

FACT SHEET

Burwell v. Hobby Lobby Stores, Inc.
and Conestoga Wood Specialties v. Burwell:
The Supreme Court Allows Some Closely-Held Corporations to
Use Religion to Undermine Women's Health and Equality

August 2014

The Supreme Court's deeply divided 5-4 decision in Burwell v. Hobby Lobby Stores, Inc. and Conestoga Wood Specialties v. Burwell¹ dealt a blow to women's health and equality. In these two cases, for-profit companies challenged the Affordable Care Act's (ACA) guarantee that women receive insurance coverage of birth control in their employee health plan. Justice Alito's opinion for the majority allowed certain closely-held for-profit corporations to get out of complying with the birth control requirement, leaving the women who work for these companies without a critical benefit in the health insurance they earned through their work and paid for through their premiums. As Justice Ginsburg's dissent makes clear, the decision not only hurts the women who work for these companies, but also has alarming implications beyond birth control.

Background: Challenging the Birth Control Coverage Benefit

The Affordable Care Act requires health insurance plans to 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 Including birth control in employee health plans with no cost-sharing furthers women's health and equality. By removing cost barriers to the full range of birth control methods – costs that lead many women to forgo consistent use of birth control or to use less costly, less effective forms of birth control – the benefit will help prevent unintended pregnancy and its accompanying negative health outcomes.³ The benefit also helps to remedy sex discrimination in health insurance⁴ and helps give a woman the ability to decide whether and when she will become pregnant, which significantly improves her social, educational, and economic opportunities.⁵

Yet some employers want to use their own religious beliefs regarding birth control to take this benefit away from the women who work for them. Hobby Lobby, which is a nationwide crafts store chain with over 13,000 employees, and Conestoga Wood, which is a wood

furniture manufacturer with nearly 1,000 employees, are two of over 70 for-profit companies that brought lawsuits against the benefit.⁶ They claim that providing women insurance coverage of birth control violates their religious exercise rights under a federal law known as the Religious Freedom Restoration Act (RFRA). RFRA says that the federal government may not "substantially burden" a "person's exercise of religion" unless doing so is justified by compelling government interests and is the least restrictive way of furthering those compelling interests.⁷

The Majority Opinion

Justice Alito's opinion for the five justice 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 under RFRA, and can bring religious exercise claims under that law.⁸ The majority then concluded – also for the first time – that a for-profit business can use its religious beliefs to deny its employees birth control coverage. In an opinion that focused primarily on the interests of employers and corporations, the rights and interests of women were largely absent.

- **The Majority Defers to the Companies' Religious Claims Rather than Undertaking a Proper Legal Analysis.** The majority held that the birth control coverage benefit imposes a "substantial burden" on the companies' religious exercise.⁹ Rather than analyzing the facts and the law as to the nature of the burden,¹⁰ the majority held that there was a substantial burden simply because the companies said there was.¹¹
- **The Majority Refuses to Engage in a Discussion of the Importance of Birth Control to Women.** Justice Alito's opinion fails to address the benefits of birth control to women, their families, and society at large. Instead, he makes a cursory statement that the Court will "assume" that the government's interest in the birth control coverage benefit is compelling, and moves onto the next issue.¹² By making such an assumption, the majority avoided any discussion of how birth control coverage promotes public health and gender equality by reducing unintended pregnancy rates and allowing women to space their pregnancies, and is critical to women's social, educational, and economic opportunities.
- **The Majority Relies on Unproven Alternatives to the Birth Control Requirement.** In holding that requiring birth control coverage in employee health plans is not the least restrictive means of advancing the compelling interest, the majority references the "accommodation" that was offered to non-profit organizations that hold themselves out as religious,¹³ and assumes, without any evidence, that, if the government were to extend the accommodation to these companies, the effect on the women employees "would be precisely zero."¹⁴ But the effectiveness and appropriateness of the accommodation was not presented to the Court;¹⁵ and, in fact, challenges to the accommodation are currently moving through the lower courts.¹⁶ The majority also suggests that the government could pay for the coverage directly,¹⁷ ignoring that this takes birth control out of employer-sponsored health care and singles it out for different treatment, a result at odds with the very purpose of the benefit.
- **The Majority Offers No Principled Reasoning About How or Why the Decision is Limited.** Justice Alito's majority opinion claims that the decision is limited,¹⁸ but does not make clear why the principles the decision outlines are narrow or should apply

uniquely in the context of birth control coverage. According to the majority, other insurance coverage requirements¹⁹ and certain antidiscrimination laws could still survive RFRA challenges²⁰ – but it does not offer a sufficient explanation as to why those laws differ from the birth control coverage benefit.

