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REPRODUCTIVE RIGHTS & HEALTH

ZUBIK V. BURWELL: NON-PROFIT OBJECTING EMPLOYERS WANT TO MAKE IT MORE DIFFICULT, IF NOT IMPOSSIBLE, FOR WOMEN TO ACCESS CRITICAL BIRTH CONTROL COVERAGE

This term, the Supreme Court will review challenges brought by non-profit organizations to the "accommodation" to the Affordable Care Act's birth control benefit. At stake for women in this case is whether their employers can make it more difficult, if not impossible, for them to access essential birth control coverage. The employers object to the accommodation they have been given, even though they do not have to include birth control in their own employer health insurance plan, and instead want to force their employees to navigate economic and other barriers to obtain that coverage elsewhere.

The Birth Control Benefit Was Meant to Further Women's Health and Well-Being

As part of the Affordable Care Act's (ACA) effort to make important preventive services more available, key preventive services must be covered by insurance plans without any additional costs to individuals, like co-payments or deductibles. The removal of financial barriers is designed to help individuals stay healthy and address problems before they become untreatable. Because existing preventive services requirements did not adequately reflect women's needs, and women were more likely to go without necessary health care due to cost, the ACA contains a "women's preventive services" provision requiring the Department of Health and Human Services (HHS) to determine the critical women's services to be covered. HHS asked the Institute of Medicine (IOM) to identify which women's preventive services should be included as part of this requirement.

An expert panel at the IOM identified birth control as one of eight key women's preventive services to be covered, because birth control promotes the health of women and children and furthers women's well-being by allowing them to decide whether and when to have children. As of August 1, 2012, new health insurance plans are required to include coverage of all FDA-approved methods of birth control for women, sterilization, and related education and counseling without imposing any additional costs.[1]

The Birth Control Benefit Is Making a Positive Impact for Women

The impact of the birth control benefit is widespread. It is estimated that 55 million women with private insurance coverage are now eligible for birth control without out-of-pocket costs,[2] and many women are now using that coverage.

The benefit has made a difference for the financial security of women and their families. In 2013, the benefit saved women an estimated $1.4 billion on the birth control pill alone.[3] And the out-of-pocket costs on certain birth control methods have decreased significantly or been eliminated entirely.[4] Prior to the benefit, some of these costs could be prohibitively expensive. For example, an IUD, one of the most effective forms of birth control, can have upfront costs of up to $1,000, which is equivalent to nearly a month's full-time salary for a minimum wage worker.[5] The birth control benefit has gone a long way in helping to remove the cost barriers that kept women from being able to choose the most effective and appropriate birth control method for them.

Non-Profit Organizations with Religious Objections to Birth Control Do Not Have to Provide It in their Insurance Plan But Are Still Bringing Legal Challenges

In implementing the birth control benefit, the Obama Administration decided to accommodate certain non-profit

organizations with religious objections to birth control. The "accommodation" allows an objecting entity to opt out of including birth control in its employer- or school-based insurance plan. The objecting employer only has to fill out paperwork to notify either its insurance plan or the federal government of its objections. If it does so, its health insurance plan does not have to include birth control. The insurance company separately provides the benefit directly to the women without the participation of the objecting employer.[6]

Yet, some non-profit employers and schools have gone to court claiming that the accommodation itself violates the federal Religious Freedom Restoration Act (RFRA).[7] RFRA prevents the government from imposing a substantial burden on the exercise of a person's religious beliefs unless it furthers a compelling government interest and uses the least restrictive means for advancing that interest.

The Supreme Court will review seven of these challenges from objecting employers this term, hearing them together in a consolidated case, *Zubik v. Burwell*.[8]

The Objecting Employers' Challenge to the Accommodation Should Fail

The non-profit objecting employers' challenge to the accommodation is without merit. Already, eight of nine federal courts of appeals found that the accommodation at issue in this case is consistent with RFRA.[9]

First, the accommodation does not impose a substantial burden. The objecting employers erroneously claim that the notification they must provide in order to opt out of the birth control benefit is a "trigger" to women getting birth control coverage. But as the eight federal courts of appeals held, the opt-out notice by the objecting employer does not trigger birth control coverage. It is the law itself that requires insurance companies to provide this coverage, and the non-profit itself "has *no role whatsoever* in the provision of the objected-to contraceptive services."[10]

