March 28, 2016; Contraceptives and Religious Freedom

What do you get when you mix "Obamacare," contraceptives, and assertions of religious freedom together? The answer is, a fascinating U.S. Supreme Court case. Last Wednesday, the Supreme Court heard oral arguments in the case of *Zubik v. Burwell*. This case pits religious non-profit institutions against certain provisions contained within the Affordable Care Act (ACA), also known as "Obamacare." The ACA, passed six years ago, was intended to expand healthcare coverage to millions of Americans who otherwise couldn't afford to purchase healthcare insurance. However, for a variety of reasons, dozens of legal challenges to the ACA have been filed across the country. In fact, *Zubik,* which actually consolidates several pending cases, is the 4th ACA case to make its way up to the Supreme Court and the second concerning contraceptives.

Under the ACA, healthcare plans and insurers must offer preventative care to women, including birth control. Failure to offer such services can result in substantial penalties and fines. Places of worship are automatically exempted from this requirement. However, religious non-profit organizations, like religious schools and hospitals, aren't automatically exempted.

This doesn't mean that religious non-profits are required to provide employees with contraceptives. Rather, in an effort to accommodate such religious objections, the ACA simply requires the non-profit to file a written notification of its objection to offering employees contraceptive healthcare coverage. The government, along with the insurer or third-party administrator, will then step-in and provide birth control at no cost to those employees, dependents, or students, who ask for such coverage.

To better understand the issues at play, let's take a look at the story behind one of the cases. In Washington D.C., the Catholic Little Sisters of the Poor operates a nonprofit residential home for about 100 elderly people. Employees are provided healthcare insurance. However, the coverage specifically excludes abortions, contraceptives, and sterilizations. For religious reasons, the Catholic Church finds such coverage sinful and therefore objectionable.

Under the ACA, the Little Sisters could have avoided having to provide birth control to employees by filing a written objection, therefore opting out of the requirement. Instead, they filed a lawsuit against the government, specifically the U.S. Department of Health and Human Services, the federal agency tasked with overseeing the ACA. The Little Sisters argue that the notification requirement violates their religious freedom and places an undue burden on them.

The focal point of the Little Sisters' argument is the 1993 federal Religious Freedom Restoration Act. The Act, which passed unanimously in the House of Representative and by 97 of the 100 Senators, and was signed into law by President Clinton, provides that the federal government can't pass a law that "substantially

burden[s] a person's exercise of religion" unless the law meets two conditions. First, the burden must be necessary to further "a compelling state interest." Second, the burden must be the least restrictive way to further government interest.

In the *Zubik* case, the government argues that providing women with means of birth control is a compelling state interest. For example, over the last 50 years the use of birth control by women has greatly improved their situation. Because they have been able to delay or prevent pregnancy, their level of education and employment has increased dramatically as has their healthcare in general.

The government also argues that requiring a religious non-profit organization to go through the opt out process doesn't amount to a "substantial burden." And, even if it is a burden, it is the least restrictive manner of furthering the government's goal of providing affordable preventative healthcare to all women.

The Little Sisters argue that through the notification process, the government is forcing them "to maintain an objectionable contractual relationship" with an insurance provider that provides services they consider sinful. Although the Little Sisters won't provide their employees with contraceptives, the insurance carrier will. This puts an untenable burden on the Little Sisters because it makes them "complicit in sin."

Currently, of the 13 federal circuit courts, eight have upheld the ACA notification requirements and one has ruled against them. That's a major reason why the Supreme Court agreed to hear the *Zubik* case. The justices don't like a split in the circuit courts over the interpretation of such an important law.

What makes this particularly interesting is the fact that with the recent death of Justice Antonio Scalia, there are now eight Supreme Court Justices. Four are considered liberal and four are considered conservative. A 4-4 split is very possible. If that occurs, the lower court rulings in each circuit stand and nationwide uncertainty would continue. A possible option would be for the court to wait until a new justice is appointed, then rehear the matter.