The Dissent

In a forceful dissent, Justice Ginsburg calls the majority opinion "a decision of startling breadth."²¹ The dissent focuses on the rights and interests of women workers in these cases, noting, "Working for Hobby Lobby or Conestoga, . . . should not deprive employees of the preventive care available to workers at the shop next door."²² The dissent also raises an alarm about how the decision could undermine other critical rights and protections, warning that the Court "has ventured into a minefield."²³

- **The Dissent Calls Out the Majority for Giving Unprecedented Rights to For-Profit Corporations.** The dissent explains how the Court's decision to recognize for-profit corporations as "persons" capable of exercising religion is unprecedented, goes far beyond the text and legislative history of RFRA, and is "unsound."²⁴ The dissent also disputes the majority's assertion that the decision is limited, noting both that a "[c]losely-held' [business] is not synonymous with 'small'"²⁵ and that "its logic extends to corporations of any size, public or private."²⁶
- **The Dissent Makes it Clear that any Burden is Too Attenuated to be Considered "Substantial."** The dissent "[u]ndertakes the inquiry that the Court forgoes" by analyzing the facts and law to answer RFRA's "substantial burden" question.²⁷ The dissent finds that the birth control coverage benefit simply means that a company's health plan must include coverage of birth control alongside other preventive services.²⁸ Any decision to use birth control is "the woman's autonomous choice," in consultation with her health provider, not a decision made by Hobby Lobby or Conestoga Wood.²⁹ In other words, any connection between the company owners' religious objections and the benefit is too attenuated to be a "substantial" burden on religious exercise.³⁰
- **The Dissent Focuses on How Birth Control Furthers Women's Health and Equality.** The dissent notes that the majority opinion "grudgingly" makes

the assumption that there is a compelling interest.³¹ Instead of merely assuming it, the dissent examines the wealth of evidence demonstrating how the birth control benefit will further the health and well-being of women and their families.³²

- **The Dissent Recognizes that Providing Birth Control Through Employer-Sponsored Plans is the Least Restrictive Means.** Rejecting the majority opinion's least restrictive means analysis, the dissent criticizes the alternatives suggested by the majority and points out that having employers include coverage for birth control in their already existing health plans is the least restrictive way of advancing the government's compelling interests.³³
- **The Dissent Sounds the Alarm on how Far the Majority Opinion Could Reach.** The dissent points out the potential far-reaching consequences of the decision, including the possibility for successful challenges to coverage requirements for other health services, such as vaccines or blood transfusions, or to anti-discrimination laws.³⁴

What the Decision Means

As a result of the Supreme Court's decision, women workers and female dependents of employees at these

companies will not have access to no cost-sharing birth control coverage in their employee health plans as guaranteed by the ACA.³⁵ Thousands of workers at the over 70 other for-profit businesses that have brought similar lawsuits will also likely lose this coverage, as the lower courts resolve those cases consistent with *Hobby Lobby*.

However, the Court's decision did leave in place the contraceptive coverage benefit, meaning that those who do not work at a closely-held for-profit company claiming a religious opposition to birth control will still get the coverage. Currently, 47 million women have access to this benefit,³⁶ and the number is growing.

But by allowing the owners of some companies to withhold health insurance coverage of birth control that is otherwise required by federal law, the majority decision makes it more difficult for women to access the basic health care they need, undermining the rights and economic stability of women workers and their families. And in approving the ability of corporations to use religion to discriminate in this case, the majority opens the door to new challenges by employers with religious objections to other health care benefits or to employers arguing that religious objections should override other responsibilities they have to their employees, such as equal pay.

- 1 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, Nos. 13-354, 13-356, 2014 WL 2921709 (June 30, 2014).
- 2 42 U.S.C. § 300gg-13(a)(4) (2012); Health Res. & Servs. Admin., U.S. Dep't of Health & Human Servs., Women's Preventive Services Guidelines, <http://www.hrsa.gov/womensguidelines> ("HRSA Guidelines") (last visited Aug. 4, 2014), implemented by 77 Fed. Reg. 8,725 (Feb. 15, 2012).
- 3 INST. OF MED. CLINICAL PREVENTIVE SERVICES FOR WOMEN, CLOSING THE GAPS 89-94 (2011), available at <http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx>. See also, 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).
- 4 See, e.g., Equal Emp't Opportunity Comm'n, No. 915.003, EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues (July 14, 2014), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (interpreting the federal law against sex discrimination in employment to require employers to include prescription contraceptive coverage in health benefits for their employees if they offer an otherwise comprehensive health plan).
- 5 See, e.g., Adam Sonfield et al., GUTTMACHER INST., THE SOCIAL AND ECONOMIC BENEFITS OF WOMEN'S ABILITY TO DETERMINE WHETHER AND WHEN TO HAVE CHILDREN (March 2013) (collecting and summarizing studies demonstrating the social, educational, and economic benefits of women's ability to decide whether and when to have children through access to and use of effective contraception); Martha J. Bailey et al., *The Opt-In Revolution? Contraception and the Gender Gap in Wages* (Nat'l Bureau of Econ. Research, Working Paper No. 17922, 2012) 26-27, available at http://www-personal.umich.edu/~baileymj/Opt_In_Revolution.pdf (stating that access to birth control has contributed to an increase in women's wages and a narrowing of the wage gap).
- 6 See Nat'l Women's Law Ctr., Status of the Lawsuits Challenging the Affordable Care Act's Birth Control Coverage Benefit (last visited Aug. 4, 2014), <http://www.nwlc.org/status-lawsuits-challenging-affordable-care-act%E2%80%99s-birth-control-coverage-benefit>.
- 7 42 U.S.C. § 2000bb-1.
- 8 *Hobby Lobby*, 2014 WL 2921709, at *14-19.
- 9 *Id.* at *19-22.
- 10 While courts generally do not question a person's religious belief, they must evaluate RFRA's legal question about whether a law imposes a "substantial burden" on religious exercise. *Id.* at *38-39 (Ginsburg, J., dissenting).
- 11 See *id.* at *21 (majority opinion) (stating that because the companies' owners believe that the benefit requires them to provide coverage for certain forms of contraceptives to which they object or pay a penalty, the regulations impose a substantial burden on religious exercise).
- 12 *Id.* at *23. While Justice Kennedy joined Justice Alito's opinion in full—including the opinion's discussion of the compelling interests—Justice Kennedy's concurrence notes that providing birth control coverage to employees "serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee." *Id.* at *28 (Kennedy, J., concurring).

