ISSUE ADVISORY: *Zubik v. Burwell* – Religious Discrimination Threatens BC Access

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On March 23rd, the Supreme Court will hear the case ***Zubik v. Burwell***. *Zubik* questions whether the Health and Human Services contraceptive-coverage mandate and its accommodation under the Affordable Care Act (ACA) violate the **Religious Freedom Restoration Act (RFRA)** by forcing religious non-profits to act in violation of their religious beliefs as protected by the First Amendment.

Consequences May be Serious for Many - This case has the potential to cause widespread harm to women, LGBTQIA people, children and others. *Zubik* plaintiffs focus on the birth control benefit, but a ruling in their favor could open the floodgates for institutions, companies and individuals to use their religious beliefs to harm or discriminate against others in a wide variety of situations. Catholic women of reproductive age – the vast majority of whom who use or have used modern birth control and who are employees of these religiously-affiliated non-profits are especially disadvantaged by the extremist claims represented in *Zubik*.

Additionally, employees of for-profit entities that are the "closely-held" companies whose owners object to providing insurance coverage for contraception, as in the *Hobby Lobby* case, fall under the accommodation. Many tens of thousands of women of reproductive age could be denied coverage.

Six cases have been consolidated under *Zubik*: *Priests for Life v. Burwell, Southern Nazarene University v. Burwell, Geneva College v. Burwell, Roman Catholic Archbishop of Washington v. Burwell, East Texas Baptist University v. Burwell* and *Little Sisters of the Poor Home for the Aged v. Burwell*. The six cases originate from a total of 43 lawsuits filed against the ACA contraceptive mandate.

Least Restrictive Means is at Issue - Nine appellate courts have ruled on lawsuits concerning this issue (D.C., 2nd, 3rd, 5th,6th ,7th ,10th, and 11th federal circuit courts). **All but one** (8th) sided with the government and ruled against the nonprofits defending a women's right to reproductive health. The specific legal question to be addressed is: Whether the HHS contraceptive-coverage mandate and its "accommodation" violate the Religious Freedom Restoration Act by forcing religious nonprofits to act in violation of their sincerely held religious beliefs, when the government has not proven that this compulsion is the least restrictive means of advancing any compelling interest. Announcement of the Court's ruling is expected in June.

Following passage of the **Affordable Care Act**, the **Department of Health and Human Services** gave churches an exemption from the law. When numerous religiously-affiliated non-profit organizations (hospitals, universities, charitable entities, anti-choice groups) objected to the birth control coverage mandate, the **Obama administration** responded with an "accommodation" that permitted those objecting organizations an exemption from the law.

Accommodation Allows Groups to Deny Insurance Coverage - The original accommodation allowed a narrow exemption under which the religious non-profits had to inform their insurance carriers of their objection to contraceptive coverage; the insurers were to then issue separate contraceptive insurance coverage policies for the employees. Subsequent litigation pressure forced the administration to change the accommodation to require objecting employers to send a notification form with the insurer's name an address directly to HHS and arrangements with a third party would be made with insurers to provide coverage. Some nonprofits object to even signing and submitting the form. This is the accommodation being challenged in *Zubik*.

The claim that is made by religiously affiliated groups is that the mandate is a violation of those groups' religious liberty as guaranteed by the **First Amendment** and the **Religious Freedom Restoration Act** (RFRA), the same law that was invoked in *Hobby Lobby v. Burwell*. NOW and other women's and civil liberties groups argue that organizations refusing to provide contraceptive coverage in employees' insurance plans are imposing their religious beliefs on employees and are engaging in unfair discrimination based on religious beliefs.

Using Religion to Discriminate is Not New - In the 1960s, institutions objected integration because of sincerely held beliefs that God wanted the races separate. Universities refused to admit students who engaged in interracial dating. Religious freedom guarantees the right to religious beliefs, but it does not grant the right to discriminate against others. Those that oppose the accommodation requirements are arguing for the right to impose their faith on other citizens by controlling how the government operates. The U.S. Court of Appeals, Fifth Circuit concluded:

> "The Plaintiffs' religious beliefs forbid them from providing or facilitating access to contraceptives, but the requirement that they enter into the contracts does not force them to do so. The acts that violate their faith are the acts of the government, insurers, and third-party administrators, but RFRA does not entitle them to block third parties from engaging in conduct which they disagree."

RFRA is now being used by an array of companies and organizations to avoid having to comply with various local, state, and federal laws. A number of them have related to objections to providing services to same sex couples. This is the unfortunate outcome of the *Hobby Lobby* decision in which it said that corporations can hold a religious belief. *Hobby Lobby* was certainly the product of an activist Court majority inventing a new application for a religious liberty right and one benefiting -- not humans -- but corporations! The *Hobby Lobby* decision, some say, was predictable in that the Supreme Court has been deliberately stacked with very conservative members who also identify as Roman Catholic. (Not all, it should be said, oppose abortion rights nor are conservative in their political views.)

