iud-4245.htm> (last visited Dec. 13, 2013).
- 13 Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services And Supplies Without Cost-Sharing*, 14 Guttmacher Pol'y Rev. 7, 9 (2011), available at <http://www.guttmacher.org/pubs/gpr/14/1/gpr140107.html>.
- 14 U.S. Equal Employment Opportunity Commission Decision (Dec. 14, 2000), available at <http://www.eeoc.gov/docs/decision-contraception.html>.
- 15 In Montana and Wisconsin, the state attorneys general interpreted their state laws to require contraceptive coverage. See Montana Attorney General Opinion Vol. No. 51, Op. No. 16, available at <http://www.doj.mt.gov/resources/opinions2006/51-016.pdf>; Letter from Wisconsin Attorney General Peggy A. Lautenschlager to State Senator Gwendolynne Moore, Oct. 17, 2003 (on file with the National Women's Law Center). In Michigan, the ruling came from the Michigan Civil Rights Commission. Michigan Civil Rights Commission, *Declaratory Ruling on Contraceptive Equity*, Aug. 21, 2006, available at http://www.michigan.gov/documents/Declaratory_Ruling_7-26-06_169371_7.pdf.
- 16 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.").
- 17 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.
- 18 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.
- 19 *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).
- 20 *Korte v. Sebelius*, 12-3841, 2013 WL 5960692, *64 (7th Cir. Nov. 8, 2013) (J. Rovner, dissenting).
- 21 *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).
- 22 Twenty-six states have contraceptive equity laws that require insurance plans to provide coverage of birth control if they provide an otherwise comprehensive prescription drug benefit. In two additional states, the state employment non-discrimination law has been interpreted to require contraceptive coverage. For more information about the state laws, see Nat'l Women's Law Ctr., *Contraceptive Equity Laws in Your State: Know Your Rights – Use Your Rights, A Consumer Guide*, <http://www.nwlc.org/resource/contraceptive-equity-laws-your-state-know-your-rights-use-your-rights-consumer-guide-0>.
- 23 See *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006), *cert. denied* 552 U.S. 816 (2007) (holding that a contraceptive coverage law did not violate the establishment or free exercise clauses of the federal or state constitutions); *Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 85 P.3d 67 (Cal. 2004), *cert denied* 543 U.S. 816, 125 S.Ct. 53 (2004) (same).
- 24 *Equal Emp't Opportunity Comm'n v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986).
- 25 *Id.* at 1368.
- 26 See *O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1160-62 (E.D. Mo. 2012).
- 27 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).
- 28 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).