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# The Case for Contraceptives: The Legislative History of the ACA's Birth Control Mandate

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## Abstract

This paper seeks to outline the legislative and judicial history of the Affordable Care Act's contraception coverage mandate. It begins by explaining the justifications and specifications of the provision. It then highlights the three phases of litigation that have surrounded the mandate: closely held, for-profit companies; religious nonprofit organizations; and state attorney generals. This paper provides context for the litigation by describing the opposing stances towards the mandate of the Obama and Trump Administrations and the different modifications to the provision made under each administration. In the wake of last week's finalization of the controversial rules the Trump Administration issued, this paper dissects lingering judicial questions about the mandate that are sure to resurface in coming litigation. Finally, I conclude with an urge for the reader to consider if women's health is being granted the status it deserves.

## Introduction

On March 23, 2010, as President Barack Obama signed the Patient Protection and Affordable Care Act (ACA) into law, one has to wonder if he knew of the legal challenges in its future, or of the efforts of the future Administration to dismantle the legislation that defined his tenure as President. Nevertheless, since its enactment, the ACA has been subject to a slew of litigation and torrents of criticism from the Republican Party. One of the provisions that has proven to be the most controversial is the mandate that health insurance plans cover the full cost of Food and Drug Administration (FDA) approved contraceptive methods (Law et al., 2016), which has inspired hundreds of employers to file suit in federal court on the basis of infringement of religious freedom. The policies of the Trump Administration have sought to protect these plaintiffs by expanding exemptions to employers who object to providing birth control, but have likewise motivated lawsuits of their own. This paper seeks to review the history and content of the litigation surrounding the contraception mandate; further, it will highlight lingering judicial questions on the matter and discuss potential arguments that should arise in future rounds of litigation.

## Background of Policy: The Affordable Care Act

Upon the passage of the ACA in 2010, women's preventive care was deemed a primary priority. The essential components of preventive care were enumerated by the Institute of Medicine (IOM), which advised the government to require, among other provisions, private health insurance plans to cover all FDA-approved

contraceptive methods without cost sharing. The IOM (2011) concluded that free availability to birth control is required to "ensure women's health and well-being" (pg. 1). Prior to the ACA, birth control coverage was widely present in private health insurance plans; however, it was not universal, nor did it come without cost-sharing (Sobel, Salganicoff, & Gomez, 2018). Since the passage of the ACA, millions of women have benefited from the contraception mandate; a report from the IMS Institute for Healthcare Informatics revealed that 5.1 million women in 2013 received oral contraceptives with no copay, compared to just 1.2 million in 2012 (Burke & Simmons, 2014).

However, public comments on the potential for the mandate to infringe upon employers' religious freedoms led federal agencies to incorporate both an exemption and accommodation into the provision (Salganicoff, 2016). That is, employers that were distinctly religious (i.e., a church) were altogether exempt from the mandate; other non-profit religious organizations with religious objections could qualify for an accommodation, in which insurers or plan administrators would provide contraception to employees, and employers would not be "required to contract, arrange, pay, or refer for contraceptive coverage" (Birth Control Benefits, n.d., n.p.). Yet, the accommodation was not extensive enough for two different sects of opposition, for two distinct reasons: for-profit companies, which could not qualify for the accommodation and demanded to; and religious nonprofits, which argued they were entitled to a full exemption (Salganicoff, 2016). These two streams of opposition were manifested in high-profile lawsuits; they will be discussed in the following section.

## Litigation and Adjustments Under the Obama Administration

### *Burwell v. Hobby Lobby*

The owners of Hobby Lobby are the devoutly evangelical David and Barbara Green, who have incorporated religious practices into their business; Hobby Lobby's purpose statement includes "honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles" (Hobby Lobby, n.d., n.p.). Because the Greens believe life begins at conception, they oppose four of the contraceptive methods on the FDA-approved list, as they might prevent the implantation of a fertilized egg. These four methods include two methods of emergency contraception and two types of intrauterine devices (Burwell v. Hobby Lobby, 2014). Yet, due to the contraception mandate, the Greens were required by law to provide these methods to their employees. Because Hobby Lobby is a for-profit corporation, it was not entitled to either the exemption or the accommodation. Thus, in 2012, Hobby Lobby filed suit against the provision, which was later heard and decided by the United States Supreme Court (Duke, 2015). On June 30, 2014, the Supreme Court ruled in favor of Hobby Lobby, upholding its right to an accommodation on the basis of the Religious Freedom Restoration Act (RFRA) (Religious Exemptions, 2017). The RFRA bars the government from "substantially burdening" free exercise of religion through regulations or penalties, unless it is doing so to advance a "compelling government interest," and is employing the least restrictive approach to do so (Stahl & Lynch, 2017). Following this decision, the Obama administration altered its policies, allowing

closely-held, for-profit businesses to qualify for the accommodation; a closely-held corporation is one that "is not a nonprofit; has no publicly traded ownership interests; and has more than 50% of the value of its ownership interest owned directly or indirectly by 5 or fewer individuals" (Sobel, Salganicoff, & Gomez, 2018, n.p.).

