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Reporters' Web Briefing on Zubik v. Burwell
Kaiser Family Foundation
March 16, 2016

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ALINA SALGANICOFF: Hello. I am Alina Salganicoff, Vice President and Director of Women's Health Policy here at the Kaiser Family Foundation. It is my pleasure to welcome you to a reporter's web briefing on the Zubik v. Burwell case. While it certainly has been a busy morning for Supreme Court watchers across the nation, in the short-term, the work of the Court will continue as planned with the Supreme Court scheduled to hear the oral arguments for Zubik v. Burwell next Wednesday. The case, which is actually seven consolidated cases, has been filed by several religiously affiliated nonprofits who are claiming that the accommodation to the contraceptive coverage requirement that was developed by the federal government falls short and still compels them to violate their religious beliefs. This is the second time that the Supreme Court has heard the challenge to the contraceptive coverage requirements on religious grounds. The first was Hobby Lobby, which was argued almost two years ago today to the day, I think.

Before we get to the details of the briefing a few logistics. To remind you, this briefing is being recorded and we will have the audio and the slides posted shortly after the event. We are going to notify everyone who RSVP'd when it's up and the transcript will also be available in the coming weeks. While this is a listen-only format, we encourage you to chat or type in your questions at any time during the briefing and we will get to them during the Q&As.

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As many of you know, the debate about contraceptive coverage is not a new one. Starting in the 1990s, many states passed laws to start to require insurance plans to cover contraceptives. There were also several efforts in Congress to get a national law passed. The Equity in Prescription Insurance Contraceptive Coverage Act, referred to as EPICC, gave momentum after the FDA approved Viagra that was ultimately not passed. In 2010, a provision of the Affordable Care Act, known as the Women's Health Amendment, made preventive services for women, and subsequently no-cost contraceptive coverage, a requirement for nearly all plans.

Since the adoption of the coverage requirement, the federal government has issued multiple regulations but has attempted to balance the religious beliefs of employers with the entitlements that most insured women now have to get contraceptive coverage. The most recent regulations were issued in July 2015 in response to the Hobby Lobby ruling. The accommodation created by the regulations affects both religiously affiliated nonprofits and religious closely held corporations like Hobby Lobby, and is at the heart of the case that will be argued next week. The vacancy on the Court resulting from the death of Justice Antonin Scalia and the possibility of a split decision has raised even more questions in this very complicated case.

To help us better understand the many layers of this case, we have brought together an outstanding panel of national

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experts on both contraceptive coverage, the Religious Freedom Restoration Act, known as RFRA, which is the law that the nonprofits are claiming as being violated in their lawsuits and the Supreme Court. We are going to start with Laurie Sobel, who is a senior policy analyst here at the Kaiser Family Foundation. She is taking the lead on our staff for tracking, analyzing, and explaining the ins and outs of contraceptive coverage as well as the litigation that follows that law. Prior to joining Kaiser, Laurie was a senior attorney at Consumers Union and an expert on insurance regulation, which is also an element of this case. Laurie is going to provide us with an overview of the cases to date as they work their way through the Court, explain the legal arguments of the nonprofits and the government are making in their cases, and provide an overview of the different insurance issues that are also raised in this case.

We will then hear from Marci Hamilton, who is the Paul. R. Verkuil Chair in Public Law at the Benjamin Cardozo School of Law at Yeshiva University. Professor Hamilton is also Senior Fellow in the Fox Leadership program at the University of Pennsylvania and the Academic Curator for the National Constitution Center 2015 Religious Liberty Exhibit, among many other activities. Professor Hamilton has extensive experience with the Supreme Court, first clerking for United States Supreme Court Justice Sandra Day O'Connor and subsequently serving as Lead Council in *Boerne v. Flores* in the 1997 Supreme

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Court case that lead to a successful Constitutional challenge of the Religious Freedom Restoration Act, also known as RFRA, which is the basis of this case. She is a leading church-state scholar and a national expert on RFRA and also the author of numerous books on religion and the law. Professor Hamilton is going to review the foundations of RFRA, discuss how the Hobby Lobby case has affected the reach of the law, and explore some of the implications of possible rulings.

Last but not least we are going to hear from Lyle Denniston who is really the dean of Supreme Court reporters. Lyle has been covering the United States Supreme Court now for nearly six decades, and today is his 85th birthday. Happy birthday, Lyle, and thank you. While most of his career has been with newspapers including the Washington Star, the Baltimore Sun, the Wall Street Journal, and the Boston Globe, the past 12 years he has been writing for scotusblog.com, which is really the go-to online clearing house of information and analysis about the Supreme Court. I can't think of a reporter with a deeper understanding and appreciation of how the Court functions. I asked Lyle to share his insights on the different approaches that the Court might take in this ruling on the case, especially in light of the recent death of Justice Scalia and the possibility of a split decision. With that, I am going to turn it over to Laurie.