Second, the accommodation furthers compelling governmental interests. In *Burwell v. Hobby Lobby Stores, Inc.*,[11] as explained in more detail below, five Supreme Court Justices squarely found that the government has a compelling interest in the provision of birth control without cost-sharing.[12] In his concurring opinion, Justice Kennedy stated that the birth control benefit "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."[13]

By promoting access to birth control, the accommodation serves the important goals of promoting women's health, closing gender gaps in health care, and promoting women's equality. As the D.C. Circuit concluded in its decision rejecting the non-profits' challenge: "the accommodation is supported by the government's compelling interest in providing women full and equal benefits of preventive health coverage, including contraception. . . ."[14]

Finally, the objecting employers have not suggested a less burdensome means by which the government can effectively advance this compelling government interest in providing women with meaningful access to the medically appropriate methods of birth control without out-of-pocket costs. Their proposed alternatives include government programs, government incentives, and direct government payments. All would remove birth control from a woman's regular insurance system, impose additional logistical burdens, and reinstate the very economic hardships that the birth control benefit was designed to remove.

For example, the objecting employers suggest that their employees get a "birth control only" insurance plan through the ACA marketplace. But there is no such insurance product in the marketplace. They also suggest that women receive a tax credit for their birth control purchase. But that would require a woman to pay up-front for her birth control, not only an insurmountable financial barrier for many women without the ability to make that payment, but also of little financial benefit to those in most financial need. Moreover, a net tax benefit is not equivalent to the no-cost provision in the current accommodation.

These proposals, like others that have been suggested, require women to take on significant administrative and logistical burdens just to access birth control, burdens that women at non-objecting employers do not face. As the D.C. Circuit Court of Appeals concluded in its assessment of a range of suggested alternatives, "[e]ven assuming that any alternative program had or would develop the capacity to deal with an enormous additional constituency, it would not serve the government's compelling interest with anywhere near the efficacy of the challenged accommodation and would instead deter women from accessing contraception."[15]

The Supreme Court's *Hobby Lobby* Case Itself Demonstrates that the Challenge to the Accommodation is Without Merit

In 2014, the Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc.*, in which it considered a RFRA challenge to the birth control benefit by for-profit employers which did not have access to the accommodation. In a 5-4 decision, the

Supreme Court held that certain closely-held employers could claim an exemption under RFRA from the requirement to include birth control in their health insurance plans. In reaching this conclusion, the Court specifically pointed to the very accommodation already provided to the non-profits as demonstrating that a less restrictive means was available for employees to receive birth control coverage. Justice Kennedy stated that the accommodation "equally furthers" the government's compelling interest in ensuring women such access.[16] Justice Alito's majority opinion stated that employees under the accommodation have the same access to birth control as those who work for non-objecting employers.[17] Given the existing accommodation, neither opinion saw a need to create a new government program.

Following the Court's decision, the federal government extended the accommodation to closely-held for-profits with religious objections like Hobby Lobby. Accordingly, a ruling in *Zubik* will not only affect the employees who work for for-profit companies that now have the accommodation following *Hobby Lobby*.

The Overwhelming Legal Case in Support of the Accommodation is Good News for the Lives, Health, and Futures of Women and Their Families

The Court has already established and accepted the compelling government interest in ensuring women receive birth control without additional costs. The negative effects of the economic and other barriers to access of the proposed alternatives have been identified. And the absence of any burden on objecting employers that even approaches being substantial has been recognized by the vast majority of lower courts considering this issue. For these reasons, the objecting employers' challenge should fail.

That will mean women and their families will be stronger and more secure because of the important interests advanced by the birth control benefit and the accommodation. Women deserve and need real access to birth control, regardless of who their employer may be.

1 The implementing regulations exempt churches and other houses of worship from the birth control benefit. The benefit does not apply to grandfathered plans. The ACA's grandfathering provision provides for a gradual transition to the new regulatory scheme as health plans lose their grandfathered status over time.

2 DEPT. OF HEALTH AND HUMAN SERVS., OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING AND EVALUATION, THE AFFORDABLE CARE ACT IS IMPROVING ACCESS TO PREVENTIVE SERVICES FOR MILLIONS OF AMERICANS (May 2015) https://aspe.hhs.gov/sites/default/files/pdf/139221/The%20Affordable%20Care%20Act%20is%20Improving%20Access%20to%20Preventive%20Services%20for%20Millions%20of%20Americans.pdf.

