



Planned Parenthood  
Federation of America



Planned Parenthood Action Fund

## WOMEN'S ACCESS TO PREVENTIVE HEALTH CARE

### *IT'S THEIR DECISION, NOT THEIR BOSS'*

- The Supreme Court is set to hear *Hobby Lobby v. Sebelius*, a case brought by an arts and crafts store that is opposed to the birth control benefit. Based on personal religious beliefs, the owners of the for-profit Hobby Lobby stores do not believe they should be required to provide insurance coverage that covers birth control to their employees.
- At question is whether corporations have the right to deny their employees coverage of medical treatments to which they are entitled by law based on the personal beliefs of the corporation's owners, and whether corporations have the same rights of free exercise of religion as individuals.
- Under the health care law, insurance companies are required to provide preventive care with no out-of-pocket cost to individuals. That preventive care — as decided by the independent Institute of Medicine — includes birth control as well as other treatment such as wellness visits, cancer screenings, and vaccinations.
- The current benefit includes an expansive religious exemption, allowing approximately 350,000 churches, religious schools, and houses of worship to refuse to provide this benefit to their employees, under their right to religious freedom under the First Amendment. Corporations and other for-profit businesses are not exempt under current law.
- If the Supreme Court rules in favor of Hobby Lobby, it will, for the first time ever, establish a precedent in which for-profit businesses and corporations are now afforded individual religious rights under the First Amendment.
- A decision in favor of Hobby Lobby will also create a very slippery slope in which employers would have the right, for the first time ever, to deny coverage of specific medical treatments to which their employees are legally entitled, based on the personal beliefs of the corporation's owners, including mental health services, vaccines, blood transfusions, cancer treatments, surgeries, and more.

### BACKGROUND

As of August 1, 2012, insurance companies are required to provide all women with access to common forms of birth control without any out-of-pocket cost — a recommendation that came from the Institute of Medicine, reflecting the fact that medical and scientific communities agree that access to birth control is common preventive care for American women.

Ninety-nine percent of American women between the ages of 15 and 44 who are sexually active have used birth control at some point, and nearly 60 percent of women who take the birth control pill use it for medical reasons other than contraception, such as treatment for ovarian cysts,

hormone replacement after chemotherapy, endometriosis, and more.<sup>1</sup> An overwhelming majority of Americans (70 percent) believe insurance companies should cover the full cost of birth control, just as they do for other preventive services.<sup>2</sup>

Access to birth control is commonsense and mainstream health care, allowing women to take control of their health and economic security and to take personal responsibility for their family planning decisions. Today, tens of millions of women are benefiting from coverage of contraception with no out-of-pocket costs.

However, more than 40 lawsuits have been filed by for-profit companies based on the notion that employers should be able to limit their employees' access to birth control because the employer objects on religious or moral grounds. These companies range from an arts and crafts store to an auto parts store and multiple construction companies — none of which have any expertise or medical experience in the area of women's health.

Religious employers, such as churches and houses of worship, are exempt from the requirement to provide this new benefit to their employees. For-profit corporations are not granted the same exemption, nor should they be — because women who work at for-profit businesses should be allowed to make medical decisions based on the recommendations of their doctors, rather than having their choices limited because of the personal beliefs of their bosses.

This term, we expect the Supreme Court to take up the question of whether for-profit corporations can assert rights to free exercise of religion as a basis for interfering with their female employees access to contraceptive care because the employer believes it contradicts his personal religious beliefs.

Assuming the Court agrees to hear the *Hobby Lobby* case, its ruling could have wide-ranging implications for women's access to birth control, the rights of employers to interfere with medical decisions of their employees, and much more.

If the Supreme Court rules in favor of Hobby Lobby, it will assert for the first time in American history that private for-profit corporations have religious rights, and that employers have the right to interfere with medical decisions of their employees based on their personal beliefs. In this specific case, Hobby Lobby's owners are opposed to the Affordable Care Act's birth control benefit because they believe, contrary to scientific consensus, that some common forms of birth control cause abortions.

