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Justices Revive Birth-Control Insurance Challenge

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By *Marcia Coyle*

The University of Notre Dame will get another chance to challenge the Affordable Care Act's contraceptive insurance requirement because of action by the U.S. Supreme Court on Monday.

In *University of Notre Dame v. Burwell*, the justices vacated the U.S. Court of Appeals for the Seventh Circuit's rejection of the university's claim that the mandate substantially burdened its freedom of religion. The high court told the Seventh Circuit to reconsider in light of the justices' 2014 decision in *Burwell v. Hobby Lobby*.

The Becket Fund for Religious Liberty, which represents a number of nonprofit religious organizations challenging the contraceptive requirement, hailed the high court's action as a "major blow" to the government's defense of the coverage requirement.

"For the past year, the *Notre Dame* decision has been the centerpiece of the government's effort to force religious ministries to violate their beliefs or pay fines to the IRS," said Becket senior counsel Mark Rienzi, who filed an amicus brief in the *Notre Dame* case. "As with the Supreme Court's decisions in *Little Sisters of the Poor* and *Hobby Lobby*, this is a strong signal that the Supreme Court will ultimately reject the government's narrow view of religious liberty."

In *Little Sisters of the Poor v. Burwell*, the Supreme Court last year granted an injunction pending appeal to a Roman Catholic order of nuns challenging the contraception requirement in the Tenth Circuit.

Americans United for Separation of Church and State, which filed an amicus brief supporting the government on behalf of three *Notre Dame* students who intervened in the case, urged the Seventh Circuit to rule once again that religious institutions have no right to interfere in the private moral choices of students and staff.

"*Notre Dame's* complaint here is trivial," said the Rev. Barry Lynn, executive director of Americans United. "Under the current rules, the school is not required to

pay for birth control. It must merely tolerate someone's private decision to use it. In no way is the school's religious liberty being violated by what students and staff may do in the privacy of their own homes."

The government, at the time of *Notre Dame's* initial challenge, allowed nonprofit religious groups to self-certify on a form to their insurers or the U.S. Department of Health and Human Services that they objected to the coverage. Insurers would then provide the coverage at no cost to the objecting group. *Notre Dame* and other religious nonprofits have argued that the accommodation nevertheless makes them complicit in delivery of contraception.

A three-judge panel of the Seventh Circuit, voting 2-1, affirmed a district court's denial of a preliminary injunction sought by *Notre Dame*. Writing for the majority, Judge Richard Posner said, "While a religious institution has a broad immunity from being required to engage in acts that violate the tenets of its faith, it has no right to prevent other institutions, whether the government or a health insurance company, from engaging in acts that merely offend the institution."

In its petition to the Supreme Court, the university, represented by Jones Day's Matthew Kairis, argued that the government's accommodation put *Notre Dame* to the "exact choice" that faced the corporations in the *Hobby Lobby* case: Engage in conduct that seriously violates its religious beliefs or suffer substantial economic consequences.

In *Hobby Lobby*, Kairis wrote, the court said that choice substantially burdened the companies' exercise of religion and violated the Religious Freedom Restoration Act. The Seventh Circuit decision, he added, also conflicts with the court's subsequent ruling in *Wheaton College v. Burwell*, in which a majority of justices said religious nonprofits' objections could be made in a letter to the Health and Human Services secretary instead of on the government's form.

In seeking what is known as a "GVR"—for grant the petition, vacate the lower court decision and remand the case—Kairis noted that the Seventh Circuit was the only federal appeals court to have ruled on the merits of the government's accommodation without considering the *Hobby Lobby* decision.

The government countered: "There is no reasonable probability that a GVR would lead the Court of Appeals to reconsider its view of the merits because the court was already bound by circuit precedent materially identical to *Hobby Lobby* on the substantial-burden issue." Besides, it added, *Hobby Lobby* and *Wheaton College* "actually confirm the validity of the accommodations."

A second petition raising similar issues is pending before the justices: *Michigan Catholic Conference v.*

Burwell from the Sixth Circuit—which, like the Third, Seventh and D.C. circuits, [rejected the religious nonprofits' arguments](#). The Sixth Circuit did consider the *Hobby Lobby* and *Wheaton College* rulings when it denied en banc review to a group of Roman Catholic nonprofits in Michigan and Tennessee.

The D.C. Circuit case—*Priests for Life v. U.S. Department of Health and Human Services*—was [decided by a three-judge panel in November](#). The plaintiffs have moved for review by the full circuit court.

Four other circuits—the Seventh, Eighth, Tenth and Eleventh—recently heard arguments in religious nonprofits' challenges and could rule at any time.