LAURIE SOBEL: I am going to start by walking you through the rules for the accommodation and exemption for

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contraceptive coverage, and then I'll briefly discuss the Hobby Lobby case and how the Zubik case addresses a different question and has a different set of plaintiffs. I will highlight how the lower courts have ruled and finally I'll discuss how the ruling might impact contraceptive coverage going forward.

I am going to walk you through, first, what are the current rules for contraceptive coverage, and I've framed this as how does your employer's religious objection to contraceptive coverage affect your coverage. While the rules are aimed at employers, they ultimately impact workers' and dependents' coverage to contraceptive coverage.

First we have if your employer has a religious objection to contraceptive coverage, and is a house of worship, then that employer is exempt, does not need to do anything if they have a religious objection, and the women workers and dependents may have limited or no coverage at all for contraceptives.

Next, which is this category that we are talking about here for these patients, is your employer a religiously affiliated nonprofit or, after Hobby Lobby, as Alina mentioned, the administration issued new guidelines that now offer the same accommodations to closely held corporations. If your employer is in that category, then your employer may elect an accommodation which means that they need to notify their insurer, a third party administrator, or the government of

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their objection. What that does is they will guarantee the women workers and dependents full coverage for contraceptives, but the employer no longer pays for that coverage and rather the insurance company or the third party administrator pays for that contraceptive coverage.

Finally, we have the category if you do not meet either of these first two categories, and even if your employer has a religious objection, then that coverage is still mandatory and women workers and dependents have full access to contraceptive coverage.

Hobby Lobby was the first round at the Supreme Court, as Alina mentioned, occurred two years ago. That case was brought by for-profit companies with religious objections to contraceptive coverage. It was brought under the Religious Freedom Restoration Act, which you will hear a lot about today, that is the basis of this lawsuit as well. Professor Hamilton is really the expert on that law and she will go into more detail about the origin of that law. The Hobby Lobby decision held that certainly closely held for-profit firms with sincerely-held religious beliefs cannot be compelled to pay for contraceptive coverage. As a result of that case, the Obama Administration issued new regulations that extended the accommodation that was previously available to nonprofits to closely-held for-profits.

Here we are at Zubik, which is the case that is being heard next week at the Supreme Court. This case is brought by

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religiously affiliated nonprofits that believe that the accommodation still results in a violation of their religious rights under the Religious Freedom Restoration Act. As I mentioned before, at the time of the Hobby Lobby case, the accommodation was not available, so that was not litigated in the Hobby Lobby case. The petitioners represent 37 different entities and individuals including universities, nonprofit advocacy organizations, nursing homes, which is namely Little Sisters of the Poor, and as well some exempt employers that sponsor health insurance for nonexempt, nonprofits. So even though they are not required to do anything, they are sponsoring health insurance that includes nonprofits that have an accommodation available to them but not the exemptions. That includes two dioceses as well as two bishops that run those diocese. Then employee church plans and third party administrators for a church plan, which I will talk more about church plans in a minute, but it is sufficient to note here that it matters what type of insurance plan employers have chosen in terms of what they are litigating in terms of their burdens and also how the accommodation is fully implemented for that.

At the heart of these seven cases that are consolidated into Zubik, there is a real disagreement about how the accommodation works. The religious nonprofits are contending that the notice that is required, the notification to their insurer or to their third party administrator or to the

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government actually facilitates, or triggers, the coverage and that that coverage remains part of the employer's plan and ultimately they are still financing that coverage. While the government contends that the notification does not trigger the coverage, it is actually the federal law that requires insurance, insurer, or the third party administrator to provide this coverage.

We just need to put up the slide about what the Religious Freedom Restoration Act actually is. It is noteworthy to emphasize that this law applies to all federal laws that are of general applicability and are not of discriminatory nature, so they are not targeting a particular group, RFRA applies. It says that the government shall not substantially burden any person's exercise of religion unless that burden is the least restricted means to further a compelling governmental interest. What the Court does is it breaks down into four questions. The first question is, is the employer a person capable of religious belief? This question was really at the heart of the Hobby Lobby case of whether a for-profit company could be a person capable of religious beliefs. In this case, the government is not contesting this question, so we move onto the next question.

The next question is does the requirement of the accommodation, the notification, does that substantially burden the employer. This gets to the heart of how the Court is going to view the notification requirement. Is it triggering the

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coverage or do they agree with the government that the law is triggering the coverage? The answer to that is yes. We move onto the third question. Does the government have a compelling interest to provide health insurance coverage, preventative care, including contraception? The government has essentially the same argument that it had under Hobby Lobby, which is that they have a compelling interest in, one, safeguarding the public health, two, promoting a women's compelling interest in autonomy, and three, promoting gender equality.