### *Zubik v. Burwell*

The accommodation was not sufficient for some religiously affiliated nonprofits that already qualified for it. Across the nation, nonprofits began filing suit, arguing that the accommodation, while removing their responsibility to pay for the birth control, did not protect them from complicity in supplying contraceptive methods that violated their religious beliefs (Salganicoff, 2016). Of the suits, seven were consolidated into *Zubik v. Burwell* and heard before the United States Supreme Court.

As in *Hobby Lobby*, the plaintiffs in *Zubik* cited the RFRA in their opposition to the contraceptive mandate (Sobel, Salganicoff, & Gomez, 2018). They claimed that the accommodation substantially burdened their free practice of religion, as "the contraceptive coverage is 'triggered' by their notice, and the insurer or third party administrator utilizes their employer plan to provide the objectionable coverage" (Salganicoff, 2016, n.p.). The "notice" the plaintiffs were referring to was the paperwork they had to submit that stipulated their objection to providing contraceptive coverage (Salganicoff, 2016). After hearing oral arguments, the Supreme Court issued a per curiam opinion on May 16, 2016, remanding the decision back to the lower courts, imploring the parties involved to devise a scheme that balances freedom of religion with the seamless provision of contraceptives (*Zubik v. Burwell*, 2016). On January 9, 2017, the De-

partment of Health and Human Services issued a statement saying it had been unable over the past year to conceive of such a compromise (Religious Exemptions, 2017); nine months later, it dramatically changed course, with the publication of the Trump Administration's Interim Final Guidelines.

### *New Guidelines of the Trump Administration*

The inaugural year of the Trump Administration came with an executive about-face on women's contraceptive access. In October of 2017, the Departments of Health and Human Services, Labor, and the Treasury issued an Interim Final Rule (IFR) on religious exemptions and accommodations for the contraceptive mandate under the ACA. The purpose of issuing the new rules was to drastically extend the exemption in both scope and justification. Under the rules, the exemption applied to nonprofit and for-profit employers, insurers, and private universities or colleges that had a religious objection to the coverage. Most radically, the rules also extended the exemption to nonprofit or closely held for-profit employers, insurers, and private colleges or universities with just a moral objection to contraceptives. The accommodation still exists; however, it is now merely offered as an option to those employers who qualify for an exemption already (*Birth Control Benefits*, n.d.; *California v. HHS*, 2017; *Religious Exemptions*, 2017; Sobel, Salganicoff, & Gomez, 2018). Suddenly, the tables had turned; those champions of the increased access to birth control under the Obama Administration found themselves filing suits against the Trump Administration, which had completely inverted the executive stance on the mandate. As a judge in a subsequent lawsuit on the matter wrote in his opinion, the Interim Final Rules "represent an abandonment of the [Depart-

ments'] prior position with regard to the contraceptive coverage requirement, and a reversal of their approach to striking the proper balance between substantial governmental and societal interests" (*California v. HHS*, 2017, pg.2).

### *The New Face of Litigation Under Trump*

Nearly immediately following the publication of the IFR, a group of Democratic state attorneys from eight states and four nonprofits filed suit in federal court (Hackman, 2017), alleging the new rules infringe upon the Civil Rights Act and the First Amendment (Carter, 2017). Washington Attorney General Bob Ferguson, one of the plaintiffs, writes, "The Civil Rights Act prohibits discrimination against women based on sex or the capacity to be pregnant.

The rules result in women having less access to reproductive health care, which is discrimination based on their gender" (Carter, 2017, n.p.). Two cases in the federal district courts of California and Pennsylvania resulted in the judges issuing preliminary injunctions, effectively preventing the IFR from going into effect (Keith, 2018). Both of these cases have been appealed to their respective circuit courts, and will likely advance to the U.S. Supreme Court (Sobel, Salganicoff, & Gomez, 2018). Thus, the litigation enters into its third phase, as the Government takes a new side, and women's access to contraceptives becomes subject to judges, presidents, employers, and bureaucrats.

