



REPORT

from the Capital

Supreme Court asks for additional briefs in contraceptive mandate case

WASHINGTON — In an unusual development, the U.S. Supreme Court asked for additional briefs in the contraceptive mandate case six days after hearing the oral argument.

Scholars and court-watchers say the development is likely an indication that the Court is seeking a way to avoid a 4-4 decision in the consolidated cases known as *Zubik v. Burwell*. Such a ruling would leave the lower court decisions in place and set no national precedent.

In *Zubik*, religiously affiliated non-profits – such as charities, hospitals and universities – challenge the government’s accommodation procedure designed to allow them to avoid paying or contracting for contraception. The groups say the accommodation, which requires written notification of a religious objection, makes them complicit in the use of the contraception they find objectionable.

The March 29 order asked the parties to file new briefs addressing whether and how their employees can obtain contraceptive coverage through the organizations’ insurance companies “in a way that does not require any involvement of [the organizations] beyond their own decision to provide health insurance without contraceptive coverage to their employees.”

The Baptist Joint Committee for Religious Liberty filed a brief in the case defending the sufficiency of the government’s current religious accommodation. The BJC brief argues that the exemption procedure does not amount to a substantial burden on the exercise of religion, which is the legal standard in the Religious Freedom Restoration Act. While petitioners may have sincerely held beliefs against contraception, the brief explains that “substantial to the believer is not inevitably the same as substantial in law.”

The BJC brief makes clear the importance of free exercise exemptions and points out that the government must have



the ability to enact exemptions that apply to specific situations.

In the order for supplemental briefs, the Court asked the parties to consider a hypothetical example that would require the employers to only tell their insurance company they do not want the objectionable coverage when signing up for insurance, eliminating the need for additional written communication to the government. The BJC brief mentioned a similar example, noting that – based on the far-reaching arguments made by the groups – even such a plan would likely be objectionable to them.

Despite continuing differences, the first round of supplemental briefs indicate the parties are considering the Court’s hypothetical in a potential resolution. The nonprofits’ brief asserts that a similar process would satisfy their RFRA objections: allowing their insurance company to provide an independent contraception-only plan to their employees through “a separate policy, with a separate enrollment process, a separate insurance card, and a separate payment source, and offered to individuals through a separate communication.” This differs from the current accommodation by relieving the nonprofits of the requirement to subsequently object to the coverage and requiring the employees to undergo two separate enrollment processes. The parties will file their final *Zubik* briefs on April 20.

Coming up with an alternative method would require changes to existing government regulations, according to Douglas

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White House issues final rules for partnerships with faith-based social service providers

After years of work, there are now new regulations for partnerships between the government and faith-based social service providers, improving religious liberty protections for providers and beneficiaries.

On March 31, the White House released the final rules for nine agencies, which take effect at the end of April. The more than 300 pages of rules represent the resolution of a complex administrative process.

The regulations are very similar to the proposed ones released in August, strengthening partnerships between the federal government and religious organizations providing services for those in need. In October, the BJC worked with a broad coalition of dozens of organizations to submit comments on the proposals, suggesting clarifications and improvements for consistency among agencies.

The story of these regulations began with “charitable choice,” a legislative provision inserted into a handful of social services laws in the 1990s that affected financial partnerships between the federal government and religiously affiliated organizations. In 2001, President George W. Bush emphasized the importance of these partnerships through his faith-based initiatives, instituting regulatory changes aimed at protecting the religious character of providers and creating faith-based offices throughout the government. Building on these developments, President Barack Obama created a bipartisan advisory council and task force to shore up the legal footing for what he re-named the White House Office of Faith-based and Neighborhood Partnerships.

The advisory council’s consensus recommendations formed the basis for President Obama’s executive order in November 2010, which established important guidelines for partnerships between the federal government and faith-based social service providers. And now, these agencies have released the final rules to implement that order.



The new regulations clarify some terms — for example, they prohibit government funding of “expressly religious activities” in order to prevent government funding of religion. This is a change from the prohibition on the vaguely worded “inherently religious activities” description in some earlier regulations. The regulatory

changes clarify that religious activities must be offered at a different time or in a different location from any federally funded programming.

