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Mark L. Rienzi

*The Catholic University of America, Columbus School of Law*

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# Fool Me Twice: *Zubik v. Burwell* and the Perils of Judicial Faith in Government Claims

Mark L. Rienzi\*

It is tempting to think of *Zubik v. Burwell* as a case that fizzled. After all, the latest version of the contraceptive mandate fight was initially viewed as one of the term's biggest blockbusters. The case generated widespread public interest and involved a particularly large expenditure of legal resources by the Court and the parties. There were dozens of parties, two classes, four years of litigation, seven petitions for certiorari, expanded merits briefing, a supplemental round of merits briefing, extended oral argument, and more than 70 amicus briefs. On one side stood the consciences of groups like the Little Sisters of the Poor and on the other stood expanded access to birth control. The button could hardly be hotter.

Yet after all of that attention and effort, *Zubik* came to a surprisingly short and seemingly inconclusive result: a three-page per curiam opinion remanding the cases for further consideration. Because the Court's opinion did not resolve the merits of the case, many called it a "punt" or a "dodge."<sup>1</sup> Viewed in that light, *Zubik* looks like Macbeth's view of life: full of sound and fury, but ultimately signifying nothing.

\*Associate professor, Catholic University of America, Columbus School of Law; senior counsel, Becket Fund for Religious Liberty. The author was counsel to several of the plaintiff organizations whose cases came to the Supreme Court in *Zubik v. Burwell*, and to the religious plaintiffs in three prior Supreme Court cases concerning the contraceptive mandate: *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 134 S. Ct. 1022 (2014) (mem.); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); and *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014) (mem.).

<sup>1</sup> See, e.g., Adam Liptak, Justices, Seeking Compromise, Return Contraceptive Case to Lower Courts, N.Y. Times, May 16, 2016, <http://www.nytimes.com/2016/05/17/us/supreme-court-contraception-religious-groups.html> ("President Obama, in a BuzzFeed

But viewing *Zubik* that way is a mistake. The Supreme Court litigation in *Zubik* generated three important government concessions showing a surprising truth at the heart of the seeming conflict: that it is possible to protect *both* contraceptive access and religious liberty. Based on those concessions, the Supreme Court was able to reach unanimity in a case that was once predicted to generate deadlock. Far from dodging the issues, the Court's opinion worked significant changes in the relationships between the parties, in that it vacated important precedents in at least eight different circuits, and forbade the government from making religious organizations comply with the contraceptive mandate or pay large fines.

At a time when perceived conflicts between health care access and religious liberty are on the rise, the government's 11th-hour concessions in *Zubik* provide important evidence that even seemingly intractable conflicts are often resolvable. Simply put, there are many other ways to provide broad contraceptive access without enlisting the Little Sisters of the Poor and other religious groups. The path to resolution that developed in the Supreme Court will thus make *Zubik* a model for other disputes about health care and religious liberty.

But *Zubik* is not just a model for future cases; it is also a warning. When the justices requested supplemental briefing and proposed solutions for the parties to discuss, commentators noted that the Court was acting out of character, more like a trial judge or mediator.<sup>2</sup> And while the Supreme Court's adoption of those uncharacteristic

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interview, said the opinion was notable for what it said about the state of the Supreme Court. 'I won't speculate as to why they punted,' he said, 'but my suspicion is that if we had nine Supreme Court justices instead of eight, there might have been a different outcome.'"); S.M., *The Supreme Court Dodges a Decision on Contraceptive Coverage*, *Economist*, May 28, 2016, <http://www.economist.com/blogs/democracyinamerica/2016/05/prophylactic-move> (calling *Zubik* "one of this year's most closely watched cases" which ultimately "fizzled to a close").

<sup>2</sup> See, e.g., Charles F. Webber & Jane Dall Wilson, *Zubik v. Burwell: The Supreme Court as Mediator*, *Law360*, June 1, 2016, <http://www.law360.com/articles/801585/zubik-v-burwell-the-supreme-court-as-mediator> ("The real story in *Zubik* is that the court acted in the role of a mediator, not as a court seeking to resolve a concrete legal dispute presented to it. The court actively sought a middle ground, appeared to find one that both parties could live with, then sent the case back to the lower courts with instructions to 'allow the parties sufficient time to resolve any outstanding issues between them.' This Supreme-Court-as-mediator is extremely unusual—if not unprecedented.").

roles proved successful, it is important to understand *why* the Court was forced to act like a trial judge or mediator four years into the dispute, and *why* the government's position changed so dramatically at the Supreme Court.

The answer is simple, but deeply troubling: lower courts were far too trusting of the government's claims. Rather than forcing the government to carry its statutory burdens, many lower courts gave the government the benefit of the doubt and presumed that the government's descriptions of its programs and alternative options were accurate. As a result of that deference, the government was not forced in the lower courts to explain exactly how its contraceptive mandate system worked or to acknowledge the existence of adequate alternatives. Instead, those important developments happened quite late, in merits briefing at the Supreme Court.

Three important consequences flowed from the lower courts' undue deference to the government. First, judicial resources were wasted. The Supreme Court was forced to do work that could and should have been accomplished years earlier in lower courts across the country. Had the government's arguments been greeted sooner with skepticism rather than deference, the entire issue and dozens of cases might have been resolved years ago. Second, many lower courts were drawn into clear misstatements about how the contraceptive mandate operates and whether the government has alternatives. Now that the government has abandoned the arguments with which it breezed through those courts, it has left many judges looking somewhat credulous for having accepted claims the government would not even try at the Supreme Court. Excessive deference thus undermines the credibility of the courts, particularly those that most emphatically embraced positions the government itself would rather jettison than defend at the Supreme Court. Third, by trusting the government, those courts turned civil-rights laws relating to religion on their head. Those laws are designed to be deferential to religious believers about what their faith requires of them, but to apply the highest level of judicial skepticism—strict scrutiny—to the government's arguments. The lower courts in *Zubik* got it exactly backwards: skepticism toward the religious believer and almost blind faith in the government's claims.

*Zubik* then offers a crucially important lesson for litigants and lower court judges about the dangers of deference to the government

in civil-liberties cases. Religious-liberty laws—like many civil-rights laws—are built on the premise that majoritarian governments will sometimes undervalue the rights of minorities. Both the Constitution and federal civil-rights laws require Article III courts *not* to defer to governments in those circumstances. This is especially true in hot-button cases, in which the political pressure on government to sacrifice minority religious practices to achieve a popular majoritarian goal will be greatest. Instead, it is the responsibility of the lower courts to do exactly what the Supreme Court eventually did in *Zubik*—pressure the government to explain itself and prove its case. As in *Zubik*, this pressure will often reveal that win-win solutions are available, despite the government’s initial protestations to the contrary. Failing to apply such pressure will waste judicial resources, expose judges to embarrassment for embracing positions the government later admits were false, and frustrate the proper functioning of civil-rights laws.

This article proceeds in three parts. Part I examines the three government concessions that made the Supreme Court’s *Zubik* decision possible and how those concessions ultimately revealed that it is possible to protect both contraceptive access and religious liberty. Part II discusses how the circuit courts were brought to emphatically adopt positions the government would ultimately abandon under the slightest pressure. Part III concludes with some key lessons lower courts should take from *Zubik* to better protect the integrity of both the court system and religious-liberty laws.

### **I. *Zubik*’s Surprise: Three Government Concessions Point to Win-Win Solutions to What Seemed Like an Intractable Conflict**

When the sudden death of Justice Antonin Scalia left the Court with just eight members, some commentators concluded that *Zubik* would be a case in which neither the parties nor the justices could find agreement.<sup>3</sup> After all, *Zubik* was only the latest chapter in a long-running dispute over the federal government’s contraceptive mandate. That dispute had generated dozens of lawsuits and had already sharply divided the Court in previous terms.