The nonprofits, on the other hand, contend that the government can't have a compelling interest when they have allowed so many employers to not comply with the contraceptive coverage -- those employers with grandfathered plans, and exempt employers. If we answer yes to this question, then we move onto the final question which is is the government meeting these compelling interests in the least restrictive way? Is the accommodation the least restrictive way?

The nonprofits argue there are still less restrictive ways to accomplish these same goals, including allowing employees to qualify for subsidies on the exchange so they can enroll either in an entirely new plan or a contraceptive-only plan, or the government could possibly use Title X funding for the Federal Family Planning program to provide contraceptives directly to employees and dependents who lack the coverage. The government contends that these alternatives would be not as effective in achieving its compelling interest because they

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would place financial, logistical information, and

administrative burdens on women seeking contraceptive services.

I am going to walk through a rather complicated area of the cases, which I touched on briefly before, which is what type of plan have employers chosen in terms of their health plan. First we have the houses of worship. No matter what kind of plan that employer has chosen, they are exempt. It does not matter what kind of plan they have chosen. Then we go to the cases, the types of nonprofits that are in this case, which are the religiously affiliated nonprofits that have the accommodation. If they have a secular health plan, which is most health plans, whether they are fully insured or self-insured does not matter. Essentially, the government has enforcing authority for both employer as well as the plan or the third party administrator.

Then we get to this area that most people have not heard of, which is a church health plan. If the employer has chosen a church health plan that is fully insured, we still have full coverage in terms of women and dependents will still have full coverage because the government has enforcing authority against the insurance company. However, if they chose a self-insured church plan, then the government does not have enforcement authority for the third party administrator for self-insured church plans. This is because church plans are exempt from RFRA and the third party administrator is exempt from ERISA and a third party administrator is a term from

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ERISA. Just to clarify, a church plan is a plan that is established or maintained for its employees by a church or a convention of churches, but the church plans are not limited to judicial church entities, but may include entities controlled or associated with a religious denomination, many of which are the plaintiffs in these cases such as church-related hospitals or nursing homes or other types of nonprofits. The end result is while employers with self-funded church plans are required to provide notice of their objections, the third party administrators for these plans have no enforceable obligation to provide the employees with the contraceptive coverage. I can answer more questions about that. I know that is a lot of information about a very specific area, but it may come to be a big part of this case because 18 petitioners, including The Little Sisters of the Poor, have this self-insured church health plan as part of the case.

I am just going to briefly show this map that shows that nine courts of appeal have looked at these cases, the challenges of the accommodation, and eight of them have ruled in favor of the government and only one has ruled in favor of the plaintiff saying that this law violates RFRA and Lyle will talk more about whether that matters in terms of a tie decision.

Finally, I just want to talk about what are the stakes for contraceptive coverage and beyond. As part of our National Employer Benefits survey, employers were asked if they had

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notified their insurer of a religious objection to contraception. Overall, 3-percent of nonprofits offering health insurance had notified their insurer of a religious objection to contraceptives, but note 10-percent of large nonprofits, those with a thousand or more workers offering health insurance to their employees, reported notifying their insurer of a religious objection. Keep in mind, many of the large nonprofits are faith-based universities or health systems, some of which are represented in the Zubik case. While the vast majority of nonprofits are small, most of the workers are employed by large nonprofits. The Zubik ruling may impact what these nonprofits do going forward. If they have already notified their insured about a religious objection, but the accommodation was not upheld, then these employers may opt out of or ask for an exemption instead of an accommodation, and this difference is significant for employees. It is the difference between coverage and no coverage. Of course, whatever the Court rules in Zubik will impact the accommodation for closely-held for-profit corporations and whether they continue to litigate the contraceptive coverage rule. As with any Supreme Court case, the ruling will likely have broader implications beyond contraceptive coverage, which Marci will address these potential ramifications. I want to turn it over to Marci now.

MARCI HAMILTON: Thanks, Laurie. Hi, everybody and essentially what I am going to do is give you the roadmap through religious liberty under the constitution and then under

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RFRA, slide please. Under the First Amendment, since the beginning of interpretation at the Supreme Court, the Court has held that the right to believe is absolute. And so there is no question that the government of the United States may not tell you what to believe. The right to religious speech is very highly protected, but the right to religious activity, conduct, the law that governs actions, that is more capable of being regulated, and so we go to the next slide.

