



To: Debra Ness, President, NPWF
From: Sarah Lipton-Lubet, Director of Reproductive Health Programs, NPWF
Date: July 1, 2014
Re: *Burwell v. Hobby Lobby Stores, Inc., et al.*

Yesterday, the Supreme Court issued a decision in *Burwell v. Hobby Lobby Stores, Inc., et al.* In a deeply split and devastating 5-4 decision, the Court ruled in favor of the petitioners, Hobby Lobby Stores, Inc. and Conestoga Wood Specialties Corp., holding that the federal contraceptive coverage rule violates the Religious Freedom Restoration Act by imposing a substantial burden on the petitioners' religious exercise. You can read the decision [here](#).

Topline Messages:

- The Supreme Court ruled yesterday that some bosses can withhold coverage for contraceptive care from their employees' health insurance based on their own religious beliefs that their employees may not share. Yesterday's decision singles out birth control, and the women who need it, for discrimination.
- Birth control is a vital part of women's health care—99% of women use contraception at some point in their lives. It is covered by health plans without copays or deductibles under the regulations implementing the Affordable Care Act, allowing a woman and her doctor—not her boss—to decide what's best.
- More than 27 million women have already benefited from the ACA's birth control provision, and it has saved women over \$480 million.
- Yesterday's decision is unprecedented in terms of giving bosses the ability to interfere in their employees' health care decisions. This decision threatens to embolden for-profit corporations to push the envelope even farther.
- Although the Court limited today's decision to closely held corporations, these are not just mom and pop shops. As Justice Ginsburg pointed out, for example, the candy giant Mars, Inc., is a family-owned business with 72,000 employees, and Cargill, Inc., is a closely held company with revenues of \$136 billion.
- Despite yesterday's dangerous and deeply troubling decision, the contraceptive coverage benefit remains in place for millions of women.

Analysis:

There were a total of five opinions in the *Hobby Lobby* decision:

- Justice Alito delivered the opinion of the Court, in which Justices Roberts, Scalia, Kennedy, and Thomas joined.
- Justice Kennedy filed a concurring opinion.

- Justice Ginsburg filed a dissenting opinion, in which Justice Sotomayor joined in full, and Justices Breyer and Kagan joined as to all but Part III-C-1.
- Justices Breyer and Kagan filed a dissenting opinion.

The case posed four questions: (1) Can a for-profit corporation bring a claim under the Religious Freedom Restoration Act? (2) Does the contraceptive coverage rule substantially burden the corporations' exercise of religion? (3) Does the contraceptive coverage rule serve a compelling government interest? (4) Is the contraceptive coverage rule the least restrictive means of furthering the government's interest?

In brief, the majority held: (1) Yes, a for-profit corporation can bring religious exercise claim. (2) Yes, the contraceptive coverage rule does impose a substantial burden. (3) The Court does not have to answer the question of whether the rule serves a compelling interest, because (4) the contraceptive coverage rule fails the least restrictive means test.

Justice Alito, writing for the majority, asserted that contraception alone—and the women who need it—can be singled out for worse treatment:

“[O]ur decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them. . . . The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”

Contrary to his assertion, the Court's decision is likely to embolden other for-profit corporations to try to use religion as a license to discriminate, and nothing in the dicta at the end of Justice Alito's opinion prevents that.

Justice Kennedy's concurrence highlights his belief that although the government *does* have a compelling interest in women's health (a point the majority sidesteps), the contraceptive coverage rule was not the least restrictive means to further that interest.

Justice Ginsburg's dissent highlights the actual implications of the Court's decision, calling it “a decision of startling breadth,” and explaining that the Court “has ventured into a minefield.” She counters the majority opinion on each of the four questions laid out above.

Last, Justices Breyer and Kagan wrote separately to say that although they agree with Justice Ginsburg that Hobby Lobby's challenge to the contraceptive coverage rule should have failed, they do not think it is necessary to decide whether or not for-profit corporations can bring claims under the Religious Freedom Restoration Act.

While we are continuing to analyze the implications of this decision, it is clear that it is a severe and significant setback for women's health and equality.