March 2016

National Family Planning & Reproductive Health Association

**Note: This document is intended for NFPRHA members only. Please do not distribute.*

Zubik v. Burwell: Frequently Asked Questions

On Wednesday, March 23, 2016, the US Supreme Court will hear oral arguments in *Zubik v. Burwell*, the consolidation of seven cases brought by religiously affiliated nonprofit organizations challenging the Affordable Care Act's (ACA) contraceptive coverage requirement. Despite the Court's 2014 ruling in *Burwell v. Hobby Lobby Stores, Inc.*, which held that closely held for-profit corporations do not have to comply with the contraceptive coverage requirement, a separate line of cases brought primarily by religiously affiliated nonprofit organizations has continued to work its way through the courts.

Why is the Court Hearing Another Contraceptive Coverage Challenge?

The Court's *Hobby Lobby* ruling only directly impacted certain closely held for-profit corporations, not religiously affiliated nonprofits. Unlike the for-profit corporations, which did not have the right to opt out of providing contraceptive coverage prior to *Hobby Lobby*, religiously affiliated nonprofits were given an accommodation by the Obama administration that allows them to opt out of directly arranging or paying for contraceptive coverage. The objecting nonprofits simply need to sign a form certifying that such coverage violates their religious beliefs and/or notify HHS of their objections in writing. In such cases, the insurance plan or third-party administrator (TPA) must offer the coverage directly to enrollees without cost-sharing. The nonprofits argue, however, that the accommodation imposes a substantial burden on their exercise of religion in violation of the Religious Freedom Restoration Act (RFRA)—the same law under which the Supreme Court ruled in *Hobby Lobby*.

Didn't the Supreme Court Say in *Hobby Lobby* that the Accommodation Was Okay?

Yes and no. In *Hobby Lobby*, much of the Court's reasoning turned on its assessment that the religious nonprofit accommodation was a less restrictive means of ensuring contraceptive access than requiring closely held for-profit corporations to comply with the requirement without the ability to opt out. Although the Court's majority was careful to say that it was not ruling on whether the accommodation complies with RFRA, it wrote, "At a minimum, however, it does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves [the Department of Health and Human Services' (HHS)] stated interests equally well." However, just days after the *Hobby Lobby* ruling was announced, the Court issued an injunction preventing the Obama administration from requiring that Wheaton College comply with the accommodation, casting doubt on precisely how the Court might ultimately rule on the accommodation.

What are the Core Issues in the Current Case?

The nonprofits argue that the accommodation imposes a substantial burden on their exercise of religious beliefs in violation of RFRA. They contend that the act of opting out of the contraceptive coverage requirement triggers the insurer or TPA to provide contraceptive coverage to the nonprofits' employees, thereby forcing the nonprofits to facilitate delivery of the contraceptive coverage which violates their beliefs. The government, which is defending the accommodation, argues that it is the ACA that triggers the insurer or TPA to provide the coverage, not the nonprofits' act of notification.

How is the Court Likely to Rule?

As with any Supreme Court case, it is difficult to predict how the Court will ultimately rule. However, the Court will likely conduct a legal analysis centered on two key questions: does the accommodation substantially burden the objecting nonprofits' exercise of religion, and if so, is the accommodation the least restrictive means of furthering a compelling governmental interest? To date, nine appellate courts have considered and ruled on nonprofit challenges; all but one have ruled against the nonprofits, largely on the grounds that the accommodation does not constitute a substantial burden.

Should the Court determine that the accommodation is a substantial burden, *Zubik* will likely come down to the question of least restrictive means, which was also the deciding issue in *Hobby Lobby*. The nonprofits argue that the accommodation is not the least restrictive means, because the government could "accomplish its goals through existing programs," including Title X. *Hobby Lobby* suggests that the nonprofits may find support for their arguments among at least some of the Justices, as well as strong opposition from others, including Justice Ruth Bader Ginsburg, who in her *Hobby Lobby* dissent refuted the notion that Title X can absorb the unmet needs of individuals with private health insurance coverage. As it did during *Hobby Lobby*, NFPRHA has once again worked with the National Health Law Program to incorporate language into its amicus brief to refute claims that safety-net programs such as Title X are suitable alternative, less restrictive means.

How Does the Death of Justice Scalia Impact this Case?

The unexpected passing of Justice Antonin Scalia has certainly cast uncertainty about the potential outcomes in *Zubik* and other cases expected to be closely decided. However, the swing vote in *Zubik* was always expected to be Justice Anthony Kennedy, and that remains true. Although Justice Kennedy ruled with the 5-4 majority in *Hobby Lobby* (which included Justice Scalia), his concurrence in that case suggests support for the accommodation as a way to balance employers' and employees' interests, which may bode well for the accommodation in *Zubik*. Assuming the rest of the current Court splits along the same lines as in *Hobby Lobby*, if Justice Kennedy were to rule in favor of the accommodation in *Zubik* it would result in a 5-3 ruling upholding the accommodation. If Justice Kennedy rules against the accommodation, it would likely result in a 4-4 tie, meaning the appellate court rulings in the seven cases at issue—

all of which upheld the accommodation—would stand. But such a divided ruling would also not be precedential, meaning that it would have no impact on any other appellate courts or rulings, including those of the Eighth Circuit Court of Appeals, the one appellate court that has ruled against the accommodation to date. In other words, a 4-4 ruling would leave a split among the lower courts that the Supreme Court would ultimately have to settle at some point in the future. Thus the focus in *Zubik*, as it has always been, continues to be convincing five of the Court's Justices to uphold the accommodation.

What Would a Ruling against the Accommodation Mean for the Publicly Funded Family Planning Network?

This is the hardest question to answer. If a majority of the Court (at least five Justices) rules against the accommodation, it would likely be because the Court determined the accommodation is not the least restrictive means because there is some other, alternative means of achieving the government's compelling interest. But the Court's ruling would not make such alternative means a reality; rather, the administration and/or Congress would likely have to take steps to make any alternative means a viable pathway to coverage for women impacted by the ruling, and it is unclear when, or even if, that would occur. If the Court rules against the accommodation, it would leave women who work for objecting religiously affiliated nonprofits without any means of accessing contraceptive coverage, unless and until an alternative means could be implemented. Additionally, a ruling against the accommodation would also take away contraceptive coverage from women working for objecting closely held for-profit corporations (the organizations at issue in *Hobby Lobby*), because the Obama administration post-*Hobby Lobby* expanded the accommodation so that women working for objecting closely held for-profit corporations would still have a means of accessing contraceptive coverage. It is likely that some, although it remains to be seen how many, of the women working for objecting employers would find themselves in need of no- or low-cost family planning care and seek that care in the publicly funded family planning safety net.