The Court had reached, by 1990, and in 1993, the Court had reached two decisions that summarized their free exercise positions on the First Amendment. Essentially, there are two universes. The one universe is where you have a law that is neutral and generally applicable. If you have a law that is neutral and generally applicable, it is going to be constitutional unless it is arbitrary or irrational. If the law, however, is not neutral, in other words is discriminatory or it is not generally applicable and so some people get a penalty for the same conduct that others don't, then you have ordinary strict scrutiny under the Constitution, and this important. What the Supreme Court said in Church of Lukumi Babalu Aye is that if there is a law that only applies to this religious group, it has been shaped, gerrymandered just for this religious group, and it does not apply to anybody else doing exactly the same thing, and in that case it was killing animals. In that circumstance, the government has heightened requirements. It must now prove it has a compelling interest

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and that the law is narrowly tailored to that compelling interest. The bottom line is that there were these two universes, neutral generally applicable law, laws like stop signs, and laws that were targeting religion. And laws targeting religion the government had a heavy burden. Laws that were neutral, the government was able to justify quite easily.

There was one case that departed from this paradigm, and that is Wisconsin v. Yoder which is a case involving Amish children, whether they have to be sent to the full compulsory education requirements of the state, and the Court said, no, applying an amalgam of what I just described. So you had a neutral and generally applicable law that required every student to get a certain amount of education, but the Court applied strict scrutiny. While it was a neutral generally applicable law, the government was still under this burden of proving that it had a compelling interest and that the law was narrowly tailored, and by using that standard the law was struck down for the Amish, not for all children. Next slide, please.

The most important factor in dealing with RFRA is how does it differ from actual constitutionally required religious liberty? There's a lot of rhetoric about rights and liberty around RFRA, but it is a statute and it is a statute that goes beyond the Constitution that is not constitutionally required. Under RFRA, and under any free exercise case, the believer first must prove that it is suffering a substantial burden. If

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it is a de minimis burden, that does not establish via the issue and it is over, but if it can prove they have a substantial burden on their religious conduct then the government now has to prove that whatever law that is in front of them, a neutral generally applicable law or not, now the government has to prove there is a compelling interest that serves the least restrictive means.

The big differences are these. First, neutral generally applicable laws are subjected to rationality reviewed deference under the First Amendment and still are. Under RFRA they are subjected to hyper-strict scrutiny. Not only does the government have to prove a compelling interest, but it has to prove not just a narrow tailoring, but the least restrictive means so that this means of getting this end accomplished is the least restrictive for this believer. In both RFRA and the Constitution, these laws only permit relief against a government. And so we are talking about government actions, negative rights against the government. I am sure you have heard about the RFRA's in the states where they are being thrown around as a possibility to use for discriminatory purposes. That's a different ballpark. There really is no complete identity between the federal and the state RFRA's.

In 2000, after RFRA was declared unconstitutional in 1997, Congress reenacted it and it also enacted a new definition of religious exercise. It was wildly expanded so that now religious exercise was any exercise of religion

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whether or not compelled by or central to a system of religious belief. The reason that was adopted was because there were entities and individuals who were losing cases because the belief they were claiming was on the periphery of their faith system. What this says is it does not matter how important the belief is or even if it is central to your system of religious belief, it still gets the hyper-strict scrutiny approach. Neutral generally applicable laws, laws that are discriminatory and laws that are not generally applicable, they all get exactly the same test, compelling interest and least restrictive means and the religious exercise does not have to be compelled by. Next slide, please.

Now, what that means is that opens the door for the kind of arguments that we are hearing in the Zubik case, but also originally in the Hobby Lobby case, and that argument is this. I as a believer cannot possibly participate in this program because it will make me complicit in someone else doing something. The Hobby Lobby theory was that they could not contribute toward a health plan, that it was possible that female employees, whether fellow believers or not, might actually use that contraception and they objected to four types of contraception. The Court issued an expansive ruling, the most aggressive interpretation of RFRA yet, and essentially at the same time said but this case is very special. We do not expect this to happen a lot, so they wanted to say that it was different, but on the other hand they provided a broad

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interpretation of RFRA that looks like it could easily apply in other cases. Essentially, instead of saying that you needed a specific believer or specific religious entity, now it turned out that for-profit corporations that were in the business of making money first and foremost, even they were capable of invoking RFRA.

Secondly, the Court read the phrase, substantial burden, as though substantial had been removed. Any burden was going to be enough in the way that the court defined burden. Then the Court really reached out because the Court said that they would not say that there was a compelling interest in women getting contraception, they wouldn't disagree with it either, they would just assume it, because really the case is going to be answered by the least restrictive means. What was the least restrictive means for the family that owned Hobby Lobby that did not want to have four types of contraception in their health plan coverage, and the answer was possibly have the government pay for it. If the government pays for it then there will not be a burden on the Green family. By suggesting that the answer was in the government paying for it, it opened the door to the same answer to every other case. Next slide.