### *IFR Finalized*

Despite the surrounding judicial turmoil, on November 7, 2018, the Trump-

administration finalized its IFR, effectively extending the exemption to nearly any employer who can justify a moral aversion to contraceptives. The Departments issued the religious and moral exemptions separately, the first providing the exemption to “entities that object to services covered by the mandate on the basis of sincerely held religious beliefs,” and the second providing “protections to nonprofit organizations and small businesses that have non-religious moral convictions opposing services covered by the mandate” (U.S. Department of Health and Human Services [HHS], 2018, n.p.). The Departments emphasize that the new procedures do not affect existing government operations, such as community health centers, that issue free or subsidized contraceptive coverage to low-income women. Further, they claim that the new exemptions “should affect no more than approximately 200 employers with religious or moral objections” (HHS, 2018, n.p.).

Yet, it is clear that the fight is not over. Proponents of seamless coverage of birth control vow to see the provision rectified by the court, and they reject the statistic the Administration proposed that claimed just 200 employers would be affected. Fatima Goss Graves, the president of the National Women’s Law Center, has spurned the new provisions, saying, “If the Administration thinks it can move these rules forward without a fight, they’re wrong. Countless women depend on this critical birth control coverage for their health and economic stability— and we will continue to fiercely defend them” (Mosbergen, 2018, n.p.). As the battle over birth control continues, it is important to consider the judicial questions that remain unanswered, the opposing statutes at play, and how legal arguments will evolve in the wake of

the finalization of Trump’s rules. These will be considered in the next section.

### *The Judicial Future of the Contraceptive Coverage Mandate*

As the new battle lines are drawn between the Administration and religious or “moral” employers, and those proponents of seamless contraceptive coverage, it is critical to define what precisely is coming to a head. The Trump Administration and its supporters have extended the exemption to objecting employers; opponents claim this violates the First Amendment and the Civil Rights Act. Champions of the contraceptive movement would like to see at the very least a compromise between religious freedom and seamless contraception—hence, the accommodation—but opponents claim any imposition of the mandate violates the RFRA. Each of these statutes comes with a myriad of constitutional interpretations and judicial precedent that will surely factor into the Supreme Court’s ultimate decision, if and when it decides to hear the pending cases.

### *The Religious Freedom Restoration Act*

First, it is imperative the Court address the lingering questions of the RFRA that remain unresolved since *Zubik*. Recall again the components of the RFRA, which reads that the “Government shall not substantially burden a person’s exercise of religion” unless “it demonstrates that application of the burden to the person is in furtherance of a compelling government interest and is the least restrictive means of furthering that compelling government interest” (Religious Freedom Restoration Act of 1993, 2018).

### *Does the accommodation substantially burden the religious exercise of employers?*

Prior to *Zubik*, over 100 nonprofit organizations claimed that the accommodation to the contraceptive mandate does indeed substantially burden their religious freedom (Sobel, Salganicoff, & Gomez, 2018). The Court, however, failed to endorse or refute this position in *Zubik* (Epps, 2016), instead taking a more practical approach, mandating the parties reach a compromise (Stahl & Lynch, 2017), leaving the question unsettled. Moving forward, proponents of contraceptive coverage must either devise a superior compromise between the exemption and the accommodation, convince the Supreme Court that the accommodation is not a substantial burden to religiously objecting employers, or convince the Supreme Court that, although the accommodation may impose a substantial burden, it is justified by a compelling government interest.

Does the government have a compelling interest in mandating employers provide contraceptives against their religious beliefs? The Obama Administration cited three primary compelling interests in upholding the contraceptive mandate: gender equality, female autonomy, and public health. First, the Administration argued that access to contraceptive methods advanced gender equality by permitting women to control when they would have a child and how many they would have, thus allowing them to be equally involved and competitive in the workforce (Stahl & Lunch, 2017). Further, the mandate allows women control over their own bodies that is not subject to an employer’s discretion. It also reduces the number of unwanted pregnancies and diseases prevented by contraceptive methods, and is

thus an important factor in the preservation public health (Sobel, Salganicoff, & Gomez, 2018). In *Burwell v. Hobby Lobby* (2014), however, the Court decided such generalities would be insufficient in future cases, and instead the compelling interest needed to be justified in requiring particular employers to provide contraceptives.

The Trump Administration, however, has been clear on its position that the coverage of birth control does not serve a compelling government interest. It points to the millions of women enrolled in grandfathered plans, which are all legally exempt from the contraceptive mandate (Religious Exemptions, 2017). Further, it emphasizes the existence of many federal, state, and local programs that already provide free or subsidized contraceptives for low-income women, and argues, “the availability of such programs to serve the most at-risk women diminishes the Government’s interest in applying the Mandate to objecting employers” (Religious Exemptions, 2017, pg. 47803). In addition, the Departments argue that imposing the contraceptive mandate on objecting organizations will not even benefit the women who are the most prone to experiencing unplanned pregnancies—women who are unmarried, 18-24 years old, low-income, lack education, or are part of a minority group (Religious Exemptions, 2017; Institute of Medicine, 2011). Thus, the Trump Administration argues, the compelling interest to impose such a mandate on religiously or morally objecting employers is lacking.