<sup>3</sup> See, e.g., Joan Frawley Desmond, What Will Justice Scalia’s Death Mean for the Little Sisters of the Poor?, *Nat’l Cath. Reg.*, Feb. 18, 2016, <http://www.ncregister.com/daily-news/what-will-justice-scalias-death-mean-for-the-little-sisters-of-the-poor>.

The contraceptive mandate dispute arises from a provision in the Affordable Care Act (ACA), which was enacted in 2010. The ACA requires certain employer-provided health benefits to include “preventive care” for women.<sup>4</sup> A subagency within the Department of Health and Human Services (HHS)—the Health Resources and Services Administration (HRSA)—was tasked by Congress with defining “preventive care” and, on its website, defined that term to include female sterilization and all FDA-approved female contraceptives.<sup>5</sup> Beginning in 2011, HHS in turn issued a series of regulations dictating how various employers must comply with the contraceptive coverage requirement.<sup>6</sup>

For a small minority of employers, however, religious beliefs prevent them from being able to assist the government’s efforts to expand contraceptive access. These employers view some or all contraceptives as religiously forbidden and, therefore, would be violating their religion if they provided employees with a health plan that included contraceptives. Accordingly, they asserted claims under the Religious Freedom Restoration Act (RFRA), arguing that the government was impermissibly burdening their religion without a sufficient reason.<sup>7</sup>

#### *A. Prior Decisions Suggested Zubik Could Be Deadlocked*

By the time the issue was before the Court in *Zubik*, the justices had already considered similar religious-liberty claims arising from the contraceptive mandate four times.<sup>8</sup> Each time, the Court had acted to protect religious people and organizations from forced compliance with the mandate. But the Court’s actions had revealed divisions among the justices.

<sup>4</sup> 42 U.S.C. § 300gg-13(a)(4).

<sup>5</sup> See Health Resources and Services Administration, Women’s Preventive Service Guidelines, <http://www.hrsa.gov/womensguidelines>.

<sup>6</sup> See, e.g., 76 Fed. Reg. 46621 (Aug. 3, 2011).

<sup>7</sup> *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1173–95 (10th Cir. 2015). The plaintiffs in these cases also asserted a variety of other claims, challenging the mandate on, *inter alia*, First Amendment, Administrative Procedure Act, and other grounds. See, e.g., *id.* at 1195.

<sup>8</sup> *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius*, 134 S. Ct. 1022 (2014) (mem.); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2765 (2014); *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014) (mem.); *Zubik v. Burwell*, 135 S. Ct. 2924 (2015) (mem.).

The Court first addressed the mandate in ruling on an emergency application from the Little Sisters of the Poor. For many religious nonprofits, the mandate was scheduled to take effect on January 1, 2014, triggering a wave of lawsuits and decisions in the fall of 2013. Although most nonprofits had received injunctions in the lower courts, the Little Sisters of the Poor were denied an injunction from the U.S. Court of Appeals for the Tenth Circuit on December 31.<sup>9</sup> With millions of dollars in fines set to accrue on January 1 if they did not sign the government’s form, the Little Sisters filed the legal version of a Hail Mary: an emergency All Writs Act application for an injunction pending appeal from the Supreme Court. The application was filed with Justice Sonia Sotomayor, the circuit justice responsible for the Tenth Circuit.

Late on New Year’s Eve—while she was en route to Times Square to assist with the ceremonial dropping of the ball to ring in the New Year—Justice Sotomayor issued an injunction protecting the Little Sisters from the mandate and ordering the government to file a responsive brief.<sup>10</sup> The Little Sisters had argued that the form the government wanted them to sign would authorize the use of their plan to distribute contraceptives.<sup>11</sup> The government responded that the form would not cause the flow of contraceptives and really was just needed “to provide for regularized, orderly means of permitting eligible individuals or entities to declare that they intend to take advantage”<sup>12</sup> of the “accommodation.” The government even insisted that forcing the Little Sisters to sign the form was the “least restrictive means” of furthering its interests.<sup>13</sup>

The government’s position was bizarre. If the form did not help contraceptives flow, why did the government insist on it? And why would the government fight so hard—all the way to the

<sup>9</sup> Order Denying Plaintiff-Appellants’ Emergency Motion for an Injunction, *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014) (No. 13-1540).

<sup>10</sup> *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 893 (2013) (mem.).

<sup>11</sup> Emergency Application for Injunction Pending Appellate Review at 8–10, *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014).

<sup>12</sup> Memorandum for Respondents in Opposition at 33, *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014) (No. 13A691).

<sup>13</sup> Opposition to the Emergency Motion for Injunction Pending Appeal, *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014) (No. 13-6827).

Supreme Court, against the Little Sisters of the Poor, of all people—to get them to sign it? If the government simply needed to know they objected, it would not use the threat of millions of dollars in fines to get the nuns to execute a particular document. The government’s regulatory and litigation behavior simply didn’t match its claim that the form was meaningless.<sup>14</sup>

Three weeks later, the justices called the government’s bluff. They gave the Little Sisters the injunction they had asked for. But they also gave the government what they had said they wanted—a way to know the nuns objected. As a condition of the injunction, the Court required the Little Sisters to tell HHS that they “are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services.”<sup>15</sup> The ruling was clear, though, that the government could not insist on making the nuns sign the prescribed form: “applicants need not use the form prescribed by the Government and need not send copies to third-party administrators [TPA].” The decision issued without dissent.

A few months later, the Court appeared much more divided in *Burwell v. Hobby Lobby Stores, Inc.* There, it had determined by a 5–4 vote that the contraceptive mandate could not be applied against a religious family-owned business. In particular, the Court held that forcing the religious plaintiffs to provide health benefits that include emergency contraceptives constitutes a substantial burden on their religion, and that the government had not established that such a requirement was the least restrictive means of achieving a compelling government interest.

The Court explained that even if it assumed the existence of a compelling interest, the government had not demonstrated why “the most straightforward way” of achieving its interests—namely, “for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them”—was not

<sup>14</sup> See also *Sharpe Holdings, Inc. v. U.S. Dep’t of Health & Human Servs.*, 801 F.3d 927, 942 (8th Cir. 2015) (“We need look no further than to the government’s own litigation behavior to gauge the importance of self-certification in the regulatory scheme. If TPAs had a wholly independent obligation to provide contraceptive coverage to religious objectors’ employees and plan beneficiaries, there would be no need to insist on the nonprofit religious organizations’ compliance with the accommodation process.”).

<sup>15</sup> *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius*, 134 S. Ct. 1022 (2014) (mem.).



a viable alternative. In particular, the Court suspected that the cost of providing those contraceptives directly “would be minor” when compared to the cost of the act as a whole. “If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS’s argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal.”<sup>16</sup>

The *Hobby Lobby* decision could have stopped there, because once it was clear that HHS had not carried its burden, the government could not win under RFRA. But the Court went further, leaving a door open that would eventually result in the *Zubik* cases. Although the Court was clearly not convinced by HHS’s argument that it should not have to create new programs—saying “we see nothing in RFRA that supports this argument”—it explained that the government would not have to create a new program anyway. Why? Because “HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs”: the so-called “accommodation” the government offered (at the time) only to religious nonprofits.<sup>17</sup>

Under the “accommodation,” the government allowed certain religious organizations to add the drugs to their health plan in an alternative way—essentially by submitting a government-designed form (EBSA Form 700) instructing their insurer or plan administrator to include the drugs instead. This accommodation scheme—which was at issue in the *Little Sisters* case—required the religious organization to execute plan documents to “ensure[] that there is a party with legal authority to arrange for payments for contraceptive services and administer claims in accordance with ERISA’s protections for plan . . . beneficiaries”<sup>18</sup> and to ensure that beneficiaries receive such payments “for so long as [they] remain[] enrolled in the plan.”<sup>19</sup> If religious organizations comply with the mandate by issuing those plan documents, the government said it would require the insurer

<sup>16</sup> All quotes in this paragraph from *Hobby Lobby*, 134 S. Ct. at 2780–81 (emphasis in original).