Here is what happens in Zubik. In Hobby Lobby, the for-profit corporation had no exemptions. They were required to provide for their employees who they could not discriminate against under Title Seven based on religion or gender, a benefit package that included contraception for no fee for the

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employee, but Hobby Lobby held that those four types of contraception could be removed because of the effect of RFRA. Therefore, what RFRA did in that case was create an accommodation. What is happening in this case, in *Zubik v. Burwell*, is that there is already an accommodation. There is complete accommodation for religious institutions, churches, synagogues, mosques. There is a way of avoiding the burden for these nonprofits like the ones who are bringing these cases. Then we already know that for-profit corporations received an open door.

That set aside, the government has provided an accommodation and the government has a long history of providing accommodations in many, many circumstances. What is really being asked in this case? What is being asked is two things. One, can I say that my substantial burden is proven by the fact that I feel like I will be complicit in some third party doing something, so that it's not that there is anyone saying that the university or the Little Sisters of the Poor themselves would ever have to use or touch contraception. It is that one of their employees might, and if one of their employees do, they are saying that their religious faith has been violated because of the fact they have become complicit. What that means is that for them, the argument is they do not have to sign a form that informs the government because it sets into motion the possibility of women getting contraception.

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Their baseline objection is to the women receiving the contraception at no pay while they are being employed by them.

One possible precedent that this could set is that religious objectors, the employers in these cases, will be able to limit independent third party actions. It does not matter the faith. It does not matter if you are a Jew working at Notre Dame University because you are a top notch secretary. You can have your decisions about birth control and the cost of it in reproductive care determined by the faith of your employer.

Secondly, this really is going to, if it would come out in favor of Zubik, it is really going to throw a monkey wrench into our long tradition of legislative accommodations because essentially what the Little Sisters of the Poor and Notre Dame are asking is they are saying not only should we have the benefit of the permissive legislative accommodations that are all over the United States, but when there is an accommodation you should be able to use RFRA to fine tune that accommodation to our specific needs. What that means is that legislative weighing of harm and safety is going to be pushed aside and essentially we are going to be talking about how can every single law including the accommodation be fine-tuned for one set of believers? Thanks very much and I will hand it over to the birthday boy, Lyle.

LYLE DENNISTON: Thank you so much, Marci. Let me try to be as brief as I can so that we can get to your questions. Let me first stress that the argument is next Wednesday, a week

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from today, beginning at 10 a.m. It will continue for 90 minutes. There will be several lawyers appearing. If you wish to attend the argument, you should already have been in touch with the Public Information Office at the Court. If you want to try to get into the argument from here on, you should today call 202-479-3050 and attempt to get a seat because it is going to be very crowded.

Let me first begin with the comment that the accommodation that the government is offering to the nonprofit institutions, and by the way, it now has regulations offering the same accommodation to profit-making corporations in the wake of the Hobby Lobby decision, has already been more or less endorsed by the Supreme Court in the Hobby Lobby decision and most particularly in the separate concurring opinion, in that decision by Justice Anthony Kennedy. It was also more or less endorsed by the court in what is called the Wheaton College case involving a religiously affiliated college in Illinois. The Court, in both of those instances, at least in the Kennedy opinion and the concurrence, and impliedly in the Alito opinion in the majority in Hobby Lobby and clearly in the unsigned opinion from the Court in the Wheaton College case. The Court said that if there is a substantial burden on a faithful organization of having to comply with the Affordable Care Acts of birth control or contraceptive mandate, the government can require that they do so if it gives them an accommodation, which shifts the burden to a third party. The government does

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not contest under the substantial burden argument that access to these particular contraceptives would violate those religious nonprofit institution's religious beliefs. The government and the institutions directly disagree on whether or not the notification would impose a substantial burden. The religious institutions claim that mere notice to the government sets in motion a process by which their own health plan, their own employee or student health plan, goes forward with providing the materials to which they object on faith grounds. The government argues that, no, you are not being compelled to do anything. All you are being told to do is to tell us that you have an objection, and then tell us how we can get in touch with the people. The requirement the institution must, itself, get in touch with the government to the extent of notifying and providing contact information is another facet of the challenge argument. That is we are making it easier for the government to reach them. The government argues that it could, on its own, find out who the plan was. There is a disagreement among the religious institutions as to whether or not their ultimate goal here is to prevent any of their employees or students from having access to the contraceptives. The government believes that that is their ultimate objective and that is what they are driving for. They disclaim that objective saying they would not mind if the government were, in itself, to provide the contraceptives directly.