3 Nora V. Becker & Daniel Polsky, *Women Saw Large Decrease In Out-Of-Pocket Spending For Contraceptives After ACA Mandate Removed Cost Sharing*, 34 HEALTH AFF. 1204, 1209 (2015).

4 *Id*. at 1208.

5 The federal minimum wage is $7.25 an hour. 29 U.S.C. § 206(a)(1). A woman who works 40 hours a week at the minimum wage earns $290 per week, or $1,160 per month, before taxes and deductions. See Brief of the Guttmacher Institute and Professor Sara Rosenbaum as Amici Curiae in Support of the Government at 17 n.37, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (June 30, 2014).

6 45 C.F.R. § 147.131.

7 42 U.S.C. § 2000bb-1 (2016).

8 *Zubik v. Burwell,* 778 F.3d 422 (3d Cir. 2015), *cert. granted*, 136 S.Ct. 444 (Nov. 6, 2015) (No. 14-1418); *Priests for Life v. U.S. Dep't of Health and Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014), *cert. granted* (Nov. 6, 2015) (No. 14-1453); *Roman Catholic Archbishop v. Burwell*, 772 F.3d 229 9(D.C. Cir. 2014), *cert. granted*, (Nov. 6, 2015) (No. 14-1505); *Geneva Coll., et al. v. U.S. Sec'y Dep't of Health and Human Servs.*, 778 F.3d 422 (3d Cir. 2015), *cert. granted*, (Nov. 6, 2015) (No. 15-191); *East Tex. Baptist Univ. v. Burwell, et al.*, 793 F.3d 449 (5th Cir. 2015), *cert. granted*, (Nov. 6, 2015) (No. 15035); *Little Sisters of the Poor Home for the Aged, et al. v. Burwell et al.*, 794 F.3d 1151 (10th Cir. 2015), *cert. granted*, (Nov. 6, 2015) (No. 15-105); *Southern Nazarene Univ. v. Burwell*, 794 F.3d 1151 (10th Cir. 2015), *cert. granted*, (Nov. 6, 2015) (No. 15-191).

9 *Priests for Life v. U.S. Dep't of Health and Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014); *Geneva Coll., et al. v. U.S. Sec'y Dep't of Health and Human Servs.*, 778 F.3d 422 (3d Cir. 2015); *Univ. of Notre Dame v. Burwell, et al.*, 786 F.3d 606 (7th Cir. 2015); *Wheaton Coll. v. Burwell, et al.*, 791 F.3d 792 (7th Cir. 2015); *Little Sisters of the Poor Home for the Aged, et al. v. Burwell et al.*, 794 F.3d 1151 (10th Cir. 2015); *East Tex. Baptist Univ. v. Burwell, et al.*, 793 F.3d 449 (5th Cir. 2015); *Catholic Health Care System, et al. v. Burwell, et al.*, 796 F.3d 207 (2d Cir. 2015); *Michigan Catholic Conference and Catholic Family Services, et al. v. Burwell et al.*, 807 F.3d 738 (6th Cir. 2015); *Grace Schools, et al., and Diocese of Fort Wayne-South Bend, Inc., et al. v. Burwell, et al.*, 801 F.3d 788 (7th Cir. 2015); *Eternal World Television Network v. U.S. Dep't of Health and Human Servs.*, No. 14-12696, 14-12890, 14-13239, 2016 WL 659222 (11th Cir. Feb. 18, 2016). But see *Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs.*, 801 F.3d 927 (8th Cir. 2015); *Dordt Coll., et al. v. Burwell*, 801 F.3d 946 (8th Cir. 2015).

10 *Geneva College*, 778 F.3d at 437 (emphasis added).

11 *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751.

12 NAT'L WOMEN'S LAW CTR., 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 (Aug. 2014), http://nwlc.org/resources/burwell-v-hobby-lobby-stores-inc-and-conestoga-wood-specialties-v-burwell-supreme-court-allows-some-closely-held-corporations-use-religion-undermine-women%E2%80%99s-health-and-equality/.

13 *Hobby Lobby Stores, Inc.*,134 S.Ct. at 2785-86.

14 *Priests for Life,* 772 F.3d at 263-64.

15 *Id*. at 265.

16 *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2786.

17 *Id.* at 2759.