<sup>17</sup> All quotes in this paragraph from *id.* at 2781–82.

<sup>18</sup> 78 Fed. Reg. 39880.

<sup>19</sup> 78 Fed. Reg. 39876.

or plan administrator to provide the drugs without charging the religious group.<sup>20</sup>

*Hobby Lobby* found this alternative mechanism of compliance to be less restrictive than what the government was then requiring of religious businesses. The Court made clear that it was not deciding whether this arrangement would satisfy RFRA as to any organization that objected to it.<sup>21</sup>

To the extent there was any doubt about whether the Court was deciding the legality of this alternative mechanism, the Court eliminated that doubt just three days later, when it granted Wheaton College an emergency injunction against the “accommodation.”<sup>22</sup> Like the Little Sisters of the Poor, Wheaton had sought emergency relief at the Supreme Court under the All Writs Act when fines were about to accrue. The government argued, however, that forcing Wheaton to execute the form and allow the use of its plan was “the least restrictive means” of achieving the government’s goals.<sup>23</sup> Despite that claim, the Court granted Wheaton relief, generating a strongly worded dissent from Justices Sotomayor, Ruth Bader Ginsburg, and Elena Kagan.<sup>24</sup>

After *Hobby Lobby* and *Wheaton College*, the government modified its regulations to allow contraceptives to be added by sending a notification letter to the government. The government made clear that the notification letter, like Form 700, would have to be a plan instrument.<sup>25</sup> And the government emphasized that the effect of this new process was exactly the same as the old process: it would trigger the provision of contraceptives

<sup>20</sup> *Id.*

<sup>21</sup> *Hobby Lobby*, 134 S. Ct. at 2782 (“We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims.”).

<sup>22</sup> The Wheaton College application itself was something of a precursor to *Zubik*, as it came from one side of a split among the courts of appeal regarding the legality of the mandate, particularly after *Hobby Lobby*. See, e.g., *id.* at 2807 (“The Circuit Courts have divided on whether to enjoin the requirement that religious nonprofit organizations use EBSA Form 700.”).

<sup>23</sup> Memorandum for Respondents in Opp. at 3, *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014) (No. 13A1284).

<sup>24</sup> *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014).

<sup>25</sup> See, e.g., sample EBSA Form 700, available at <https://www.dol.gov/ebsa/preventiveserviceseligibleorganizationcertificationform.doc> (“This form or a notice to the Secretary is an instrument under which the plan is operated.”).

to plan beneficiaries.<sup>26</sup> In this respect, the government showed flexibility about *how* the drugs were added to the employer-provided coverage; but there was no change regarding *whether* the government required the drugs be added. One way or the other, the government would not yield and religious groups would be required to comply with the contraceptive mandate. And the religious groups were equally steadfast in their position: whether the drugs were added to the plan via Form 700 or a letter to the government, they objected to this use of their health plans.<sup>27</sup>

Thus, the immediate aftermath of *Hobby Lobby* included both the seeds of the return trip to the Supreme Court and omens that the conflict would remain intractable. That conflict continued to seem intractable as the issue percolated in the lower courts the following year, resulting in one more emergency All Writs Act application being granted, setting the stage for another Supreme Court fight on the merits.<sup>28</sup>

*B. Government Concessions at the Supreme Court Demonstrate That Solutions Are Possible*

Of course we now know that the conflict wasn't nearly as intractable as it once seemed. That is because the government changed its position at the Supreme Court on three key issues.

First, after years of claiming the opposite in the lower courts, the government conceded in its merits brief that contraceptive coverage provided under the "accommodation" actually was "part of the same plan as the coverage provided by the employer."<sup>29</sup> This concession severely weakened the government's substantial burden argument, which in turn shifted the Supreme Court's focus to strict scrutiny.

<sup>26</sup> 79 Fed. Reg. 51092, 51092 (Aug. 27, 2014); The Center for Consumer Information & Insurance Oversight, Fact Sheet, <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html> (current as of Sept. 8, 2014) ("Regardless of whether the eligible organization self-certifies in accordance with the July 2013 final rules, or provides notice to HHS in accordance with the August 2014 [Interim Final Rules], the obligations of insurers and/or TPAs regarding providing or arranging separate payments for contraceptive services are the same."). This fact sheet often changes. The version cited is on file with author.

<sup>27</sup> *Little Sisters of the Poor*, Brief on Interim Final Regs. at 5, *Little Sisters of the Poor v. Burwell*, 794 F.3d 1151 (2015) (No. 13-1540) ("The interim final rules therefore merely offer the Little Sisters another way to violate their religion and comply with the Mandate.").

<sup>28</sup> *Zubik v. Burwell*, 135 S. Ct. 2924 (2015) (mem.).

<sup>29</sup> Brief for the Respondents at 38, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) (quotations omitted).

Second, the government admitted for the first time in its merits brief that its interests actually did not require women to receive complete cost-free contraceptive coverage from their employers. Instead, the government acknowledged that its interests would be satisfied so long as women had access to a plan with some contraceptive coverage, which they could obtain from many sources, including “a family member’s employer,” “an Exchange,” or “another government program.” As the government told the Court, “All of these sources would include contraceptive coverage.”<sup>30</sup>

Third, when the Court asked for supplemental briefing on alternatives, the government acknowledged that its existing system was not the least restrictive means of achieving its goal. Instead, after years of telling the lower courts that it was already using the least restrictive means possible, the government told the Court that the system actually “could be modified” to avoid forcing religious organizations to execute documents that violate their faith, while still getting women contraceptives.<sup>31</sup>

As set forth below, these three concessions dramatically changed the case, made the Supreme Court’s unanimous opinion possible, and showed that solutions are possible that protect both contraceptive access and religious liberty.

Concession 1: Contraceptive coverage under the “accommodation” actually is part of the employer’s plan after all.

When the litigation resumed in the lower courts, the government was initially very successful: eight out of nine courts of appeals ultimately decided in its favor.<sup>32</sup> All of those eight circuits began their analysis—and most ended it—by agreeing with the government’s

<sup>30</sup> *Id.* at 65.

<sup>31</sup> Supp. Brief for the Respondents at 14–15, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418).

<sup>32</sup> By the time the Supreme Court considered *Zubik*, the Second, Third, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits had ruled for the government; only the Eighth Circuit had ruled for the religious plaintiffs, thus creating the circuit split that eventually caused the government to acquiesce in the request for the Court to take up the cases. *Zubik* consolidated a total of seven certiorari requests arising from four different circuits (Third, Fifth, Tenth, and D.C.); later-filed petitions from four other circuits were granted, vacated, and remanded in light of *Zubik* (Second, Sixth, Seventh, and Eighth); and the Eleventh Circuit vacated its own decision.

argument that the mandate did not impose a “substantial burden” on plaintiffs’ religion at all. The key to this reasoning was accepting the government’s claim that the contraceptives provided under the “accommodation” were *not* part of the employer’s health plan at all, and therefore could not possibly violate the rights of the religious employers who contracted for those plans.<sup>33</sup> Once these courts viewed the contraceptive coverage as separate from the religious organizations’ health plans, they could accept the government’s claim that the religious organizations were simply trying to unfairly control the actions of third parties and interfere with their independent provision of contraceptives.<sup>34</sup>

The government’s claim that contraceptive coverage under the “accommodation” was not part of the religious organization’s health plan was always in tension with its insistence that the coverage must be “seamless” with that plan. How can coverage possibly be “seamless” with—but simultaneously “separate” from and “independent” of—the same health plan? By definition, the more “seamless” a plan is, the *less* independent and separate it is. A seamless garment is not a patchwork, much less two separate garments.