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Remember, this is going to be decided probably only by an eight-member Court because of the death of Justice Scalia. He has not been replaced yet and the reality appears to be, especially today, that he will not be replaced until, perhaps, a year from now, after a new president has taken office and made a nomination and that nomination goes through the process.

The reason that we are anticipating a possible four/four here is that there were four dissenters in Hobby Lobby, that is Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan, arguing that the RFRA was not violated by the ACA birth control mandate. Then there were five justices, as a majority. But the critical fact to keep in mind now is that Justice Kennedy wrote a separate concurrence arguing that the decision was not nearly as broad as the dissenters claim it was. That, in fact, the government could deal with the problem by this accommodation that the government has argued. The question now is does Justice Kennedy still hold to the view that the accommodation discussed in his separate opinion in Hobby Lobby and discussed by the Court itself in the Wheaton College case, does that apply in the wake of the new arguments by the religious institutions.

My own perception is that there are only two options for the Court if it finds itself closely divided. One is to order the argument of the case next term. The Court has often done that in a number of cases over the years. It signifies

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nothing except that it is having a hard time making up its mind. The second option is to announce a four/four split which means that nothing gets decided and the lower court opinion, or the lower courts' opinions, because there are several involved in this case, is upheld without an opinion by the Supreme Court and without setting a national precedent. My own sense is that the Court is going to try very hard, particularly Justice Kennedy is going to try very hard, to find a way to resolve this case without a four/four split. The reason that they want to avoid a four/four split is that there is a split in the lower courts, as Laurie told you, the Eighth Circuit has upheld the religious objection to the mandate. If the Supreme Court punts on this and issues a four/four decision, that still leaves extent of the division in the lower courts and it will vary from region to region in the country as to what the rights of women under the ACA are. My sense is that the Court is going to try very hard to avoid a four/four split. That may mean that they are going to try to reach for a narrower opinion, which might mean finding that the government's accommodation is not the least restrictive alternative, although one must re-read Kennedy's separate opinion in Hobby Lobby because he said we should not be in the position of trying to force the government to adopt, or create, an entirely new program.

In any event, that is a possibly and ordering re-argument next term would not be really of much benefit because the challenge of the Republicans to an Obama nominee will

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probably keep the Court from getting a ninth Justice until next March or April of 2017. Thank you very much for joining us.

ALINA SALGANICOFF: Thank you so much, Laurie, Lyle, and Marci for a terrific briefing. What I want to do now is take a quick minute while the questions are coming in to address the elephant in the room and really to ask the panel if they have any thoughts about one of the announcements today about Merrick Garland will have any impact on the Court that may influence the outcome of the case or is that basically are we looking at no change, no impact?

LYLE DENNISTON: I will take that one. Alina, even if Judge Garland is more moderate in his ideological orientation or views than a more liberal Obama nominee might have been, clearly Judge Garland is much closer towards the center left than Justice Scalia was. If you do not take seriously, as it is very hard to take seriously, that the Republican leaders of the Senate are concerned more about the principle of letting the people speak, I don't take that seriously. I think this is all about the fact that it was Justice Scalia who left the Court and would be replaced by anybody nominated by President Obama. I don't think that the Republicans will relent. And the main reason they will not is that the Court would tilt, at least slightly more, perhaps considerably more to the left even if Judge Garland is more moderate because he would move along with the four Progressives in the Court, more towards the left side.

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ALINA SALGANICOFF: Thank you. We do have a question that has come in from Julie Rovner from Kaiser Health News. She asks are there any technicalities in these cases that the courts can fall back on to avoid their central disagreement? I do not know who might like to take that on.

MARCI HAMILTON: I think that is very unlikely. In a lot of ways, this is a big picture case, and God bless Laurie for going through what a self-insured church plan is. Basically the question in this case is whether or not there an already existing accommodation can be fine-tuned through RFRA. It will be odd if the Court actually says you can fine tune an accommodation because the whole point of RFRA was the presumption that there would not be accommodation through the legislative process. The very legislative history of RFRA undermines this argument that it now can be a tool for fine tuning every single accommodation to the needs of the particular religious believer. I actually submitted an amicus brief for Representative Bobby Scott at his request on the legislative history showing that it just was never a collective that everybody agreed in the Congress. Secondly, no one ever intended for the Court to become the legislator second guessing what the rules should be. I think that is what Kennedy is saying and that is why I think we have got a good shot at a five/three.

ALINA SALGANICOFF: Anyone want to add to that? No? We have a question here from Rachel Karas from Inside Health

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Policy who is asking what do you think the insurance industry's reaction would be if the Court decides in favor of Zubik? Are there any lawsuits insurers could bring as the result of such a ruling?