The implications of a favorable ruling for Hobby Lobby would impact much more than women's access to birth control. It would create a very slippery slope, giving private, for-profit employers the right to impose their own medical preferences on their employees.

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<sup>1</sup> Jones, Rachel K. (2011). *Beyond Birth Control: The Overlooked Benefits Of Oral Contraceptive Pills*. New York: Guttmacher Institute. Available at <http://www.guttmacher.org/pubs/Beyond-Birth-Control.pdf>.

<sup>2</sup> Hart Research Associates (2010). "Birth Control Prevention Survey." Available at <http://www.plannedparenthood.org/about-us/newsroom/press-releases/survey-nearly-three-four-voters-america-support-fully-covering-prescription-birth-control-33863.htm>.

## THE BIRTH CONTROL BENEFIT: A PROFOUND HEALTH AND ECONOMIC IMPACT ON WOMEN

The availability of birth control has had a profound and beneficial social and health impact on women since its introduction. Preventive care, including birth control, is basic health care for women and families across the country. Because of the birth control benefit, millions of women now have access to the care they need, and will be able to access that care with no out-of-pocket cost — simply put, being a woman will no longer be a “pre-existing condition.”

### *Birth Control Use and Prevalence:*

Birth control is extraordinarily important to women for all kinds of reasons. It benefits a young woman finishing college or starting a career. It benefits a family struggling to make ends meet. It benefits a woman suffering from endometriosis. It benefits the mothers and fathers who planned their families and had children when they were ready.

Virtually all (99 percent) of American women between the ages of 15 and 44 who are sexually active have used birth control at some time.<sup>3</sup>

Birth control has changed the lives of countless women and their families. In a study, women have credited birth control with the ability to take better care of themselves or their families, support themselves financially, complete their education, and keep or get a job. And, the single most frequently cited reason for using contraception was that women could not afford to take care of a baby at that time.<sup>4</sup>

The availability of the birth control pill is responsible for a third of women’s wage increases relative to men.<sup>5</sup> Women are now more able to fulfill their increasingly diverse educational, political, professional, and social aspirations. That’s why the CDC calls birth control access one of the top 10 public health achievements of the past century. As the Supreme Court has noted, “[T]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>6</sup>

Women rely on birth control for a host of health reasons — the Guttmacher Institute says that 58 percent of pill users cite health benefits as a contributing factor to their use of the birth control pill.<sup>7</sup>

The many non-contraceptive benefits of using the pill include:

- decreased chances of ectopic pregnancy;
- decreased risk of pelvic inflammatory disease;
- less menstrual flow and cramping;

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<sup>3</sup> Guttmacher Institute (2013). Contraceptive Use in the United States. Available at [http://www.guttmacher.org/pubs/fb\\_contr\\_use.html](http://www.guttmacher.org/pubs/fb_contr_use.html).

<sup>4</sup> Frost, Jennifer J. and Laura Duberstein Lindberg. (2012). “Reasons for using contraception: Perspectives of US women seeking care at specialized family planning clinics.” *Contraception*, 87(4): 465-472. Available at <http://www.guttmacher.org/media/nr/2012/09/25/>.

<sup>5</sup> Bailey, Martha J. et al. (2012). “The Opt-In Revolution? Contraception and the Gender Gap in Wages.” *American Economic Journal: Applied Economics*, vol. 4(3), pages 225-54, July.

<sup>6</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992).

<sup>7</sup> Jones, Rachel K. (2011). *Beyond Birth Control: The Overlooked Benefits of Oral Contraceptive Pills*, New York: Guttmacher Institute, 2011. Available at: <http://www.guttmacher.org/pubs/Beyond-Birth-Control.pdf>.

- quick return of ability to become pregnant when use is stopped;
- reduced acne;
- reduced bone thinning;
- reduced iron deficiency anemia due to menstruation;
- reduced premenstrual symptoms, such as depression and headaches;
- reduced risk of ovarian and endometrial cancers; and
- shorter and more regular periods.