As described in more detail below, the circuit courts nevertheless accepted at face value the government’s claims that the contraceptive coverage was separate from the employer’s plan and based their substantial burden analysis on that view.<sup>35</sup> But as the litigation moved to the Supreme Court, the inherent conflict in the government’s position began to undermine the “not your plan” argument that had previously been so successful.

First, in July 2015—at a time when the government was undefeated in the courts of appeal and may have thought it would run the table and avoid Supreme Court review—HHS issued revised rules finalizing the “accommodation.” In so doing, the agency needed to explain why other proposed solutions would not work. Commenters had

<sup>33</sup> Brief for the Appellees at 25, *Priests for Life v. Burwell*, 772 F.3d 229 (D.C. Cir. 2014) (No. 13-5368).

<sup>34</sup> Compare *id.* at 22 (“Plaintiffs object to requirements imposed on third parties, not on themselves.”) with *Priests for Life*, 772 F.3d at 246 (“[A]n adherent may not use a religious objection to dictate the conduct of the government or of third parties.”).

<sup>35</sup> See, e.g., *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 461 (5th Cir. 2015) (“[T]he government is requiring the insurers and third-party administrators to offer [contraceptive coverage]—separately from the plans—despite the plaintiffs’ opposition.”).

suggested many other ways that contraceptives could be provided to women who want them—by mail, directly from prescribing doctors, from pharmaceutical companies, or through government programs like Medicaid. In response, HHS took the position that “these alternatives raise obstacles to seamless coverage” because “plan beneficiaries and enrollees should not be required to incur additional costs—financial or otherwise—to receive access.” The government then explained that the insurers and administrators of the *employer’s plan* were actually better situated to provide “seamless” access. This is because any solution that operated outside the employer’s plan would involve providers “that may not be in the insurance coverage network” of the employer’s plan, and would “lack the coverage administration infrastructure to verify the identity of women in accommodated health plans and provide formatted claims data for government reimbursement.”<sup>36</sup>

Once the agency had so forthrightly admitted in the Federal Register that the accommodation system would in fact use the employer’s plan—using its “insurance coverage network,” its “claims administration infrastructure,” its information to “verify . . . identit[ies],” and its systems to “provide formatted claims data,”—the government lost its nerve. It could not plausibly insist to the Supreme Court that the contraceptive coverage would be completely separate from the employer’s plan. The religious parties promptly seized on the government’s statements and presented them to the Supreme Court as evidence that the contraceptive coverage would use their health plan after all.<sup>37</sup>

As a result, the government began acknowledging in its Supreme Court filings that, in fact, the contraceptive coverage provided under the “accommodation” is part of the employer’s health plan after all. For example, in opposing certiorari in one case, the government explained: “If the objecting employer has a self-insured plan, the contraceptive coverage provided by its TPA is, as an ERISA matter, *part of the same ERISA plan as the coverage provided by the employer.*”<sup>38</sup> In its merits brief in *Zubik*, the government likewise acknowledged that

<sup>36</sup> All quotes in this paragraph are from 80 Fed. Reg. 41328–29 (July 14, 2015).

<sup>37</sup> See, e.g., Petition for Writ of Certiorari at 7, 11, 21, *Little Sisters of the Poor et al. v. Burwell*, 136 S. Ct. 1557 (2016) (No. 15-105).

<sup>38</sup> Brief for the Respondents in Opp. at 19, *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (No. 15-35) (emphasis added). ERISA stands for the Employee Retirement Income Security Act.

“[a]s a result, the coverage provided by the TPA is, as a formal ERISA matter, part of the same ‘plan’ as the coverage provided by the employer.”<sup>39</sup>

Although the government attempted to limit this concession to self-insured plans, the damage had been done. Self-insured plans are actually the most common kind of employer health plan available.<sup>40</sup> And the details of what the government said would happen under the accommodation—using the plan’s “insurance coverage network,” “claims administration infrastructure,” and information to “verify . . . identit[ies]” and provide claims data for reimbursement—were the same regardless of whether an employer uses an “insurer” or “third party administrator.”<sup>41</sup>

Thus it was no surprise that, by the time of oral argument, the government’s “substantial burden” argument was in tatters. Justices Anthony Kennedy and Ginsburg each pointedly suggested during argument that the solicitor general appeared to be conceding the substantial burden argument entirely.<sup>42</sup> The solicitor general told the Court the government would be “content” if the Court assumed a substantial burden and decided the strict scrutiny questions.<sup>43</sup> Chief Justice John Roberts commented that he thought the government was trying to “hijack” the religious groups’ health plans, a concern echoed by Justice Kennedy.<sup>44</sup> When pressured directly about whether the government was trying to force inclusion of contraceptives in

<sup>39</sup> Brief for the Respondents, *supra* note 29, at 38 (emphasis in original).

<sup>40</sup> In fact, at around the same time this issue was playing out in the contraceptive cases, the government told the Supreme Court in another case that self-insured plans actually cover the majority of workers—nearly 60 percent of them. See Brief of the United States at 19, *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936 (2016) (No. 14-181) (citing Paul Fronstin, *Self-Insured Health Plans: State Variation and Recent Trends by Firm Size, Emp. Benefit Res. Inst. Notes* at 2 (Nov. 2012)).

<sup>41</sup> 80 Fed. Reg. 41328-29.

<sup>42</sup> Transcript of Oral Arg. at 45, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) (JUSTICE KENNEDY: “And is it fair for me to infer from the way you open your remarks that you concede that there is a substantial burden here? And the question then is what is a permissible accommodation? What’s the least restrictive alternative? Do you concede that there’s a substantial burden?”); Arg. audio at 1:02, *Zubik*, 136 S. Ct. 1557 (JUSTICE GINSBURG: “So you are giving up on the substantial burden?”). Note that the transcript has Ginsburg asking “Now you aren’t . . .” but this is in error.

<sup>43</sup> Transcript of Oral Arg., *supra* note 42, at 61.

<sup>44</sup> *Id.* at 76 (“That’s why it’s necessary to hijack the plans.”).



“the one insurance policy” offered by the employer, the solicitor general agreed that would be a “fair understanding” of the case.<sup>45</sup>

If any doubts remained about the viability of the government’s once-successful substantial burden argument, they were eliminated by the supplemental briefing order and arguments. First, the justices issued the supplemental briefing order focused entirely on strict scrutiny questions—the Court specifically asked the parties to address whether solutions were possible that would allow employees to receive contraceptives from their existing insurance companies, but without requiring any involvement of petitioners. That order would make no sense if the justices actually agreed with the “not your plan” argument that had won in almost every circuit court. If even four justices had accepted that argument, there would have been no need to even consider strict scrutiny at all.<sup>46</sup>

Furthermore, the government’s supplemental briefs again emphasized that the “accommodation” really does use the employer’s plan, at least for the most common plan type (that is, self-insured). In that context, the government acknowledged “the statutory obligation to provide contraceptive coverage falls only on the plan,” the government can achieve its goals only “in a written plan instrument,” and “[t]here is no mechanism for requiring TPAs to provide separate contraceptive coverage without a plan instrument.”<sup>47</sup>

Ultimately, the government’s Supreme Court concessions about how the accommodation works had two important effects. First, they eliminated any possibility that the government could win the case with the argument that had been so successful in the courts of appeal, namely that the “accommodation” was separate and independent

<sup>45</sup> *Id.* at 61.