LYLE DENNISTON: I cannot conceive of what the claim would be by an insurance company. Would it be against one of the religious nonprofits in order to do what? I just can't conceive of what legal claim an insurer would have if Zubik prevails.

ALINA SALGANICOFF: This is Alina. I think that part of how the insurance industry would react against the ruling really matters and if one of the recommendations was that the insurance plans offer a contraceptive-only plan, that currently does not exist so that may be something that they do, but I also cannot imagine what any lawsuits would be that the insurance company would necessarily file.

I want to encourage you to please send in your questions by chat. I'm going to add another question here which is I wanted the panelists to talk a little bit more about given the multiple issues that are wrapped up in this case, what do you think is the thorniest issue that the Court is going to need to grapple with as it approaches a ruling in this case?

MARCI HAMILTON: Well it is my view that the thorniest issue is what to do about a religious believer who says complicity is a substantial burden because this is just the tip of the iceberg. If complicity is the substantial burden, then

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it will open the door to demanding accommodations for just about any action one might take that will have an effect on others, including non-believers. In the big picture, what this case is asking is whether or not religious believers can construct either a workplace or a university or any other private entity, can they construct it so that if it's not a religious institution it still has the ability to determine that non-believers are doing something or not. That is a far step and that is why eight circuits have said that it does not make much sense, the argument. One circuit has gone the other way. I do think that the narrowness of this split is so lopsided that I think it is very hard to sell the theory that complicity of my action is going to make me violate my religion because someone who is not in my religion is going to take an action. That, I think, is a hard thing for them to face.

LYLE DENNISTON: Alina, and Laurie, if I could just add to that. I do agree that that is the core of difficulty in this case, but I do see the possibility that the Court could go off on the question of who is a third party in this context. If the Court were, in fact, looking for a way to avoid a four/four split, I find it not inconceivable, pardon the word in this context, not inconceivable that the Court would say that when the government has required that it be notified of who the TPA or insurer is and contact information be provided, that that may, in fact, involve the institution in the process. The difficulty of looking at this as an alternative outcome is that

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it has to proceed on the assumption that notifying the government in this additional information way is a form of complicity, and I agree with Professor Hamilton that that's a very broad approach and I cannot conceive of the four progressives of the Court going for that. If the Court were to suggest, in some way, perhaps ordering the cases re-argued with a new question on what constitutes a third party in the RFRA context and what constitutes the process of implementing a federal statute through the notification process. I tend to think that is a fairly longshot, and it may well be balancing on the head of a pin, as angels do, but I do think that is one way in which the Courts can kick the can down the road over to next term, ordering re-argument with this additional question and then washing their hands of it for a period of probably eight to 10 months.

ALINA SALGANICOFF: Thank you. We do have another question that has come in from Robert Field from the Philadelphia Inquirer. What role do you think Roberts will play? Will he try to push for a compromise as with the other ACA cases to try to preserve the nonpartisan perception of the Court?

LYLE DENNISTON: My sense about the Chief Justice is that he is already pretty well locked in having joined Hobby Lobby without joining Justice Kennedy's separate concurrence. Whichever way he goes could only, if he is inclined towards the ACA favorably, is to simply pad the majority making it,

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perhaps, six to two. I think he is probably not inclined to do that. In this case, without a ninth Justice, particularly without Justice Scalia, the Chief Justice's options, I think, are more narrow than they have been in the past. This is a case probably more than most where we routinely say that Justice Kennedy is holding the deciding vote. I think there is no question but that it all comes down to where Kennedy is. He may talk with the Chief Justice about possibly joining in, although I think Kennedy's going to be his own person in this case, as he so often is.

MARCI HAMILTON: I'd add to Lyle's comments, which I completely agree with. The fact that even the four, without Justice Kennedy, still included a line that said this opinion is deciding an issue that is unlike any other. There was discussion at oral argument and in some of the briefing that abortion is distinct and so if they believe that these were abortifacients, which was their argument, then there is a super protection for anything having to do with abortion. The question is whether or not the Chief Justice will think that that case was limited to for-profit companies with respect to just a few numbers of contraception or if he is willing to take the next step and say that it could actually cut out all contraception providing, even if the person is not a fellow religious believer. I think there is a possibility he might distinguish Hobby Lobby, but my guess is he probably doesn't

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want to have to. As usual, even with an even number it is going to fall on Justice Kennedy.

ALINA SALGANICOFF: Thanks, Marci and Lyle. I am going to turn now to Alicia Gallegos has a question. She is from OBGYN News. Has the medical community, including physicians associations, weighed in on this case and what would be the ultimate impact on patients if the Supreme Court ruled for Zubik? I'm going to ask Laurie to take that one.