*Birth Control Coverage Benefit:*

With the birth control benefit, America is now experiencing the single greatest advancement in women’s health in a generation. Under the benefit, all insurance policies are required to cover birth control with no out-of-pocket cost — it’s part of preventive care.

This means women will have access to birth control at no cost, no matter where they work or live. The Affordable Care Act treats coverage for women, including birth control and well-woman exams, like all other preventive care — ensuring women get the basic health care they need and deserve.

The decision to include contraception as part of women’s preventive health care is grounded in science. The Obama administration used the Institute of Medicine’s nonpartisan 2011 study recommending that women’s preventive health services include the full range of FDA-approved birth control methods as the guideline for their approach to women’s care.<sup>8</sup>

Nearly 75 percent of American voters support the benefit that health plans cover prescription birth control at no cost.<sup>9</sup>

Birth control is expensive — a 2010 survey found that more than a third of female voters have struggled to afford prescription birth control at some point in their lives, resulting in inconsistent use, often leading to unintended pregnancies. Copays for birth control pills typically range from \$15 to \$50 a month (up to \$600 per year — equal to nine tanks of gas in a minivan), and copays and other out-of-pocket expenses for long-term contraception, such as the IUD, have significantly higher up-front costs.

Already, an estimated 27 million women nationally are benefiting from the new preventive services provision.<sup>10</sup>

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<sup>8</sup> Institute of Medicine. (2011). Clinical Preventive Services for Women: Closing the Gaps. Available at: <http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx>

<sup>9</sup> Hart Research Associates(2012). “Findings From Recent National Survey On Coverage for Prescription Birth Control.” Available at [http://www.plannedparenthood.org/files/PPFA/062012HartResearchMemo\\_%282%29.pdf](http://www.plannedparenthood.org/files/PPFA/062012HartResearchMemo_%282%29.pdf).

<sup>10</sup> Skopec, Laura, and Benjamin D. Sommers. (2013). “Seventy-one million additional Americans are receiving preventive services coverage without cost-sharing under the Affordable Care Act.” Washington, DC: Office of the Assistant Secretary for Planning and Evaluation. Available at: [http://aspe.hhs.gov/health/reports/2013/PreventiveServices/ib\\_prevention.cfm](http://aspe.hhs.gov/health/reports/2013/PreventiveServices/ib_prevention.cfm)

## CASE SUMMARY: *HOBBY LOBBY V. SEBELIUS*

As of August 2012, most health insurance plans are required to cover contraception without cost-sharing.<sup>11</sup> More than 40 for-profit corporations whose owners have personal objections to contraception have filed litigation in various federal courts challenging the contraceptive coverage provision, asserting that it violates their religious beliefs.<sup>12</sup>

Specifically, these for-profit companies claim that requiring their employer health insurance plans to include coverage of contraception violates the Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause of the First Amendment.

The Free Exercise Clause of the First Amendment protects an individual's religious exercise from laws that target religion specifically. RFRA is a federal law that provides greater protection for an individual's religious exercise by prohibiting the federal government from placing a substantial burden on an individual's religious practice, unless there is a compelling reason for the government action and the government action is implemented in the least restrictive way possible.

Five federal circuit courts of appeals have already considered this question and written opinions addressing its merits.<sup>13</sup> Two have found that the corporations are not likely to succeed on such a claim because corporations, by definition, do not have the ability to exercise religion.<sup>14</sup> A third circuit agreed that corporations cannot exercise religion, but allowed the challenge to proceed on behalf of the individual owners of a closely held company.<sup>15</sup> Two circuits have ruled that private, for-profit corporations, including in one of those cases, the corporation that operates the Hobby Lobby chain of arts and crafts stores, can exercise religion.<sup>16</sup>

The Third and Sixth Circuits rejected the notion outright that a for-profit company could claim violation of religious exercise with respect to the birth control benefit.<sup>17</sup> As explained by those courts, a for-profit corporation, unlike a person, is unable to engage in religious exercise.