Is there a less restrictive way of ensuring women have access to free contraceptive methods without cost-sharing than the accommodation?

In *Zubik*, the nonprofits claimed that less restrictive ways to provide contraceptives to women existed, such as permitting

these employees to receive subsidies on the health insurance exchange to enroll in a contraceptive-only plan, or by taking advantage of Title X, which provides federal funds for family planning. In response, however, the Obama Administration contended that these methods would impose “financial, logistical, informational, and administrative burdens” on women (Priests for Life, et al. vs. HHS, 2014, pg. 66). In a concurrence to the per curiam order in *Zubik*, Justice Sotomayor points out that such “contraceptive-only plans” are currently nonexistent and could even run contrary to federal law (*Zubik v. Burwell*, 2016). The Court will either have to decide that the accommodation is the least restrictive way to provide seamless coverage without imposing disproportionate costs on women, or the parties will once more be called to devise a less restrictive method that balances interests. I believe that such a compromise could entail altering the ACA requirements to remove mandatory coverage of the copper intrauterine device, which is the only method of the four alleged abortifacients that has been shown to prevent the implantation of a fertilized egg (Carmon, 2014).

### *The Civil Rights Act and The Constitutionality of a “Moral Objection”*

On the opposite side of the issue, arguments remain to be fully shaped, as the appellate cases have not yet been heard. Yet, opponents’ strength should lie in two primary arguments: the unconstitutionality of the so-called “moral” exemption, and the violation of the Civil Rights Act on the basis of discrimination of sex.

First, opponents should argue that the moral exemption is an attack on the

First Amendment’s Establishment Clause, which prohibits the government from enacting any law “respecting an establishment of religion” (Carlson, 2017). The Attorney General of California, who filed suit under the interim rule, has contended that the moral exemption is so broad that the government is effectively favoring “one religion over another, or religion over irreligion,” (*Board of Education of Kiryas Joel Village School District v. Grumet*, 1994, pg. 703; Butash, 2017), which has been prohibited by the Courts on the basis of the Establishment Clause. The ACLU (n.d.) has likewise contended, “While religious freedom gives us all the right to our beliefs, it doesn’t give institutions or individuals the right to impose their belief on others or to discriminate” (n.p.). By making the moral exemption so generalized, the Government is unduly prioritizing the moral convictions of employers over women’s accessibility to health care, in violation of the Establishment Clause. After establishing the overreach of the exemption, opponents must argue that the interests behind providing contraceptive coverage are significant and worthy of governmental action. This should be accomplished by pointing out that coverage of contraceptives is fundamentally a question of civil rights and equal protection under the law.

For this contention, opponents should point to a key Equal Employment Opportunity Commission (EEOC) ruling in December 2000. In this case, the EEOC (2000) mandated that employers who provided prescription drug coverage to their employees must also cover contraceptive methods, lest they be found in violation of Title VII of the 1964 Civil Rights Act. Title VII prevents discrimination on the basis of sex. This argument should be extended to the present-day scenario. Refusing to cover contraceptive meth-

ods, which are both a critical component of female preventive care and a facilitator of unobstructed female participation and advancement in the workforce, solely penalizes women and puts female employees at a disadvantage in comparison to their male counterparts.

### *Conclusion*

This paper outlined each phase of litigation surrounding the contraceptive mandate of the ACA: for-profit companies demanding an accommodation, nonprofits demanding an exemption, state attorneys general opposing expanded exemptions, and future litigants likely to emerge after the passage of the final rules, just last week. It then addressed the remaining judicial questions the Supreme Court will be ultimately responsible for resolving and discussed potential precedent today’s plaintiffs should consider employing. Now, I turn to the more fundamental issue of women’s health becoming both a political pawn and a matter whose quality is so closely tied to unaffected persons in power. I remind the reader to remember that women’s access to contraceptives is not merely a matter of Constitutional language, administrative jargon, and bureaucratic loopholes. A woman’s decision to use contraceptives is one often approached with great consideration, as she weighs the hormonal imbalance some methods could impose upon her body with her desire to live without fear of becoming pregnant, thus altering the course of her life. It is maddening and terrifying, then, if a woman must also be forced to consider if her government will suddenly decide that she is not entitled to those contraceptives any longer.

Therefore, once all of the judicial backlash has quelled, we must revisit the

question of severity regarding whether women’s health meets parity with the permanence of the regulations surrounding it. Further, we must reevaluate how we balance our priorities. As noted by Stahl & Lynch (2017), religion is something that is fundamentally pervasive and guiding in a person’s life—but then, of course, so is that person’s health. Why have we convinced ourselves it is necessary to sacrifice one for the other?

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