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- 13 *Id.* at *24 (majority opinion). *See also id.* at *28 (Kennedy, J., concurring) (stating that the accommodation provides “an existing, recognized, workable, and already-implemented framework to provide coverage”). Under the accommodation, an eligible non-profit organization can sign a form to opt out of providing birth control coverage and female employees receive the coverage directly from their insurance company or third party administrator.
- 14 *Id.* at *6 (majority opinion).
- 15 *See id.* at *25 (majority opinion) (noting that the Court does not decide whether “an approach of this type complies with RFRA for purposes of all religious claims”).
- 16 *Id.* at *9, n. 9. *See also e.g., Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014) (mem.). A few days after its decision in *Hobby Lobby*, the Court issued a temporary order in another non-profit case, over the dissent of Justice Sotomayor, joined by Justices Ginsburg and Kagan, which casts doubt on the *Hobby Lobby* majority’s implied approval of the accommodation. *Wheaton College v. Burwell*, No. 13A1284, 2014 WL 3020426 (July 3, 2014).
- 17 *Hobby Lobby*, 2014 WL 2921709 at *24.
- 18 *Id.* at *26.
- 19 *Id.* (noting that requirements to cover immunizations could survive a RFRA challenge).
- 20 *Id.* at *26 (noting that prohibitions against race discrimination in hiring could survive a RFRA challenge).
- 21 *Id.* at *30 (Ginsburg, J., dissenting). The dissent was joined by Justices Sotomayor, Kagan, and Breyer, although Justices Breyer and Kagan did not join Justice Ginsburg’s conclusion that RFRA does not extend to for-profit corporations, finding instead that the Court did not need to reach this question. *Id.* at *45 (Breyer, J. and Kagan, J., dissenting).
- 22 *Id.* at *43 (Ginsburg, J., dissenting) (footnote omitted).
- 23 *Id.* at *44 (Ginsburg, J., dissenting) (footnote omitted).
- 24 *Id.* at *33, 36-37 (Ginsburg, J., dissenting).
- 25 *Id.* at *38, n. 19 (Ginsburg, J., dissenting).
- 26 *Id.* at *38 (Ginsburg, J., dissenting).
- 27 *Id.* at *39 (Ginsburg, J., dissenting).
- 28 *Id.* (Ginsburg, J., dissenting).
- 29 *Id.* (Ginsburg, J., dissenting).
- 30 *Id.* (Ginsburg, J., dissenting) (noting that by using the word “substantia[!]” in RFRA, Congress did not likely “[have] in mind a linkage . . . interrupted by independent decisionmakers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed”).
- 31 *Id.* at *40, n. 23 (Ginsburg, J., dissenting).
- 32 *Id.* at *40 (Ginsburg, J., dissenting).
- 33 *Id.* at *42-43 (Ginsburg, J., dissenting).
- 34 *Id.* at *43-44 (Ginsburg, J., dissenting).
- 35 They may be entitled to birth control coverage through other state or federal law.
- 36 Amy Burke & Adelle Simmons, Dep’t of Health & Human Servs., Office of the Asst. Sec’y for Planning and Evaluation (ASPE), ASPE Issue Brief: Increased Coverage of Preventive Services With Zero Cost Sharing Under the Affordable Care Act, 6 (June 27, 2014), available at http://aspe.hhs.gov/health/reports/2014/PreventiveServices/ib_PreventiveServices.pdf.