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Issue Brief: What *Zubik v. Burwell* Means For Women

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Last month, the Supreme Court released a decision in *Zubik v. Burwell*, the second major challenge to the Affordable Care Act requirement that certain health plans cover all FDA-approved contraceptive methods for women without cost-sharing. In these consolidated cases, dozens of non-profit entities, including workplaces, colleges, and universities with religious objections to some or all contraceptives, argued that engaging in the process that would allow them to provide a health plan that does not cover all FDA-approved contraceptive methods still violates their rights under the Religious Freedom Restoration Act of 1993 (RFRA).

The Supreme Court declined to rule on the merits of the entities' claims. Instead, the Court remanded the cases back to the lower courts to assist the parties in reaching a compromise that does not infringe on the entities' religious beliefs and also guarantees that women enrolled in their health plans "'receive full and equal health coverage, including contraceptive coverage.'"[1] Given the Supreme Court's failure to resolve the issue once and for all, the fight over the contraceptive coverage requirement continues, with uncertain consequences for women in need of critical health care services.

The Affordable Care Act and Implementing Regulations

Under the Affordable Care Act, most new health insurance plans must cover certain preventive services for women without cost-sharing.[2] These services include all FDA-approved methods of contraception.[3] Entities that offer plans that do not cover all FDA-approved contraceptive methods face tax penalties.[4]

However, there are three categories of entities that, due to their religious beliefs, are entitled to offer health plans that do not cover all FDA-approved contraceptives. First, federal regulations *exempt* health plans established or maintained by religious employers, such as churches, church associations, or other similar religious orders,

[1] *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).
[2] 42 U.S.C. § 300gg-13(a)(4).
[3] Health Res. and Servs. Admin., *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womensguidelines/.
[4] 26 U.S.C. § 4980D.

from the contraceptive coverage requirement.[5] Their employees do not receive contraceptive coverage.

Second, the regulations contain an "*accommodation*" for religious non-profit entities that object to some or all FDA-approved contraceptive methods.[6] The accommodation allows these entities to provide a plan that does not comply with the contraceptive coverage requirement. At the same time, the regulations are intended to ensure that women enrolled in such a plan have access to all FDA-approved contraceptive methods without cost-sharing. Generally, the insurance issuer or third party administrator assumes responsibility for providing contraceptive coverage directly to plan enrollees without cost-sharing.[7]

Finally, in *Burwell v. Hobby Lobby Stores, Inc.*, the first major challenge to the contraceptive coverage requirement, the Supreme Court held that RFRA permits certain "closely-held" for-profit companies to refuse to include coverage of all FDA-approved contraceptive methods in their health plans.[8] In reaching its decision, the Court pointed to the accommodation as a less restrictive way for the government to further its interest in "guaranteeing cost-free access" to contraceptives.[9] Following the decision, the government amended federal regulations to extend the accommodation to some closely-held for-profit organizations.[10]

Under the regulations, eligible entities avail themselves of the accommodation by sending a: (1) self-certification form to the issuer or third party administrator of their health plan; or (2) notice to the Department of Health and Human Services (HHS) with certain information, including its religious objection to coverage of some or all

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[5] 42 C.F.R. § 147.131(a).
[6] *Id*. § 147.131(b).
[7] *Id*. § 147.131(c); 29 C.F.R. §§ 2590.715-2713A(b)-(c), 2510.3-16. This is not necessarily the case for self-insured church plans – plans established and maintained by a church or a convention or association of churches. The federal government does not have the authority to require the TPA of a self-insured church plan to provide contraceptive coverage, but offers to compensate the TPA if it chooses to provide the coverage. Brief for Respondents at 17, *Zubik*, 136 S. Ct. 1557.
[8] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). RFRA prohibits the federal government from imposing a substantial burden "on a person's exercise of religion" unless the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b). For more information about the Court's decision, *see* DIPTI SINGH, NAT'L HEALTH LAW PROGRAM, SUMMARY OF THE SUPREME COURT'S DECISION ON THE ACA'S CONTRACEPTIVE COVERAGE REQUIREMENT (2014), http://www.healthlaw.org/publications/search-publications/Hobby-lobby-analysis#.VztOL5ErKM8.
[9] *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2780.
[10] *See* Coverage of Certain Preventive Services Under the Affordable Care Act, Final Rules, 80 Fed. Reg. 41318 (July 14, 2015) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

contraceptives, the name of their health plan, and the name and contact information for the issuer or third party administrator of the plan.[11]

Zubik v. Burwell

Dozens of religious non-profit entities that object to the use of contraceptives on religious grounds filed cases challenging the accommodation process under the Constitution and RFRA. The entities contend that the requirement to complete a self-certification form or provide a notice to HHS forces them to facilitate access to contraceptives for enrollees in their health plans, making them complicit in conduct that violates their religious beliefs. Eight of the nine Courts of Appeals to hear these cases rejected the organizations' claims.[12]