The rules also require faith-based organizations receiving federal money to provide clear, written notice to the people receiving services of their individual rights, including that they cannot be discriminated against based on belief or no belief, cannot be required to attend or participate in any explicitly religious activity or event, and — if they object to the religious character of the organization — the social service provider will refer the beneficiary to an alternative provider.

Other improvements include requiring agencies to ensure all decisions about federal financial assistance are based solely on merit. The rules make clear that faith-based organizations are eligible to participate in federally funded social service programs, and such organizations are prohibited from discriminating against those they serve (including the denial of services) based on an individual’s religious belief or practice.

“These regulations build on widespread agreement that we can and should do more to protect the religious liberty of beneficiaries and provide greater clarity and transparency about applicable church-state rules,” wrote Melissa Rogers, executive director of the White House Office of Faith-based and Neighborhood Partnerships, in a blog post. “These reforms will strengthen partnerships that serve people in need, and we commend the agencies for working together to issue these final regulations.”

—BJC Staff Reports

ZUBIK CONTINUED FROM PAGE 1

Laycock, a religious liberty advocate and law professor at the University of Virginia who authored the BJC’s brief.

“This order implies the justices are looking for a way to get enough votes on the Court to uphold the delivery of contraception coverage,” Laycock said.

People on both sides of the case found the request encouraging: advocates for the nonprofit organizations implied that the Court felt the accommodation was not sufficient, and many supporting the government saw it as a way to make sure women can obtain contraceptives with no out-of-pocket costs.

During the March 23 oral argument, the eight justices appeared divided, raising the likelihood that they would deadlock over the challenge by religious nonprofits. The BJC’s brief was mentioned several times during the argument.

The justices could decide to hear the case again when they are back to full strength — but with Senate Republican leaders vowing not to consider President Barack Obama’s nomination of federal appeals court Judge Merrick Garland, that could take another year or more.

—BJC Staff Reports

REFLECTIONS

A unique brief defending religious liberty

So, how could the Baptist Joint Committee for Religious Liberty file a friend-of-the-court brief in the *Zubik* case on the side of the government, against the Little Sisters of the Poor and the other religiously affiliated nonprofits (“petitioners”)? It’s a fair question that church-state observers, the national media and even BJC supporters could legitimately ask. After all, this is the first free exercise case, unalloyed with Establishment Clause issues, in which the BJC and religious liberty advocate Douglas Laycock have supported the government’s position at the U.S. Supreme Court.

The BJC’s brief, written by Professor Laycock and BJC General Counsel Holly Hollman, is pro-free exercise — both in this case and in the long run.

As we often have argued, religious liberty is sometimes thwarted by government hostility or inattention; but it can also be endangered by over-the-top, all-or-nothing demands from those who claim their liberty is being denied. That’s what is happening in this case.

Petitioners say that the exemption given to religiously affiliated nonprofits — requiring them to object to providing contraceptive coverage and permitting the government to do a work-around with a secular insurance company — is a “substantial burden” on their exercise of religion, as they are required to show by the federal Religious Freedom Restoration Act (“RFRA”). Petitioners argue that they, unilaterally, are entitled to define what a substantial burden is. This is not so. While courts typically take the religious claimants’ word for the **sincerity** of religious belief, the claimants do not have *carte blanche* to define the **substantiality** of the burden on religious exercise. Only the courts can, and should, make that determination. While beliefs are inviolable and personal, exercising those beliefs often impacts the rights of others and must be weighed accordingly. In this case, petitioners’ refusal to take “yes” for an answer — being relieved from having to provide, pay for or even appear to approve of insurance coverage they deem objectionable — is arguably not even a burden, much less a substantial one, and yet would directly harm the rights of employees.

To allow all religious claims to go forward without a meaningful review of substantiality would not only flout the terms of RFRA, but intensify the cultural and political pushback that we are already starting to see both in Congress

and in the states. This will assuredly prejudice legitimate claims for religious liberty.