<sup>46</sup> See Michael McConnell, More from Michael McConnell on Supplemental Briefing in *Zubik v. Burwell*, Volokh Conspiracy, Wash. Post, Apr. 13, 2016, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/13/more-from-michael-mcconnell-on-the-supplementary-briefing-in-zubik-v-burwell/> (“[W]hy worry about alternatives unless the Justices are unpersuaded by the government’s argument that the mandate imposed no substantial burden on religious exercise to begin with? . . . Most significantly, the order suggests that the Justices are delving into the weeds of regulatory detail. I have always thought that the more you get into the regulatory details, the weaker the government’s case begins to look. The Administration’s supporters have gotten by on sloppy mischaracterizations of the proposed accommodation.”).

<sup>47</sup> Supp. Brief for the Respondents, *supra* note 31, at 16, 17 (emphasis in original).



from the employer's plan and therefore did not impose a "substantial burden." Second, they turned the Court's attention to the question of strict scrutiny, which had received scant attention below because the lower courts had mostly stopped their analysis upon accepting the now-defunct "not your plan" argument. With the focus on strict scrutiny, the government made two more important concessions.

Concession 2: Any plan with at least some contraceptives will do.

A key to the government's argument in these cases was always a claimed need to include contraceptives in *employer*-provided health insurance. After all, if it were just as good to get a plan from some other source—from a family member's employer, from the new exchanges set up under the ACA, or from another government program—then there would be little reason for the government to insist that women must be able to get contraceptive coverage from religious employers. Likewise, if it were sufficient for plans to cover some contraceptives but not all, or to offer contraceptives but require a co-pay, then the government could hardly insist on religious employers' providing a plan with free coverage of all contraceptives.

In the litigation at the Supreme Court, the government eventually conceded that its interests can be satisfied so long as women are able to obtain at least some contraceptives from an employer-based plan, and as long as women who do not have an employer-provided plan with contraceptives can get such a plan elsewhere.

First, in defending the ACA's exemption for "grandfathered" plans—which are exempt from the contraceptive mandate entirely, and which cover approximately 100 million Americans—the government explained that this gap in coverage does not undermine its compelling interest.<sup>48</sup> Why? Because most employers already provide at least "some contraceptive coverage."<sup>49</sup> Therefore, the government told the Court, the grandfathering exception does not undermine

<sup>48</sup> Although the Court had assumed a compelling interest in *Hobby Lobby*, the justices were skeptical about the grandfathering exemption which advanced "simply the interest of employers in avoiding the inconvenience of amending an existing plan." *Hobby Lobby*, 134 S. Ct. at 2780 (noting that Congress apparently did not consider the contraceptive mandate to be among the "particularly significant protections" to be implemented immediately).

<sup>49</sup> Brief for the Respondents, *supra* note 29, at 64.

the claimed interest because “most women currently covered under grandfathered plans likely have (and will continue to have) *some* contraceptive coverage.”<sup>50</sup>

But what about women whose employers do not offer *any* contraceptive coverage—either because they are fully exempt “religious employers” or because the employer is small enough that it need not offer any coverage at all? The government explained that allowing employers to leave women in this position was also fine. Why? Because women who are not offered contraceptive coverage from their employer have the option of getting on plans with that coverage from many other sources. As the government explained:

*If a small employer elects not to provide health coverage (or if a large employer chooses to pay the tax rather than providing coverage), employees will ordinarily obtain coverage through a family member’s employer, through an individual insurance policy purchased on an Exchange or directly from an insurer, or through Medicaid or another government program. All of those sources would include contraceptive coverage.*<sup>51</sup>

It is not surprising that the government believes there are so many existing ways to get women free access to contraceptives. Even before the government finalized the contraceptive mandate, HHS Secretary Kathleen Sebelius acknowledged that birth control was “the most commonly taken drug in America by young and middle-aged women” and that “contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support.”<sup>52</sup> And nearly 100 million people do not have a health plan covered by the contraceptive mandate<sup>53</sup>—a gap that would be intolerable to the government and supporters of contraceptive access if there were not easy and available ways for those women to obtain contraceptives.

<sup>50</sup> *Id.* (emphasis added).

<sup>51</sup> *Id.* at 65 (emphasis added, citations omitted).

<sup>52</sup> HHS Press Release, A Statement by U.S. Dep’t of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012).

<sup>53</sup> See Understanding Who Is Exempted from the New HHS Mandate, <http://thelittlesistersofthepoor.com/math> (last visited June 24, 2016) (“According to the government’s own statistics, almost 100 million Americans don’t have plans that must comply with the mandate.”).

The government's concessions are devastating to any claim that contraceptive coverage must include every single contraceptive, and to any claim that contraceptive coverage must come from the employer. The government thus made it obvious to the Court that as long as women have access to a plan with at least *some* contraceptives from *some* source, the government's interests are satisfied. There is no need for the coverage to come from the employer's plan, and there is no need for the coverage to include every single contraceptive.

Concession 3: The government does not need to force religious organizations to execute a particular form or notice to know they object.

For several years before *Zubik*, the government insisted in courts across the country that the current version of the contraceptive mandate was the least restrictive means of serving the government's goals. The government had originally claimed that forcing religious organizations to sign EBSA Form 700 or provide an equivalent notice was "to provide for regularized, orderly means of permitting eligible individuals or entities to declare that they intend to take advantage"<sup>54</sup> of the "accommodation." And the government went so far as to mock the Little Sisters of the Poor and other groups for refusing to sign, saying they were "fighting an invisible dragon"<sup>55</sup> they could vanquish "with a stroke of their own pen."<sup>56</sup> After insisting in *Wheaton College* that the form was the "least restrictive means"<sup>57</sup> to achieve its goals, the government eventually admitted that it did not need the form after all.<sup>58</sup> The government made similar concessions after *Hobby Lobby*, where it originally told the government that the

<sup>54</sup> Memo. for Respondents in Opp. at 33, *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014) (No. 13A691).

<sup>55</sup> Defendants' Reply in Support of Their Motion to Dismiss at 1, *Little Sisters of the Poor v. Sebelius*, 6 F. Supp. 3d 1225 (D. Colo. 2013) (No. 13-2611).

<sup>56</sup> Memo. for Respondents in Opp. at 21, *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014) (No. 13A691).

<sup>57</sup> Memo. for Respondents in Opp. at 2-3, *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014) (No. 13A1284).

<sup>58</sup> Interim Final Regulations, 79 Fed. Reg. 51094 (Aug. 27, 2014) (noting, despite earlier denials, that it was possible to use "an alternative to the EBSA Form 700 method of self-certification, and to preserve participants' and beneficiaries' . . . access to coverage for the full range of FDA-approved contraceptives, as prescribed by a health care provider, without cost sharing.").

for-profit mandate was the least restrictive means, only to later tell the world that another means would work just fine too.<sup>59</sup>

In its opening brief at the Supreme Court, the government continued to claim that requiring a form or notice from the religious groups was the least restrictive means of satisfying a compelling government interest.<sup>60</sup> And the government specifically told the Court that it could *not* accept a system in which religious organizations could avoid executing a form or notice to trigger contraceptive coverage.<sup>61</sup> But in supplemental briefs to the Court, the government finally acknowledged that this was untrue. In fact, the government acknowledged (albeit reluctantly) that the existing system actually “*could be modified to operate*” without demanding signatures from the religious groups “while still ensuring that the affected women receive contraceptive coverage seamlessly, together with the rest of their health coverage.”<sup>62</sup>

As a legal matter, this concession was damning to the government’s RFRA argument. Through RFRA, Congress only allows substantial burdens on religion where the government can demonstrate that it is using “the least restrictive means” of advancing its interests. If the procedure “could be modified” so as to lessen the religious burden, RFRA requires that it *must* be modified.