The Supreme Court consolidated cases from the 3rd, 5th, 10th, and D.C. Circuits – all of which ruled in favor of the government – and agreed to hear the Petitioners' RFRA claims. After oral argument, the Court, in a very unusual move, directed the parties to file supplemental briefs on the issue of "whether and how contraceptive coverage may be obtained by petitioners' employees through petitioners' insurance companies, but in a way that does not require any involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees."[13] The government urged the Court to uphold the current process, but noted that it could be modified to allow non-profit entities to invoke the accommodation by simply telling their insurance issuer that they object to some or all FDA-approved contraceptives.[14] While the Petitioners purported to answer "yes" to the question posed by the Court, they made it clear that their RFRA objections would not be fully addressed unless contraceptives are "provided through a separate policy, with a separate enrollment process, a separate insurance card, and a separate payment source, and offered to individuals through a separate communication . . ."[15] Of course, such a process is not only unworkable, but also completely counter to the purpose of the ACA – to provide women with seamless, automatic coverage of all FDA-approved contraceptives without cost-sharing.

A few short weeks after receiving the parties' supplemental briefs, the Supreme Court issued a decision vacating the judgments below and remanding the cases back to the relevant Courts of Appeals.[16] The Court interpreted the parties' supplemental briefs as agreeing that it would be "feasible" for the government to ensure that women receive

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[11] 45 C.F.R. § 147.131(c); 29 C.F.R. §§ 2590.715-2713A(b)-(c), 2510.3-16(b). *See also Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014).
[12] The 2nd, 3rd, 5th, 6th. 7th, 10th, 11th, and D.C. Circuits ruled against the religious non-profit organizations. The 8th Circuit ruled in their favor.
[13] *Zubik v. Burwell*, Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191 (S.Ct. Mar. 29, 2016) (order for supplemental briefs).
[14] Supplemental Brief For the Respondents, *Zubik* , 136 S. Ct. 1557. However, as the Court noted in its order, this modification would not work for self-insured plans. *Id*. at 15-17.
[15] Supplemental Brief For the Petitioners at 1, *Zubik*, 136 S. Ct. 1557.
[16] *Zubik*, 136 S. Ct. 1557.

seamless contraceptive coverage through the petitioners' insurance companies without infringing on the petitioners' religious exercise.

The Court was careful to state that it expressed no view on the merits of the cases. On a positive note, the Court did reiterate that nothing in the opinion affects the power of the government to ensure that women enrolled in petitioners' health plans have access to all FDA-approved contraceptive methods without cost-sharing. The government may rely on information gathered through the cases as notice of the petitioners' objection to some or all contraceptives, and therefore could proceed to "'facilitate the provision of full contraceptive coverage"' for enrollees, as contemplated by the accommodation.[17]

In a concurring opinion, Justice Sotomayor, joined by Justice Ginsburg, emphasized that the Courts of Appeals should not construe the decision or the order for supplemental briefing "as signals of where this Court stands" on the merits. In addition, she stressed that the opinion does not endorse the petitioners' position that the accommodation imposes a substantial burden on their religious exercise or that contraceptive coverage must be provided to petitioners' employees through separate policies with separate enrollment processes. Such policies do not exist, and requiring them "would leave in limbo all of the women now guaranteed seamless preventive-care coverage under the Affordable Care Act. And requiring that women affirmatively opt into such coverage would 'impose precisely the kind of barrier to the delivery of preventive services that Congress sought to eliminate.'"[18]

The Supreme Court also issued orders in similar cases on appeal from the 2nd, 5th, 6th, 7th, and 8th Circuits. The Court granted review, vacated the judgments below, and remanded the cases for further proceedings consistent with the opinion in *Zubik*.

What This Means for Women

It is critical to note that the orders issued in *Zubik* and the similar cases affect a small but significant subset of women who stand to benefit from the contraceptive coverage requirement – women who receive their health insurance through an organization that objects to some or all FDA-approved contraceptive methods, is eligible for an accommodation, and also objects to the accommodation process itself. After the *Zubik* decision, it is not yet clear if women who receive their health coverage through a non-profit entity that has challenged the accommodation process will receive contraceptive coverage. Hopefully, the government will choose to rely on the information gained through the litigation as notice of the entities' objection and move forward to ensure that employees, students, and dependents have full contraceptive coverage. The Courts of Appeals should act quickly to affirm that all women, no matter where they work or study, have a right to access comprehensive reproductive health care.

[17] *Id*. at 1561.
[18] *Id*. (Sotomayor, J., concurring).