Petitioners also claim the law’s outright exemption given to houses of worship and their integrated auxiliaries must include religiously affiliated nonprofits like social service agencies, colleges, universities and hospitals.

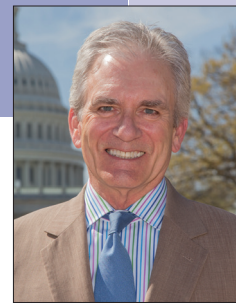
Specific legislative and administrative exemptions lifting burdens from the exercise of religion are important in protecting religious liberty. But, they should be tailored to the needs of potential religious claimants. Indeed, throughout the law, houses of worship are often treated differently from religiously affiliated nonprofits. This is seen in many of our tax laws and also in defining who properly may receive government grants. Religious affiliates employ vastly more employees who would be harmed if not covered, and such employers are less likely than houses of worship and other pervasively religious auxiliaries to hire only co-religionists who agree with them on contraception.

If Congress and state legislatures are unable to provide narrowly tailored exemptions without fear that the courts will expand them beyond their intended boundaries, they will be far less likely to provide any exemptions at all. This would be devastating to our religious liberty.

The BJC’s effort in this case was particularly productive and unique. The fact that the BJC and Professor Laycock — both religious liberty hawks who were instrumental in convincing Congress to pass RFRA in 1993 — filed on the side of the government certainly caught the Court’s attention. The BJC brief was specifically mentioned several times in oral argument from the bench and counsel arguing the case. Justice Ruth Bader Ginsburg, in discussing the sufficiency of the accommodation in her final question to petitioners’ counsel, observed:

But going back to that line-drawing problem — and that is in a brief that’s been mentioned several times, the Baptist Joint Committee — our leading proponent of RFRA discusses this line-drawing problem. Do you just say that’s wrong?

Another way in which our out-of-the-ordinary brief attracted attention became evident when I addressed the media on the plaza in front of the Supreme Court building after the oral argument. My five-minute remarks were the first to articulate our position after a succession of



J. Brent Walker
Executive Director

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Marshall explores competing religious

"If you want to be a religious exclusivist, you need to be a political pluralist."

Molly T. Marshall brought a fresh look at competing religious liberties as she delivered the 2016 Walter B. and Kay W. Shurden Lectures on Religious Liberty and Separation of Church and State.

Speaking amidst snow flurries on the campus of Bethel University in St. Paul, Minnesota, Marshall focused on understanding religious liberty in the reality of religious pluralism. She then applied those concepts to the situation in Myanmar, using its political climate as a case study on preserving religious liberty for a Christian minority.

The president of Central Baptist Theological Seminary in Shawnee, Kansas, Marshall has spent 30 years working in theological education, and she shared from her personal experiences both at home and abroad during her presentations.

"Religious pluralism presents new challenges and opportunities for strengthening religious liberty," Marshall said as she emphasized the critical task of cultivating respect for religious practices.

"Respect for the religion of others is more than simply tolerating religious difference; rather, it draws from the common affirmation of the dignity of humans and the right to religious liberty."

Marshall noted that, as a Baptist, she gets nervous when the political realm speaks too much about religion. "It is the role of the state to create a context where religious pluralism can flourish; it is not the role of the state to impose or favor one religion over another."

Marshall shared her personal story of awakening to the reality

of religious pluralism, realizing that her childhood was so insular that her circle "barely acknowledged that there were other ways of Christian faith."

She discovered that, throughout the Bible one can see "the Spirit nudging those of the covenant to transgress boundaries," explaining that scriptural narratives stress making room for the stranger as well as the religious and ethnic other. She gave a few examples: Jonah's grudging proclamation to Nineveh, Philip's Bible study with the Ethiopian eunuch, Jesus' conversation with the Samaritan woman and Paul's affirmation of the ministry of Lydia.

"Religious pluralism sharpens the challenge of strongly holding one's own belief while at the same time defending the rights of others to hold other beliefs – or none at all."