The government tried to limit the scope of this concession, suggesting that it only applies to employers with traditional insurance. As to employers with self-insured plans, the government said the proposal “would not work” because “there is no insurer” who can be obligated to provide the coverage.<sup>63</sup> And while the government said it could proceed without an employer’s signature in the insured context, it said this was impossible in the self-insured context because

<sup>59</sup> Compare Brief for the Petitioners at 14, *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014) (No. 13-354) (mandate is “the least restrictive means” of achieving government interests”) with Notice of Proposed Rulemaking, 79 Fed. Reg. 51121 (Aug. 27, 2014) (noting that government can, in fact, make sure the “same, separate payments for contraceptive services” available for employees of nonprofits are “provided to participants and beneficiaries of group health plans” used by for-profits.)

<sup>60</sup> Brief for the Respondents, *supra* note 29, at 72–89.

<sup>61</sup> *Id.* at 89.

<sup>62</sup> Supp. Brief for the Respondents, *supra* note 31, at 13 (emphasis added).

<sup>63</sup> *Id.* at 16.

it would impose an intolerable burden on women to have to obtain their contraceptive payments “through an unrelated insurer” rather than their existing TPA.<sup>64</sup>

The problem with the government’s attempted limitation, however, was that the government had *already* allowed for TPAs of self-insured plans to pass their obligation off to other parties. Thus, for the more than 600,000 people on self-insured plans using the “accommodation,”<sup>65</sup> it was *already* permissible for the TPA to “arrange for an issuer or other entity to provide payments” instead of doing so itself.<sup>66</sup> This is presumably why the Supreme Court addressed its supplemental briefing order only to whether persons on insured plans could be served through the same insurer: there was no need to ask the government about self-insured plans because the government had already answered that question in its existing regulations, which already allowed for a different entity to provide the coverage in the self-insured context.

### C. *With Resolution in Sight, the Court Remands*

The government’s concessions made what once seemed like an intractable conflict suddenly quite resolvable. If, as the government now acknowledged, so many other sources exist for plans with contraceptives—a family member’s plan, a plan on the exchanges, a plan directly from an insurer, or a plan from a government program<sup>67</sup>—then it is hard to see why the government needs to force religious employers to comply with the mandate.<sup>68</sup> Any employee who does

<sup>64</sup> *Id.* at 8 (“requiring women to obtain most of their health coverage through a TPA but their contraceptive coverage through an unrelated insurer would undermine the compelling interest in ensuring that women receive full and equal health coverage”).

<sup>65</sup> Brief for the Respondents, *supra* note 29, at 18–19.

<sup>66</sup> 29 C.F.R. § 2590.715-2713A (2)(ii).

<sup>67</sup> Brief for the Respondents, *supra* note 29, at 65.

<sup>68</sup> Of course the government regularly touts the benefits of its own exchanges as sources of good, affordable, easy-to-access health care. See, e.g., Healthcare.gov, “Why bother with health insurance?” <https://www.healthcare.gov/young-adults/ready-to-apply> (last visited June 24, 2016) (“Applying can be easy and fast,” is “more affordable—and easier—than you might think,” and comes with “complete coverage” including “free contraceptive services.”). Indeed, in his 2016 State of the Union address, President Barack Obama explained that “filling gaps in employer-based care” is “what the Affordable Care Act is all about.” See Remarks of President Obama—State of the Union Address as Delivered, <https://www.whitehouse.gov/the-press-office/2016/01/12/remarks-president-barack-obama-%E2%80%93-prepared-delivery-state-union-address>.

not like the plan offered by her employer can simply receive contraceptive coverage from these other sources, like tens of millions of other Americans already do.<sup>69</sup> Likewise, if the government does not need to force religious organizations to execute documents and notices “to provide for regularized, orderly means” for religious organizations to be accommodated—as the government had claimed earlier—then there is little reason to believe the government could pass strict scrutiny for requiring an apparently unnecessary (but religiously forbidden) act. Simply put, the government’s concessions make clear that there is no need for the courts to have to decide between contraceptive access and religious liberty—both values can be protected at the same time.

For this reason, it should not have been surprising that the Court issued a unanimous decision less than a month after the supplemental briefs were filed. Although the Court said it was not reaching the merits, its decision has several important impacts on the contraceptive mandate dispute. First, the Court vacated all of the lower court opinions on this subject—all but one of which had been in favor of the government. Second, the Court ordered that the government could not insist that religious organizations execute documents to allow the use of their plans to distribute contraceptives. Of course the government remains free to facilitate contraceptive coverage without using the religious organizations’ health plans. But the Court said it had no need for them to sign documents and could not fine them for their refusal to sign documents because the government already knows they object.

Far from being a “punt” or a “dodge” then, the Court’s decision significantly changes the precedents in the lower courts, the relationships of the parties, and the prospects for a reasonable resolution of the dispute. The government surely cannot return to the lower courts and insist yet again on forcing the religious groups to execute documents the Court unanimously found unnecessary. Nor can the government insist that its existing “accommodation” is the

<sup>69</sup> President Obama, State of the Union, *supra* note 68. In fact, contraceptive advocates have argued that Title X is actually better than insurance at “helping clients obtain—and quickly begin using—a contraceptive method best suited to them” because Title X clinics are “more likely . . . to provide contraceptives on-site, rather than giving women a prescription that must be filled at a pharmacy.” See Rachel Benson Gold, *Going the Extra Mile: The Difference Title X Makes*, *Guttmacher Policy Rev.*, Spring 2012, at 13–14.

least restrictive means of achieving its goals given that it has now acknowledged the opposite in briefing. Nor can it deny that contraceptive coverage is “part of the same plan as the coverage provided by the employer” now that it has admitted this fact at the Supreme Court. Instead, now that the government has acknowledged that contraceptive coverage from other sources will suffice, and that it does not need to insist on compliance with its current system, it is likely that the government will have to follow the Court’s guidance and reach a resolution “that accommodates petitioners’ religious exercise” while at the same time ensuring that women “receive full and equal health coverage, including contraceptive coverage.”<sup>70</sup>

## II. *Zubik*’s Lesson: How the Government’s Concessions and Supreme Court’s Resolution Exposed the Excessive Deference of the Lower Courts

The most important story of the *Zubik* litigation, however, is not the sequence of important developments at the Supreme Court. It is the absence of such developments in the lower courts.

The kind of judicial scrutiny that forced the government into making major concessions at the Supreme Court was unfortunately in short supply in the circuit courts, most of which simply accepted the government’s claims. That deference caused lower courts to embrace—sometimes quite emphatically—positions the government would eventually abandon. That deference needlessly prolonged litigation and obscured solutions that should have achieved the goals of all parties, namely, expanded contraceptive access (which the government seeks) and protection for religious liberty (which the religious parties seek).

