

# Zubik v. Burwell:

## Frequently Asked Questions about the Contraceptive Mandate Cases

*On May 16, 2016, the U.S. Supreme Court released a short, unsigned opinion in Zubik v. Burwell, sending the cases back to the circuit courts without ruling on the merits. The Court instructed the lower courts to give the parties an opportunity to reach a compromise based upon the refined positions in their supplemental briefs submitted after oral arguments. The Baptist Joint Committee for Religious Liberty had filed a friend-of-the-court brief defending the sufficiency of the government's religious accommodation and responding to arguments that would undermine the Religious Freedom Restoration Act.*

### **What is the Zubik v. Burwell case about, and what does the decision mean?**

The U.S. Supreme Court consolidated seven cases brought by religious nonprofit organizations challenging the procedure they can use to opt out of the Affordable Care Act's contraceptive mandate. The consolidated cases go by this name officially, and the various cases include religiously affiliated hospitals, schools, and other nonprofit charities (including one often mentioned in news coverage: Little Sisters of the Poor). These organizations claim that the accommodation procedure violates their rights under the Religious Freedom Restoration Act. In all seven cases, the circuit courts ruled that the accommodation was not a violation of their rights.

The Court's decision encourages the parties in the case to find an acceptable compromise. If they are successful, the government will likely have to go through its rulemaking process to enact any compromise procedure. Depending on what happens in the circuit courts, these cases may return to the Supreme Court. Meanwhile, these nonprofits will not be penalized for not following the current accommodation procedure, and their employees will still have access to contraceptives.

In addition to sending these seven cases back to the lower courts, the Supreme Court returned similar cases from three other circuits back to their respective circuit courts. One of these additional circuits, the 8th Circuit, is the only one to have ruled in favor of the religious nonprofits.

### **What is the Religious Freedom Restoration Act?**

Commonly known as RFRA, the federal Religious Freedom Restoration Act became law in 1993. It provides legal protection against government actions that interfere with the exercise of religion. Under RFRA, the government cannot substantially burden religious exercise unless the government can show that it is pursuing a "compelling governmental interest" in a manner that is the least restrictive on the person's religious exercise.

### **What is the contraceptive mandate?**

The contraceptive mandate is the requirement, under the Affordable Care Act (sometimes called "Obamacare"), that most employer-provided health insurance plans cover all 20 FDA-approved methods of contraception without any out-of-pocket costs to employees. Its purpose is to advance the ACA's emphasis on no-cost preventive health care services<sup>1</sup>.

### **How does the contraceptive mandate apply to religious organizations?**

Because birth control is an issue that sometimes involves deeply held religious opinions, especially regarding contraceptives that some believe act as abortifacients, the government created a two-tiered exemption for religious objectors who do not want to provide it. Houses of worship, denominational associations, and some entities that are closely related to them are automatically exempt from the mandate, though many choose to provide the coverage. Religiously affiliated nonprofit employers (some colleges, hospitals and charities) that oppose contraceptives have an exemption through a specified accommodation procedure.

### **What is the accommodation procedure provided to objecting nonprofits?**

If a religiously affiliated nonprofit objects to the coverage, it must give written notice to either its insurance provider or the Department of Health and Human Services. The insurance company then contacts the employees to let them know they can receive the health benefit, but they cannot receive it through their objecting employer. The objecting employer does not have to contract, arrange, pay, or refer for the coverage that may or may not be chosen by the employee.

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<sup>1</sup> Insurance plans in this informational sheet are referred to as "employer-provided" and the people under the health care plans as "employees." Some of the consolidated cases, however, involve schools that provide health insurance to students. While the ACA does not require colleges to provide health insurance to their students, if a college chooses to do so, the plan must comply with the ACA, including covering contraception.

### What's the difference between the exemption and the accommodation?

In practice, very little. Both the exemption and accommodation relieve religious organizations that object to contraception coverage from having to provide it. Houses of worship and other entities covered by that exemption do not have to take any steps to claim the exemption, and their employees will not receive the coverage unless the organization chooses to include it in its health plan. Religiously affiliated entities who are not automatically exempt must provide written notice to obtain the accommodation. Employees of an accommodated entity will be entitled to contraception coverage through the organization's secular insurance provider separate and apart from the employer's health plan.

### Didn't the Supreme Court address this in the *Hobby Lobby* case?

In 2014, the U.S. Supreme Court decided that a closely held **for-profit** employer whose shareholders have religious objections to contraception should be entitled to the same accommodation procedure provided to religious **nonprofits** when it comes to their health care plan. The Court used the accommodation that these nonprofit employers are objecting to as a way to accommodate the Hobby Lobby shareholders' beliefs and provide coverage for the employees.

### Why do these nonprofits object to the current accommodation procedure?

The nonprofits make various arguments, all arising from a conflict between their opposition to contraception and the government interest in providing access to contraception. In general, the claims are based on a religious belief that the accommodation makes them complicit in the use of the objectionable contraception.

### If a religious organization sincerely believes that its religious exercise is being burdened, shouldn't the courts defer to their religious understandings?

RFRA provides broad protection for religious exercise based on a claimant's sincere religious beliefs. While courts should defer to religious understandings of burden, that deference should not be absolute. Ultimately, RFRA is a legal standard and courts must determine if a burden is **substantial**. Otherwise, RFRA's statutory design loses its meaning.

Here's a simple example of how not all burdens on religious exercise are legally "substantial." If someone gets a speeding ticket on the way to a worship service, he could claim that the speed limit burdens his religious exercise. The court would have to determine, however, whether enforcement of the speed limit is a **substantial** burden on the person's exercise of religion.

### Why did the BJC file a brief in this case, and what does it say?

The BJC filed a friend-of-the-court brief in this case in order to explain how the far-reaching arguments made by these nonprofits can endanger religious liberty. Written by University of Virginia School of Law professor Douglas Laycock, a leading religious liberty scholar, the brief makes clear the importance of RFRA's standard in creating exemptions to policies that substantially burden religion. It also points out that the government must have the ability to enact exemptions that apply to specific situations. The regulations in these cases do not substantially burden the free exercise of religion.

The government provided a system that exempts religious nonprofit organizations from any obligation to contract, arrange, pay, or refer for contraception. Instead, coverage is provided through secular insurers, so that employees are not denied full and equal health benefits. While some frame this case as religious people versus an intrusive government, it is really about how the government can provide adequate protection for religious liberty without harming the rights of others. No employee is being coerced into contraception use, but the exemptions being challenged protect the right to free access to preventative health care – which includes contraception. Religious exemptions that relieve burdens on religious objectors while protecting government interests should be encouraged – not threatened with "all or nothing" demands.

The BJC files *amicus* briefs when its voice is needed to raise an important religious liberty principle in a case. As the leader of the coalition that fought for RFRA, the BJC continues to advocate for its use, allowing its carefully crafted language to balance competing claims that ensure religious liberty for all people.



For more information on this case, visit [BJCOnline.org/Zubik](http://BJCOnline.org/Zubik)