If religious freedom is a fundamental human right – as outlined in the 1948 Universal Declaration of Human Rights – Marshall said religious belief and practice must be voluntary. "All religions that hold that human beings have inviolable dignity because God created them and loves them will be able to embrace this argument for religious liberty," she said.

"But the complicating reality is, if you're going to be a religious exclusivist, you need to learn to be a political pluralist," she added. "And that's where it gets so difficult."

"A political pluralist allows there to be a variety of religious liberties that don't have to compete with one another."

In contrast, Marshall described political exclusivism, defining it as the "attempt of the state to impose religious belief" and provided examples, such as the Puritan-led Massachusetts Bay colony that punished those not following the Puritan interpretation of God's laws. She also offered more recent examples,



Marshall



Molly T. Marshall delivers her second lecture on the campus of Bethel Seminary, focusing on the plight of the Christian minority in Myanmar. The country in southeastern Asia (formerly known as Burma) is currently undergoing an unprecedented political transition.

us liberties in 2016 Shurden Lectures

such as experiments in Egypt and regions of Indonesia where radicalized Islamists seek to enforce a version of Sharia law on religious minorities.

In her second lecture, Marshall focused on one country currently constricting the free exercise of religious minorities: Myanmar.

Formerly known as Burma, a newly elected government in Myanmar is bringing hope for change. A frequent visitor to the country, Marshall follows its political progress closely.

Speaking only days after the new government's installation, Marshall provided a glimpse of Myanmar's oppressive history of military control. Made up of many ethnic tribes, more than 85 percent of the country is Buddhist, and adherents to that faith have special privileges in the country.

Laws passed just before the fall elections limit the rights of religious minorities in Myanmar. They include a religious conversion law, requiring a Myanmar citizen who wishes to change religion to obtain approval from a registration board. The process involves an interview – often including humiliating questions – and a period of religious study.

"In this time of unprecedented political transition, I am eager to learn how the new government will deal with the ongoing contraction of religious liberty for Muslims and Christians," Marshall said. She provided an example for Myanmar leaders looking to forge the right path: Roger Williams.

Briefly a Baptist during the colonial era in America, Williams' view of religious liberty for all and the protection of minority voices was groundbreaking, and it continues to provide guidance for many today.

"In all of American history, no one has argued for such radical freedom of conscience," Marshall said, reminding the audience that Williams once said forced religion "stinks in God's nostrils."

Marshall called the crowd to stand up for religious liberty in Myanmar as well as here at home.

"Baptists have made religious liberty a hallmark of our faith, and it matters that we stand with other Baptists – especially those in Myanmar – who face severe constriction of free exercise."

While on campus at Bethel University, BJC Executive Director Brent Walker spoke at a chapel service, giving students an overview of religious liberty and the work of the Baptist Joint Committee.

This year marked the 11th installment of the annual Shurden Lectures, which were endowed by Walter and Kay Shurden of Macon, Georgia, to take religious liberty discussions to campuses. Designed to enhance the ministry of the Baptist Joint Committee, the series focuses on inspiring and calling others to an ardent commitment to religious freedom and the separation of church and state. The 2017 Shurden Lectures will be on the campus of Campbell University in North Carolina.

—Cherilyn Crowe

Go online
for more photos and videos
BJCOnline.org/ShurdenLectures



Clockwise from upper left: Marshall with Bethel University president Jay Barnes and BJC's Brent Walker; Marshall takes a question from a student after her first lecture on the campus of Bethel University; Marshall chats with BJC supporters Karin Jessup and Dwight Jessup, who represents Converge Worldwide on the BJC board; Walker speaks at Bethel's chapel service.



K. Hollyn Hollman
General Counsel

How we
protect religious
freedom is as
important as
why we
protect it.

HollmanREPORT

A nation devoted to religious freedom, struggling to define it, state by state

As I am sure you have noticed, state legislative efforts purporting to protect religious liberty have increased dramatically, partly in response to legal recognition of marriage for same-sex couples. At the same time, legislation involving LGBT protections beyond marriage, such as in employment, housing or public accommodations, has also sparked intense national interest in state legislatures.