Consider the central assertion of the government’s substantial burden argument that was so successful in the circuit courts—that the contraceptive coverage provided under the “accommodation” was not part of the religious employer’s health plan. That assertion never made much sense as a matter of plain English—by definition, the “plan administrator” the government required to provide the drugs is surely someone who is *administering the plan*. And the government’s position never made sense as a matter of ERISA law, either, which makes clear that only the employer can amend a plan or appoint a

<sup>70</sup> *Zubik*, 136 S. Ct. at 1560.



plan administrator.<sup>71</sup> Nor did it square with common sense: if the coverage actually were separate, why would the government need signed authorization documents from the religious organization to provide it? This is presumably why, when the litigation reached the Supreme Court, the government lost its nerve and admitted the obvious: the coverage is “part of the same plan as the coverage provided by the employer” and that “[t]here is no mechanism for requiring TPAs to provide separate contraceptive coverage without a plan instrument.”<sup>72</sup>

But in the courts of appeals, the government agencies told a much different story for as long as they could get away with it. For example, the government insisted to those courts that religious organizations “need not place contraceptive coverage into the basket of goods and services that constitute their healthcare plans.”<sup>73</sup> The government told those courts that the coverage was not part of the plan but was “separate coverage through third parties” that resulted from an “independent” obligation created by “federal law” and not triggered by “the religious organization’s signing and mailing” new plan documents.<sup>74</sup>

Rather than explain and defend the details of how the “accommodation” worked, the government often retreated behind the observation that ERISA law is complicated. For example, in the D.C. Circuit, the government protested that “if I say more than a couple of lines about ERISA I’m going to like sort of find myself in quicksand.” When Judge Nina Pillard asked a follow-up question about whether there is anything in ERISA that requires the *employer* to be the one to designate a plan administrator, the government responded “The short

<sup>71</sup> See 29 U.S.C. § 1002(a) (plan must be “established or maintained by an employer or employee organization”); 29 U.S.C. § 1102(a)(1) (plan must be “established and maintained pursuant to a written plan instrument”); 29 U.S.C. § 1002 (16)(A)(i) (plan administrator is either the employer or “the person so designated by the terms of the instrument under which the plan is operated”; government can designate only where “an administrator is not designated and a plan sponsor cannot be found”); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) “Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans.”

<sup>72</sup> Supp. Brief for the Respondents, *supra* note 31, at 16–17.

<sup>73</sup> Brief for the Appellees/Cross-Appellants at 25, *Priests for Life v. U.S. Dep’t of HHS*, 772 F.3d 229 (D.C. Cir. 2014) (No. 13-5368).

<sup>74</sup> Brief for the Appellants at 2, 22, 33, *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015) (No. 14-20112).



answer is I don't know."<sup>75</sup> In other circuits, the government retreated behind the complexity of ERISA, citing "the metaphysics of ERISA."<sup>76</sup> Remarkably, these courts knew enough to understand that ERISA mattered to the outcome—one judge mused from the bench, "So it sounds like this is all an ERISA issue"<sup>77</sup>—but they ultimately contented themselves deferring to the representations of government lawyers who themselves protested to be overmatched by ERISA.

The government was enormously successful with this approach. Every court of appeals to find for the government embraced its theory that contraceptive coverage was not part of the employer's plan as a key part of its substantial burden holding. The Fifth Circuit, for example, based its ruling on the notion that contraceptive coverage is provided "separately from the plans."<sup>78</sup> The Sixth Circuit found that "the eligible organization's health plan does not host the coverage."<sup>79</sup>

The extent of the lower courts' deference to the government on this point is perhaps best illustrated by the Seventh Circuit's opinion in the *Wheaton College* case. The *Wheaton* decision was authored by Judge Richard Posner, whose early opinions in the *Notre Dame* case were widely cited by other circuits. In ruling for the government, Judge Posner firmly embraced the government's (soon-to-be-abandoned) claim that it was not using the religious organization's plan at all. For example, the court explained that it was "inaccurate" to claim that the government wanted "to use Wheaton College's health plans to distribute emergency contraceptive drugs."<sup>80</sup> The court emphasized the point repeatedly:

- "Actually there are no efforts by the government to take over Wheaton's health plans, as Wheaton contends."<sup>81</sup>
- "So when Wheaton College tells us that it is being 'forced' to allow 'use' of its health plans to cover emergency contraceptives, it is wrong."<sup>82</sup>

<sup>75</sup> Transcript of Oral Arg. at 40–42, *Priests for Life v. U.S. Dep't of HHS*, 772 F.3d 229 (D.C. Cir. 2014) (No. 13–5368).

<sup>76</sup> Arg. audio at 25:10–22, *Wheaton College v. Burwell*, 791 F.3d 792 (7th Cir. 2015).

<sup>77</sup> *Id.* at 12:15–18.

<sup>78</sup> *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 461 (5th Cir. 2015).

<sup>79</sup> *Mich. Cath. Conf. v. Burwell*, 807 F.3d 738, 751 (6th Cir. 2015).

<sup>80</sup> *Wheaton College v. Burwell*, 791 F.3d at 793 (7th Cir. 2015).

<sup>81</sup> *Id.* at 794.

<sup>82</sup> *Id.* at 795.

- “Call this ‘using’ the health plans? We call it refusing to use the health plans.”<sup>83</sup>
- “The upshot is that the college contracts with health insurers for contraceptive coverage exclusive of coverage for emergency contraceptives, and the Department of Health and Human Services contracts with those insurers to cover emergency-contraceptive benefits. The latter contracts are not part of the college’s health plans, and so the college is mistaken when it tells us that the government is ‘interfering’ with the college’s contracts with its insurers. The contracts, which do not require coverage of emergency contraception, are unchanged. New contracts are created, to which the college is not a party, between the government and the insurers.”<sup>84</sup>
- “Almost the entire weight of its case falls on attempting to show that the government is trying to ‘use’ the college’s health plans, and it is this alleged use that it primarily asks us to enjoin. But the government isn’t using the college’s health plans, as we have explained at perhaps excessive length.”<sup>85</sup>

Other courts made similar errors.<sup>86</sup>

We now know that these courts had it exactly wrong. As the government admitted to the Supreme Court, it *was* trying to use the religious organizations’ health plans, and it knew that the only way to do so was to issue “plan instruments” on those plans. Had the government been as forthcoming to the circuit courts as it was to the Supreme Court—or if lower courts had pressured the government to explain its accommodation in more detail—these mistakes would likely have been avoided and the government’s substantial burden argument would have collapsed much sooner. But unfortunately the government’s brazen-but-wrong assertions, combined with some judicial reluctance to delve into the mechanics of ERISA and the relevant regulations, was enough to fool many courts of appeal.

<sup>83</sup> *Id.* at 796.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 801.

<sup>86</sup> Compare, e.g., *Geneva Coll. v. Burwell*, 778 F.3d 422, 429 (3d Cir. 2015) (“The submission of the form has no real effect on the plan participants and beneficiaries.”) with *Supp. Brief for the Respondents*, *supra* note 31, at 16–17, (“There is no mechanism for requiring TPAs to provide separate contraceptive coverage without a plan instrument.”).

The government's success with the "not your plan" argument in the circuit courts had an important side effect: the courts almost all focused on substantial burden, leaving the strict scrutiny arguments relatively underdeveloped. Thus, while the Eighth Circuit reached the strict scrutiny arguments and decided against the government, no other court ruled on strict scrutiny grounds, and just three circuits addressed strict scrutiny in the alternative. The failure of most circuit courts to even get to strict scrutiny explains why the Supreme Court seemed to be breaking new ground when it focused the supplemental briefing on available alternatives.