Catholic Bishops Lead in Contraceptive Challenges - The organization most instrumental in recruiting the 100 plus lawsuits against the ACA's contraceptive mandate is the **U.S. Conference of Catholic Bishops**. The bishops have taken a lead role in pressing for broader exemptions from the ACA mandate. To promote this agenda, the bishops tapped into their huge network of religious non-profit schools, universities, hospitals, and social service agencies, along with for-profit businesses and any individuals who are morally opposed to contraception. A public relations campaign against the ACA mandate and extensive litigation has been waged to those ends.

It is unfortunate that after many decades of wide use of modern contraception, plus the fact that more than 90 percent of Catholic women have used contraception, the bishops and other

conservative groups will not accept reality. It is obvious to many that the contraception challenges are an attempt to exert power and control over women – and even the federal government.

Catholic Women are the Missing Interest - SCOTUSblog Guest Writer Leslie Griffin points out the Catholic women are the "missing interest" in this case. Even though the bishops claim to represent 69 million Catholic Americans, she writes, "Catholic women do not share the hierarchy's views on contraception." Interestingly, 82 percent of Catholics say that birth control is morally acceptable, compared to 90 percent of Non-Catholics and 89 percent of all Americans, according to a Gallup poll (May, 2012). So, really, who does the USCCB represent?

Griffin makes it clear that the accommodation was flawed from the very beginning in that the "exemption harmed Catholic women's religious liberty to make their own decisions about contraceptive access and placed the government on the hierarchy's side of the religious liberty debate, even though the hierarchy argued that contraception is unimportant to women's health."

Accommodation Was the Wrong Solution - The "accommodation" mechanism from the start was a flawed solution that harms women and empowers the wrong people, Griffin writes. She notes that the administration's motivation may have more to do with concern over the so-called Catholic vote, but it has never been demonstrated that the bishops can deliver on that. On the question of contraception, the bishops do not even represent the vast majority of Catholic laypersons.

Scores of amicus briefs have been filed on either side of the case. The **National Organization for Women Foundation** has signed onto the **National Women's Law Center** amicus brief along with 67 other interested organizations. The brief argues that the contraception regulations advance a compelling government interest because they protect women and children's health and promote gender equality. The contraception regulations further those compelling government interests.

All employers need to do is to fill out a form stating their opposition to opting out of having to provide contraceptive insurance coverage. Under the accommodation, when an employer objects to the contraceptive coverage, the insurance company provides the birth control coverage and communicates directly with the employees. Seems like a workable process, right? But, the employers assert that filling out the form impermissibly burdens their rights under the Religious Freedom Restoration Act because it "triggers" birth control coverage, making them complicit in an action that violates their religious beliefs.

Petitioners Offer "Alternatives" Accommodation - The suggested alternatives include having women sign up for separate, contraceptive-only health plans, or having employees to sign up for subsidized health plans of Affordable Care Act exchanges where they could get contraceptive insurance coverage, or giving tax incentives to contraception suppliers to provide these medications at no cost to consumers.

Women Worse Off Under Alternatives - Analysis of these alternatives in the National Women's Law Center brief finds that these proposed alternatives would remove contraceptive coverage from a woman's regular insurance plan, and impose additional administrative, logistical, and monetary burdens that would make it difficult, if not impossible, for women to access contraception. Specifically,

> "They would allow petitioners' exercise of religion to unduly restrict the ability of their female employees, students, and beneficiaries to access guaranteed and necessary health care services. This would render women working for objecting employers worse off than their male colleagues and women working for non-objecting employers. This result is not permitted by this Court's precedents, including *Hobby Lobby*. The Petitioners' proposed alternatives would not as effectively advance the government's interest and would also reinstate barriers that would unduly infringe on women and cause tangible harm."

Contraceptive Insurance Coverage Valuable - According to the National Center for Health Statistics, in 2011-2013, approximately 62% of women aged 15-44 were currently using contraception; 99% of sexually active women have used birth control at some point in their lives. Improved access to effective contraception reduces women's risk of unintended pregnancy, which in turn advances the health and well-being of women and children, reduces the need for abortion, and promotes women's education workforce participation and economic advancement. The birth control benefit under the ACA is a critically important and valuable benefit for women, estimated to be saving more than $1 billion per year on birth control pills alone. More than 55 million women are now eligible for the ACA birth control benefit.

Women deserve insurance coverage of birth control no matter where they work or go to school. No woman should be denied the benefit she is entitled to as a matter of law because of her employer's beliefs. On March 22, 1972, *the Eisenstadt v. Baird* decision legalized birth control for ALL Americans—single women were prohibited the use of birth control in more than half the states in the country. Let's not go back in time, and continue to fight for reproductive justice.

Our Hope for the Outcome - NOW hopes that the Court will find in favor of the government and for women's health. It is clear to us that the "accommodation" – wrongly conceived as it was -- is the least restrictive means to advance what is clearly a compelling governmental interest in preserving women's health. This case is not about protecting religious freedom, it is a conscious effort to control women's bodies.

NOW activists and allies will again be gathering for a rally in front of the Supreme Court when the case is being argued. You can participate on that day (March 23) via a Digital Rally, 9 a.m. to 12 noon, ET, hashtag #**HANDSOFFMYBC**

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