Unfortunately, in our rapid-pace, sound-bite culture, the media oversimplifies important stories. Our partisan, cultural, geographical and religious differences are then exploited and amplified in social media that feeds the 24-hour news beast without concern for clarity. Religious liberty, a fundamental and defining value of American law and society, is too important to be treated this way.

The articulated threats and proposed solutions in the states vary widely in seriousness, scope and even their relationship to religious liberty.

Consider H.B. 2 in North Carolina. This highly controversial measure regulates public bathrooms and local wages, and it prohibits municipalities from providing LGBT protections. It has nothing to do with religious liberty, but it has been incorrectly lumped into discussions about religious exemptions in an attempt to show that religious liberty bills are “discriminatory.”

Other states *have* grappled with religious liberty bills this legislative season. Within ten days of one another, governors in Georgia and Virginia vetoed religious liberty bills, while the Mississippi governor signed one into law. These three were vastly different.

Let’s take a deep breath and step back to reaffirm our religious freedom foundations. How we protect religious freedom is as important as why we protect it. There are differences in state religious liberty proposals and the legal and political contexts in which they arise. Religious exemptions may or may not be needed, but they are not inherently suspicious or harmful to others. They are instead an important part of religious freedom in America. Article II of the Constitution, in fact, recognizes this truth. It gives the president the option to swear *or* affirm the presidential oath of office, a provision that stems from conscientious objections of Quakers.

The Free Exercise Clause protects religious liberty by sometimes requiring exemptions. General legal standards like the Religious Freedom Restoration Act, which has been enacted by 21 states and

the federal government, protect religious freedom through a balancing test that weighs substantial burdens on religious exercise against compelling interests of the government, without regard to any particular law or religious practice. This standard, championed by the BJC, has long enjoyed bipartisan support with minimal controversy. Of course, as we’ve seen recently, not all bills with the name “RFRA” have that same balanced standard.

In addition, specific religious liberty exemptions exist throughout federal, state and local laws to address particular needs, such as those of houses of worship. Exemptions are common to promote religious liberty, and they should be carefully crafted to minimize harm to other important interests. As recent controversies demonstrate, however, conflicts between religious beliefs and LGBT rights are not easily addressed. When legislative efforts fail to take into account potential harm to others, the fallout is predictable.

Not all efforts to protect religious liberty are futile or misguided. Here’s how you can fairly evaluate religious liberty needs and understand proposed legislation:

1) Know the state’s legal landscape.

- Does the state constitution provide adequate protection for religious freedom?
- Does the state have other religious liberty laws, such as RFRA or specific religious exemptions?

2) Identify the purpose of the proposal.

- Is the bill solving an identifiable problem in the state or proposing a solution to a problem that does not exist?
- Why is the bill needed at this time?
- What religious exercise is being protected?

3) Consider the potential outcome.

- How could it affect those outside the group seeking protection for religious exercise?
- Are there legal protections in place to mitigate possible harm to those who may be negatively affected by the proposal?

Whether a satisfactory legal solution to any current conflict will be reached in any particular state remains to be seen. In the meantime, such questions are necessary to improve our understanding and help protect our shared heritage of religious freedom for all.

Secretary of State: ISIS guilty of genocide against Christians

ISIS is guilty of committing genocide against Christians and other religious minorities in Iraq and Syria, U.S. Secretary of State John Kerry said March 17.

Christians, Yazidis and Shiite Muslims are victims of genocide and crimes against humanity perpetrated by the group variously known as the Islamic State, ISIS, ISIL or Daesh, Kerry asserted.

A broad-based coalition of religious groups and human rights organizations had been urging the United States to declare as genocide the systematic killing of religious minorities in parts of the world.

"Today, the United States stood with millions in Iraq and Syria who have experienced the most brutal reality imaginable — genocide," said Frank Wolf, a distinguished senior fellow at the 21st Century Wilberforce Initiative and former U.S. congressman.

