Supreme Court to Decide Fate of Affordable Care Act Contraceptive Coverage Mandate

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The US Supreme Court recently heard its third case regarding the contraceptive coverage mandate of the Patient Protection and Affordable Care Act (ACA), which requires all health insurance plans to cover US Food and Drug Administration (FDA)-approved contraceptives without cost sharing. The pair of consolidated cases, Little Sisters of the Poor v Pennsylvania and Trump v Pennsylvania, concerns the Trump administration’s regulations that vastly expanded the universe of employers exempt from the mandate. The rules would exempt from this ACA requirement any employer with a religious or nonreligious moral objection to providing contraceptive coverage. In July 2019, the Third Circuit Court of Appeals upheld a nationwide injunction, so the rules have not yet taken effect. If the US Supreme Court reverses the decision of the Third Circuit and upholds the new rules, many employers could remove contraceptive coverage from their insurance plans. For women with employer-sponsored health insurance, such a decision could leave many without contraceptive coverage and thereby undermine public health.

The ACA Contraceptive Mandate and Obama Administration's Religious Accommodation

The ACA requires all insurance plans to cover certain preventive services without cost sharing. Prior to the ACA, contraceptives represented 44% and 30% of out-of-pocket health care spending on average for privately insured women who filled at least 1 oral contraceptive prescription or had an intrauterine device placed, respectively. The high cost kept many uninsured women as well as some insured women from obtaining contraception. The evidence suggests that the contraceptive coverage mandate is accomplishing its goals—most of the ACA’s reduction in out-of-pocket prescription drug costs for women of reproductive age can be attributed to the mandate, and decreases in cost sharing have been associated with better and more consistent use of contraceptives.

The preventive services required by the ACA include those given an A or B rating by the US Preventive Services Task Force. The Mikulski Women’s Health Amendment to the ACA extends this coverage requirement to include all FDA-approved methods of contraception. This extension is based on guidelines from the Health Resources and Services Administration, which relied on recommendations from the Institute of Medicine.

The ACA itself did not include exemptions for employers who had a religious objection to providing designated preventive services. The Obama administration, relying on the Religious Freedom Restoration Act (RFRA), exempted certain religious employers, such as houses of worship, from complying with the contraceptive coverage mandate and offered an accommodations process for other nonprofit employers that objected to providing contraception for religious reasons. These employers could inform their insurer or Health and Human Services (HHS) of their objection, and HHS would ensure that insurers provided employees with full contraceptive coverage.
Previous Contraceptive Mandate Litigation—Hobby Lobby and Zubik Cases

The first contraceptive coverage mandate case decided by the Supreme Court, *Burwell v Hobby Lobby Stores* in 2014, concerned for-profit employers with religious objections to the mandate. The Supreme Court found that the mandate was not the least restrictive means of ensuring their employees had access to contraception. Therefore, closely-held for-profit corporations with religious objections, such as Hobby Lobby Stores, were not required to provide their employees with contraceptive coverage. Instead, the Supreme Court extended the accommodations process to these companies.

The court did not rule on the legality of the accommodations process and left open the question of whether this solution for employers with religious objections was consistent with the RFRA. Objecting nonprofit employers continued to argue that compliance with the accommodation would itself violate their religious beliefs (“complicity”), and this challenge in 2016 was the subject of the Supreme Court’s second contraceptive coverage mandate case, *Zubik v Burwell*. The Supreme Court again declined to address the accommodations question and directed the parties to return to the administrative process to seek a mutually agreeable solution. To date, however, no solution has been reached, and in the recent oral argument in *Trump v Pennsylvania*, several justices expressed continued frustration that the parties still had not reached a workable compromise.

Trump Administration Rules

In November 2018, the Trump administration promulgated rules that determined objecting employers would not be subject to the accommodations process and instead would be fully exempt from the mandate. The rules expanded the class of exempt employers to any objecting organization regardless of corporate form or ownership. Although the RFRA only pertains to religious beliefs, the new rules also exempted employers with nonreligious moral objections from providing contraceptive coverage.

Challenges to Trump Administration Rules—Current US Supreme Court Case

Several states, including Pennsylvania and New Jersey, sued to challenge the Trump administration’s new rules. These states are now defending the Third Circuit’s decision to suspend the rules in the case currently before the Supreme Court. Of the four core legal questions at issue in this case, we note the 2 that are most central from a public health perspective and could carry consequences for policy making beyond the case at hand. First, did the Trump administration comply with the notice and comment procedures required by the Administrative Procedure Act when a federal agency promulgates a regulation? Second, does the administration have statutory authority under the ACA or RFRA to exempt all these plans from the preventive services requirement?

At oral argument, the second issue dominated the justices’ questioning, perhaps indicating that the justices plan to address the more fundamental ACA and RFRA questions rather than decide the case on narrower Administrative Procedure Act grounds. Based on the justices’ focus on the RFRA at oral argument, the court could uphold the religious exemption rule while striking down the moral exemption rule.

If the Supreme Court reverses the Third Circuit’s decision and upholds the Trump administration’s rules, employers could decline to provide contraceptive coverage without taking any steps to ensure that their employees can still access affordable contraception. If employers could opt out based on a personal opposition to contraception for religious or nonreligious moral reasons, the decision could erode the ACA’s vision of comprehensive coverage by allowing employers to choose which preventive services to cover. As Justice Sotomayor explained during oral
arguments using a hypothetical example concerning coverage for a future COVID-19 vaccine, a decision upholding the rules could have broad implications. Whenever an employer wanted to refrain from including a particular type of ACA-mandated care in its health plan, the employer could claim it was not being covered based on religious or moral beliefs. With its ruling expected in June, the Supreme Court’s decision in <i>Trump v Pennsylvania</i> will have profound implications for the ACA and its contraceptive coverage mandate.

**ARTICLE INFORMATION**

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