And while strict scrutiny did not receive as much focus in the circuit courts, those courts that ruled in the government's favor were again misled into adopting positions the government would soon abandon. For example, the government succeeded in convincing lower courts that it had a compelling need to use *employer-provided* plans because that was the best way to provide access to contraceptives. As the D.C. Circuit explained, the government sought to "build[] on the market-based system of employer-sponsored private health insurance already in place. The contraceptive coverage requirement and accommodation operate through that system."<sup>87</sup> Thus, the D.C. Circuit found that "[i]mposing even minor added steps would dissuade women from obtaining contraceptives and defeat the compelling interests in enhancing access to such coverage."<sup>88</sup> A Seventh Circuit panel declared that it would be "a bother for a person to shop for the 'best' contraceptive coverage" such that solutions other than employer-provided contraceptives "would reduce the number of women with such coverage."<sup>89</sup> The Eleventh Circuit likewise found that alternatives outside of employer-provided contraceptives "impose burdens on women that would make contraceptives less available."<sup>90</sup>

Not even the government actually believes those things. For example, consider the government's forthright acknowledgement

<sup>87</sup> *Priests for Life v. U.S. Dep't of HHS*, 772 F.3d 229, 235 (D.C. Cir. 2014).

<sup>88</sup> *Id.*

<sup>89</sup> *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 616–17 (7th Cir. 2015), cert. granted, judgment vacated, 136 S. Ct. 2007 (2016).

<sup>90</sup> *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of HHS*, 818 F.3d 1122, 1158 (11th Cir. 2016).

to the Supreme Court that women who do not get contraceptives from their employer have many alternative ways to obtain them—“a family member’s employer,” “on an Exchange,” “directly from an insurer,” “or through Medicaid or another government program”—and therefore do not undermine the government’s interests.<sup>91</sup> The government needed to make this concession at the Supreme Court because it needed to explain why exemptions covering nearly 100 million Americans did not threaten its allegedly compelling interest.<sup>92</sup> The government likewise admitted that even its existing system “could be modified” to eliminate the need for religious organizations to execute documents that violate their faith.

Again, had the government been forced to make these statements in the lower courts, it would have been clear much earlier that it was possible to find alternative solutions “that accommodate[] petitioners’ religious exercise” and also ensure that women “receive full and equal health coverage, including contraceptive coverage.”<sup>93</sup> Those alternatives may include those identified by the government (getting another plan from a family member’s employer, on an exchange, or through a government program).<sup>94</sup> Or the alternative could be one of the ways suggested by the petitioners in their supplemental brief (separate contraceptive-only plans, like the dental plans available on the exchanges; direct provision by doctors or pharmacists who already need to be involved in the process; existing government programs; or, “Like activating a credit card, it could be as simple as having the insurance company send each eligible employee a contraceptive coverage card with a sticker attached providing a telephone number to call or website portal to use should she wish to activate the coverage.”)<sup>95</sup>

But whatever the final resolution of the dispute looks like, it is clear that the path of deference followed in the lower courts allowed the government to survive for years without acknowledging important facts about its system and its alternatives. A mutually acceptable

<sup>91</sup> Brief for the Respondents, *supra* note 29, at 65.

<sup>92</sup> The justices had expressed skepticism about the government’s compelling interest arguments in *Hobby Lobby* in part based on the existence of large exceptions. 134 S. Ct. at 2780.

<sup>93</sup> *Zubik*, 136 S. Ct. at 1560.

<sup>94</sup> Brief for the Respondents, *supra* note 29, at 65.

<sup>95</sup> Supp. Brief of Petitioners at 10, *Zubik v. Burwell*, 136 S. Ct. 1557 (No. 14-1418).

resolution only became plausible when deference gave way to scrutiny. Partisans on all sides should lament the fact that the government took so long to make its admissions—earlier concessions about the availability of win-win resolutions would have resulted in greater access to contraceptives *and* more religious liberty.

### **III. Conclusion: The Supreme Court's Handling of *Zubik* as a Model**

It may seem strange to suggest that such an unusual and complicated process at the Supreme Court should be a model for future religious-liberty cases. But the oddities and complexities of the case actually offer us a useful case study. When courts receive government arguments with deference, governments will often have no shortage of excuses for why they cannot accommodate religious liberty or some other civil right. And the government's litigators will have no incentive to plainly acknowledge inconvenient truths about the challenged activities. That approach will bring us more litigation, more discord, and will undermine both civil liberties and the credibility of the courts. But when courts apply the healthy skepticism required by RFRA and other federal civil-rights laws, it turns out that even seemingly intractable disputes can be resolved on terms that protect the interests on all sides. Had the courts of appeals applied the same level of skepticism to the government's arguments that the Supreme Court did, those solutions—ones that both provide contraceptive access and protect religious liberty—might have been in place years earlier. Instead, excessive deference led to more litigation and division.

It is worth noting that RFRA does not require that religious parties always win. It was designed instead to require strict judicial scrutiny of government arguments in order to find "sensible balances," on a case-by-case basis, between government interests and private religious interests. Those sensible balances were elusive in the lower courts, because the government was allowed to succeed with superficial arguments it would later abandon. Sensible balancing only became possible when the Supreme Court greeted the government's arguments with a healthy skepticism rather than blind faith. In this respect, *Zubik* did not "punt" or "dodge" the key issues at all—it engaged them and pushed them toward resolution, while giving the lower courts an important lesson about the dangers of judicial deference to the government.

All of this makes continued litigation in *Zubik* unlikely. In fact, rather than continuing to make its case to the lower courts, the government's first move after remand was to issue a "request for information" in the Federal Register. Instead of trying to defeat the plaintiffs' RFRA claims in court, the government now says it wants information about how it can "resolve" those claims administratively. Tellingly, the government says it is interested in pursuing its goals in "alternative ways (other than those offered in current regulations)."<sup>96</sup>

That focus on alternatives makes sense. The government's best chance of achieving its stated goal of expanding contraceptive access is to adopt a new approach. An alternative to the current regulations that does not rely on religious organizations and their health plans would be able to take effect sooner and without the cloud of litigation that has engulfed the current regulations. Better yet (from the government's perspective) an approach that does not rely on the employer's health plan would provide the same access to everyone who wants it, regardless of what kind of plan their employer provides, and regardless of the employer's reason for lacking contraceptive coverage.<sup>97</sup> Indeed, advocates of contraceptive access should welcome this opportunity to disentangle such access from an employer's religious beliefs and insurance decisions.<sup>98</sup>

Of course the government could instead choose to continue litigating in defense of the current mandate. But it is hard to believe that option is appealing. For while the *Zubik* opinion does not purport to control the RFRA analysis going forward, the same cannot be said for the government's concessions about its regulations and its alternatives. Those concessions—that the mandate actually does use religious organizations' health plans and that there are other ways to achieve the government's goals that are less restrictive of religious liberty—leave the government's RFRA case in tatters. And those concessions also mean that lower-court judges who now know the government fooled them once on the way up to the Supreme Court are unlikely to be quite so trusting on the way back down.

<sup>96</sup> All citations in this paragraph to Coverage for Contraceptive Services, 81 Fed. Reg. 47,741 (July 22, 2016), <https://www.federalregister.gov/articles/2016/07/22/2016-17242/coverage-for-contraceptive-services>.

<sup>97</sup> See Supp. Brief of Petitioners, *supra* note 31, at 20.

<sup>98</sup> See Miriam Berg, "Hey Boss, Get Out of My Bedroom," Says New Bill in Senate, Planned Parenthood Action Fund, July 15, 2014, <https://www.plannedparenthoodaction.org/blog/hey-boss-get-out-my-bedroom-says-new-bill-senate>.

The Court's unorthodox approach in *Zubik* thus makes an administrative resolution more likely and continued litigation less likely (or at least less difficult, given what the government has now conceded). In the process, the Court erased errant precedents in many circuits, protected the religious groups from fines, and produced a clarity on the key issues that had evaded most lower courts. For a Court that was shorthanded and once thought to be deadlocked on a hot-button case, these are significant accomplishments.