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<sup>11</sup> In August 2011, the Department of Health and Human Services (HHS) issued an interim final rule requiring group and individual health insurance plans to cover contraception without cost-sharing. (Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621(proposed August 3, 2011) (to be codified at 45 CFR Part 147)).

<sup>12</sup> Religiously-affiliated non-profit employers, such as Liberty University and Belmont Abbey College, also filed litigation challenging the contraceptive coverage requirement, despite the fact that the Administration created an exemption for houses of worship and was in the process of creating an accommodation for religiously-affiliated non-profit employers. That accommodation, which takes effect on January 1, 2014, allows these employers to refuse coverage of contraception they find objectionable, but requires the health issuer of the plan to provide contraception at no cost to plan participants directly. Until then, religiously-affiliated non-profit employers may refuse coverage of contraception via a temporary safe harbor. In light of the accommodation, the vast majority of these lawsuits have been dismissed or languished in the lower federal courts.

<sup>13</sup> In a preliminary decision, an additional circuit has ruled in favor of a private, for-profit corporate plaintiff. *Annex Medical, Inc. v. Sebelius*, 2013 WL 1276025 (8<sup>th</sup> Cir. Feb. 1, 2013).

<sup>14</sup> *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6<sup>th</sup> Cir. 2013); *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013).

<sup>15</sup> *Gilardi v. U.S. Dep't of Health & Human Servs.*, \_\_ F.3d \_\_, 2013 WL 5854246 (D.C. Cir. Nov. 1, 2013).

<sup>16</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10<sup>th</sup> Cir. 2013); *Korte v. Sebelius*, \_\_ F.3d \_\_, 2013 WL 5960692 (7<sup>th</sup> Cir. Nov. 8, 2013).

<sup>17</sup> *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6<sup>th</sup> Cir. 2013); *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013). As explained above, the D.C. Circuit agreed that a corporation cannot exercise religion, but nevertheless allowed a challenge to be pursued by the individual owners of the closely held corporation at issue. *Gilardi v. U.S. Dep't of Health & Human Servs.*, \_\_ F.3d \_\_, 2013 WL 5854246 (D.C. Cir. Nov. 1, 2013).

However, the Tenth Circuit in *Hobby Lobby v. Sebelius* (as well as the Seventh Circuit in a similar ruling) determined that individual religious freedoms could extend to a for-profit corporation under RFRA.<sup>18</sup>

This precedent is very dangerous, as it could allow a single owner of a for-profit corporation to impose his or her personal beliefs on every employee by denying employees (and their families) access to health coverage they are otherwise entitled to under the law.

The Solicitor General of the United States asked the Supreme Court to review the *Hobby Lobby* holding because of its unprecedented holding: That for-profit corporations have the right to exercise religion and should not be compelled by the government to provide health insurance for medical procedures they find to be in conflict with their religious beliefs.

It is important to note that this decision, if upheld, could lead to companies carving out coverage of other important health care services that are sometimes subject to religious debate, including vaccinations, blood transfusions, stem cell transplants, and mental health counseling. Health care coverage is an employee benefit similar to a retirement account, and as such, the employee — not the boss — should determine how to use the coverage and what services to receive under the health plan.

Additionally, the Tenth Circuit *Hobby Lobby* decision ignored the important, tangible benefits the law affords to women in its evaluation of whether the birth control benefit fulfills a compelling public interest — a key requirement for government action under RFRA.

Congress specifically authored a provision requiring health plans to cover women's preventive health services without cost-sharing to address long-standing gender inequalities in health care access and to reduce the health disparities that result from that lack of access. As a part of that provision, Congress clearly established that birth control should be included as a women's preventive benefit covered without cost-sharing.<sup>19</sup> This provision called for the Health Resources and Service Administration (HRSA) to define which services should be covered. HRSA requested that the Institute of Medicine (IOM), which provides independent, objective, evidence-based advice to policymakers, health professionals, the private sector, and the public, to provide recommendations. The IOM reaffirmed congressional intent and recommended that access to the full range of contraceptive methods improves a woman's health and life dramatically, and that elimination of cost barriers to prescription birth control will help increase access to the full range

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<sup>18</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10<sup>th</sup> Cir. 2013); *Korte v. Sebelius*, \_\_ F.3d \_\_, 2013 WL 5960692 (7<sup>th</sup> Cir. Nov. 8, 2013).