LAURIE SOBEL: Yes, the medical community has weighed in. There are lots of amicus briefs in support of the government in this case saying that contraceptive coverage is essential for women and that the way that the law was framed in terms of giving women choice in their contraceptives is essential for women's health. Ultimately, if the Court were to rule in favor of Zubik, it would mean that the workers and dependents of nonprofits, we do not know exactly how many workers and dependents would be affected, but ultimately they are at risk of losing some or all contraceptive coverage. The burden on women to pay out of pocket has shown to really limit their choices and possibly limit contraceptives at all for them.

ALINA SALGANICOFF: Thank you. I have another question here from Stephanie Russell-Kraft, who is a freelance reporter. Have we seen this type of legal argument in any other area other than contraception or the ACA both in terms of religious institutions asking for accommodations to an accommodation?

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Have there been other niche RFRA cases in the lower courts maybe?

MARCI HAMILTON: Not to my knowledge. This was a clever idea that came initially out of the Manhattan Declaration in New York City in 2009 where the Catholic Bishops started talking to evangelical entities and actually signing a joint statement that they were going to fight against abortion, against contraception, and against same sex marriage as a unity. The best minds on that side of the table were put together and they came up with this argument that complicity is a way to push back in every one of these areas. You do not want to have to be complicit in a gay marriage, and so if you are a store owner you are going to refuse to serve them. You do not want to be complicit in the use of contraception, so you refuse to provide it whether you are a for-profit or nonprofit. That social movement is basically this is the end result. This was the goal, a complicity argument. Had Justice Scalia been here for this argument, I think it would have been possible that there would have been a four-member plurality saying complicity is perfectly legitimate as an argument. Then Justice Kennedy would have moderated that in some way, I'm not sure how. Then the four more liberal members of the Court would have said, no, this cannot be the right theory. Without Justice Scalia on the Court, there isn't quite as much momentum. Remember, he is the man who has always had the most spirited, if not sometimes insulting, speaking as someone who clerked for Justice

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O'Connor, opinions on abortion. It'll be interesting to see how far the three are willing to go, but I do think without Scalia it is a different ballgame.

LYLE DENNISTON: Let me add to that. I think what we have begun already to see in the Court is an emergence of a new dynamic duo, that is Justice Thomas and Justice Alito, they have joined in a couple of dissents in recent ordering by the Court. I think Justice Thomas is now assuming a more forward position within the Court in the wake of the death of Justice Scalia. He seems to hint at the potential that the mantle of leadership of the conservative wing has really fallen to him and he wants to shepherd Justice Alito along with him. I am not sure how far that would go because there are elements of Justice Alito's jurisprudence which are not as deeply conservative as were the views of Justice Scalia and are the views of Clarence Thomas. In any case, the hard right of the Court is suddenly a great deal smaller without Justice Scalia than it was before, as Marci suggested.

ALINA SALGANICOFF: Thank you, Lyle. I wanted to ask Laurie to comment a little bit because there's actually more litigation that is actually under way around the contraceptive coverage, to comment a little bit about that with our remaining few minutes since there are no other questions that have come in.

LAURIE SOBEL: There are two possibilities, one which I already mentioned which is the for-profits that you know have

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the accommodation available for them, many of them, if not all accommodatoin, they are currently exempt and then would have to comply with the accommodations starting in July assuming that the Court issues this decision on June 30th, we all know what will happen with that and I assume they may litigate depending on the outcome of this case, with the accommodations specific to for-profits. In addition, March for Life and two of its employees have filed a challenge to the contraceptive coverage on moral grounds, which RFRA does not cover moral grounds, it only covers religious grounds. The district court issued a decision in that case last August and so it's not clear where that case is going and whether that's going to also be appealed to the Supreme Court.

ALINA SALGANICOFF: Thank you. I am afraid that we are out of time and we have to bring this briefing to a close. I want to thank our panelists, Professor Hamilton, Lyle Denniston, and my colleague Laurie Sobel for taking the time to be here with us and to answer our questions. We really do appreciate your time and willingness to share your knowledge, Lyle, especially on your birthday, thank you. I also want to thank everyone who joined our call today. I want to encourage anyone who did not have a question that was answered to please contact Katie Smith who is our communications associate and her contact information is up on your screen. We will make sure to get back to you. We are also going to have additional resources at KFF.org. The Foundation has a brief that we have prepared on

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the Zubik case. Professor Hamilton has an amicus brief and Lyle also did an excellent analysis, and that will all be available on KFF.org along with the slides and the audio. That hopefully will be posted very shortly. Again, thank you all for a very informative briefing.

[END RECORDING]