In December, Congress included in its omnibus bill a provision giving the secretary of state 90 days to report whether the persecution by ISIS constitutes genocide. The House of Representatives unanimously passed a nonbinding resolution March 14 condemning ISIS actions as such.



U.S. Secretary of State John Kerry delivers a statement on Daesh and genocide in the Press Briefing Room at the U.S. Department of State in Washington, D.C., on March 17, 2016. [State Department photo/ Public Domain]

"My purpose in appearing before you today is to assert that, in my judgment, Daesh is responsible for genocide against groups in areas under its control, including Yazidis, Christians and Shi'a Muslims," Kerry said in a news conference at the U.S. State Department.

"Daesh is genocidal by self-proclamation, by ideology and by actions in what it says, what it believes and what it does. Daesh is also responsible for crimes against humanity and ethnic cleansing directed at these same groups and, in some cases, also against Sunni Muslims, Kurds and other minorities."

Kerry urged the international community to hold the group accountable and called for an independent investigation regarding crimes against humanity.

"One element of genocide is the intent to destroy an

ethnic or religious group in whole or in part. We know that Daesh has given some of its victims the choice of abandoning their faith or being killed and that, for many, is the choice between one kind of death and another," Kerry said.

"The fact is that Daesh kills Christians because they are Christians, Yazidis because they are Yazidis and Shi'a because they are Shi'a. ... Its entire worldview is based on eliminating those who do not subscribe to its perverse ideology."

Kerry voiced hope that victims of persecution would take comfort in knowing "the United States recognizes and confirms the despicable nature of the crimes that have been committed against them."

—Ken Camp, *The Baptist Standard*

BJC joins brief against state funding of religious education

The Baptist Joint Committee joined a friend-of-the-court brief in the 4th U.S. Circuit Court of Appeals to stand against taxpayer money being funneled to religious education.

The case involves a special needs student in Maryland whose parents want him to receive instruction in Judaism in addition to his public school education. The school district included several religious accommodations in the child's individualized education program but refused to affirmatively teach the child on topics such as kashrut, reciting prayers, keeping Shabbat and reading the Torah.

"[T]he choice to provide secular education, whether general or special, does not give rise to a duty to provide parallel religious education," asserts the brief.

The BJC joined Americans United for Separation of Church and State, Central Conference of American Rabbis, Union for Reform Judaism and other groups in the brief for the case, known as *Leiman v. Bowers*.

—BJC Staff Reports

REFLECTIONS CONTINUED FROM PAGE 3

several speakers, including a group of nuns and others. I was pleased our views were disseminated not only on C-SPAN, but other media outlets such as Nina Totenberg's evening drive-time coverage on NPR and NBC's feed for local affiliates throughout the country.

Our advocacy for religious liberty through filing friend-of-the-court briefs in the highest court of the land provides a highly visible forum to educate the public as much as to instruct the justices about our understanding of the proper interpretation of laws ensuring religious liberty. The BJC and Professor Laycock have worked together for nearly three decades to articulate and defend a proper interpretation of the First Amendment, RFRA and similar state constitutional provisions and legislation. Our work in this important case continues that mission.



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REPORT

from the Capital

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Religious Liberty Council Luncheon tickets now on sale



Tickets for the 2016 Religious Liberty Council Luncheon in Greensboro, North Carolina, are now on sale. This year, we will be celebrating the career and legacy of Baptist Joint Committee Executive Director Brent Walker, who will deliver the keynote address.

Over the course of his 27 years at the BJC, Walker has had a part in landmark legislation, boosted educational programs such as the Shurden Lectures and fought against anti-Muslim rhetoric.

There are three options for purchasing

tickets. Single tickets are \$40 each and tables of 10 are \$400. Additionally, tickets for young ministers with 5 or fewer years of experience are available for \$20.

Besides the chance to hear Walker speak, the event is an opportunity to meet members of the BJC staff and other supporters of religious liberty.

For more information, and to purchase tickets, visit our website at BJCOnline.org/Luncheon. For table sponsorship opportunities, contact BJC Development Director Taryn Deaton at tdeaton@BJCOnline.org or 202-544-4226.



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