AMERICAN CONSTITUTIONALISM

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Supplementary Material

The Contemporary Era—Judicial Power and Constitutional Authority/Constitutional Litigation

**Zubik v. Burwell, \_\_ U.S. \_\_** (2016)

*Bishop David Zubik was a sharp critic of the provisions in the Affordable Care Act of 2010 that required religious employers to offer their employee health plans that provided contraception services. He was not satisfied when, after the Supreme Court in* Burwell v. Hobby Lobby Stores, Inc. *(2014) ruled certain religious employers did not have to directly provide coverage, the federal government insisted that those employees and other employees previously exempted from the contraceptive mandate notify their insurance providers, so that the insurance providers would offer contraceptive services separately. Zubik and numerous other Catholics and Catholic institutions filed lawsuits claiming that such provisions required Catholics to be complicit in the provision of contraceptive services in ways that violated their rights under the Religious Freedom Restoration Act of 1993. Federal courts divided on whether the mandated notification violated statutory rights. All parties appealed to the Supreme Court of the United States.*

 *The Supreme Court unanimously remanded the case to the lower federal courts. The per curiam opinion noted that a possible compromise had been proposed that might settle the case, making adjudication unnecessary. What was that compromise? Will that compromise settle the case? Is Zubik an example of courts wisely preferring settlement to adjudication or an instance where the justices, perhaps because they were equally divided on the merits, desperately trying to make a controversial issue go away? If the court had reached the merits, what was the like result? What should have been the result?*

PER CURIAM.

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Following oral argument, the Court requested supplemental briefing from the parties addressing “whether contraceptive coverage could be provided to petitioners' employees, through petitioners' insurance companies, without any such notice from petitioners.”  Both petitioners and the Government now confirm that such an option is feasible. Petitioners have clarified that their religious exercise is not infringed where they “need to do nothing more than contract for a plan that does not include coverage for some or all forms of contraception,” even if their employees receive cost-free contraceptive coverage from the same insurance company. The Government has confirmed that the challenged procedures “for employers with insured plans could be modified to operate in the manner posited in the Court's order while still ensuring that the affected women receive contraceptive coverage seamlessly, together with the rest of their health coverage.”

In light of the positions asserted by the parties in their supplemental briefs, the Court vacates the judgments below and remands to the respective United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits. Given the gravity of the dispute and the substantial clarification and refinement in the positions of the parties, the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans “receive full and equal health coverage, including contraceptive coverage.” We anticipate that the Courts of Appeals will allow the parties sufficient time to resolve any outstanding issues between them.

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The Court expresses no view on the merits of the cases. In particular, the Court does not decide whether petitioners' religious exercise has been substantially burdened, whether the Government has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest.

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Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I041b59371b6011e6a807ad48145ed9f1&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I041b59371b6011e6a807ad48145ed9f1&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins, concurring.

I join the Court's per curiam opinion because it expresses no view on “the merits of the cases,” “whether petitioners' religious exercise has been substantially burdened,” or “whether the current regulations are the least restrictive means of serving” a compelling governmental interest.  Lower courts, therefore, should not construe either today's per curiam or our order of March 29, 2016, as signals of where this Court stands. . . .

I also join the Court's opinion because it allows the lower courts to consider only whether existing or modified regulations could provide seamless contraceptive coverage “‘to petitioners' employees, through petitioners' insurance companies, without any ... notice from petitioners.’” The opinion does not, by contrast, endorse the petitioners' position that the existing regulations substantially burden their religious exercise or that contraceptive coverage must be provided through a “separate policy, with a separate enrollment process.” Such separate contraceptive-only policies do not currently exist, and the Government has laid out a number of legal and practical obstacles to their creation. Requiring standalone contraceptive-only coverage would leave in limbo all of the women now guaranteed seamless preventive-care coverage under the Affordable Care Act. And requiring that women affirmatively opt into such coverage would “impose precisely the kind of barrier to the delivery of preventive services that Congress sought to eliminate.”

Today's opinion does only what it says it does: “afford[s] an opportunity” for the parties and Courts of Appeals to reconsider the parties' arguments in light of petitioners' new articulation of their religious objection and the Government's clarification about what the existing regulations accomplish, how they might be amended, and what such an amendment would sacrifice. As enlightened by the parties' new submissions, the Courts of Appeals remain free to reach the same conclusion or a different one on each of the questions presented by these cases.