<sup>19</sup> Senator Barbara Mikulski, when introducing the women's preventive amendment, clearly stated for the record: "[M]y amendment would cover family planning services." In addition, in their floor statements during the debate on the Senate health care reform bill, Senators Patty Murray, Kirsten Gillibrand, and Ben Nelson—among others—affirmatively reference family planning care as services that would be covered at no cost-sharing under the Women's Health Amendment. *See*: Press release, Mikulski Puts Women First in Health Care Reform Debate, November 30, 2009, available at <http://www.mikulski.senate.gov/media/pressrelease/11-30-2009-2.cfm> (includes text from Senator Mikulski's prepared remarks on the introduction of her amendment). *See*: Floor Statement, Senator Patty Murray, Congressional Record S12274, December 3, 2009 (stating, "Senator Mikulski's amendment will make sure this bill provides coverage for important preventive services for women at no cost. Women will have improved access to well-women visits, important for all women; family planning services ..."). Floor Statement, Senator Ben Nelson, Congressional Record S12277, December 3, 2009 (indicating that he "strongly supports the underlying goal [of Senator Mikulski's amendment] of furthering preventive care for women, including mammograms, screenings and family planning.").

of reliable, safe, and effective birth control methods, helping women plan their families and reduce unintended pregnancies.<sup>20</sup>

Yet against this backdrop, the Supreme Court is poised to determine whether or not bosses at for-profit corporations can refuse to provide medical coverage to which their employees are legally entitled based on their own personal beliefs.

### **WHAT'S AT STAKE: NO FOR-PROFIT CORPORATION SHOULD BE ABLE TO MAKE MEDICAL DECISIONS FOR ITS EMPLOYEES**

The decision to grant corporations rights of free exercise of religion would set a radical new course, creating a slippery slope — allowing employers to interfere with and influence the medical decisions of their employees.

The line won't be drawn at just birth control, and it will affect more than just the 22,000 employees of Hobby Lobby. If the Supreme Court rules in favor of Hobby Lobby, an arts and crafts store, that ruling would establish a dangerous precedent for any for-profit employer to deny coverage for ANY medical treatment if they don't agree with it.

Employers at for-profit corporations could deny their employees coverage of a number of vital medical procedures based solely on their personal beliefs — including blood transfusions, vaccines, mental health care, surgery, prescription drugs, and traditional modern medicine in general.

For the first time in America's 237-year history, the Supreme Court could rule that for-profit corporations have the right to exercise religion, allowing them to insert themselves into the private medical decisions of employees and their doctors.

Already, 27 million women have taken advantage of the birth control benefit, and a ruling in favor of Hobby Lobby would be a step backward. For American women, access to birth control means access to economic independence and commonsense, preventive care. *Hobby Lobby v. Sebelius* is a watershed case for women's reproductive rights, but it's also about so much more.

Vaccines. Blood transfusions. Surgery. Mental health treatment. Access to quality and affordable coverage for all of these mainstream medical treatments is at risk if the Supreme Court rules in favor of the for-profit corporations at the end of this term.

The Supreme Court is frequently asked to address very complex legal questions, but the questions before the Court in *Hobby Lobby v. Sebelius* boil down to a very simple answer: No for-profit corporation should ever have the right to make medical decisions for its employees.

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<sup>20</sup>Institute of Medicine. (2011). Clinical Preventive Services for Women: Closing the Gaps. The U.S. Department of Health and Human Services adopted IOM's recommendation, requiring non-grandfathered plans to cover "all Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." See: HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines.