Written by **Warren Mass** on May 17, 2016

Supreme Court Returns ObamaCare Contraceptive Mandate Case to Lower Courts

The Supreme Court issued an opinion on May 16 announcing that it would not rule in the case of *Zubik v. Burwell*, a highly publicized legal challenge presented to the High Court challenging the ObamaCare contraception mandate. Under the opinion, the court, instead, vacated (annulled) all previous judgments related to the case and remanded (returned) them to several lower appeals courts that had sent them to the Supreme Court.

In a headline for a report describing the opinion, Breitbart News used an apt sports analogy: "Supreme Court Punts on Little Sisters' Obamacare Case Until After 2016 Election."

The issue that prompted this case was the Obama administration's federal contraception mandate — a regulation adopted by the Department of Health and Human Services (HHS) under the Affordable Care Act (ACA) — popularly called ObamaCare — that requires non-church employers to cover certain contraceptives for their female employees. While churches are exempt from the mandate, faith-based organizations such as the Little Sisters of the Poor, a Roman Catholic religious order engaged in caring for impoverished elderly people, did not automatically qualify for such an exemption and sought relief in the courts.

Last November, the Supreme Court decided it would review *Zubik v. Burwell*, combined with six other similar challenges to the contraceptive mandate. (David Zubik is the bishop of the Catholic Diocese of Pittsburgh and Sylvia Burwell is the secretary of Health and Human Services.) The six other cases included *Priests for Life v. Burwell*, *Southern Nazarene University v. Burwell*, *Geneva College v. Burwell*, *Roman Catholic Archbishop of Washington v. Burwell*, *East Texas Baptist University v. Burwell*, *and Little Sisters of the Poor Home for the Aged v. Burwell.*

On March 29, the Supreme Court directed the parties to the case "to file supplemental briefs that address whether and how contraceptive coverage may be obtained by petitioners' employees through petitioners' insurance companies, but in a way that does not require any involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees."

In its opinion released on the May 16, the Court expressed optimism that a compromise that would satisfy all the parties was achievable:

> Following oral argument, the Court requested supplemental briefing from the parties addressing "whether contraceptive coverage could be provided to petitioners' employees, through petitioners' insurance companies, without any such notice from petitioners."… Both petitioners and the Government now confirm that such an option is feasible. Petitioners have clarified that their religious exercise is not infringed where they "need to do nothing more than contract for a plan

> that does not include coverage for some or all forms of contraception," even if their employees receive cost-free contraceptive coverage from the same insurance company.

It was upon reaching that stage that the High Court decided not to issue a ruling and return the cases to the lower courts, stating:

> In light of the positions asserted by the parties in their supplemental briefs, the Court vacates the judgments below and remands to the respective United States Courts of Appeals for the Third, Fifth, Tenth, and D. C. Circuits.…
>
> We anticipate that the Courts of Appeals will allow the parties sufficient time to resolve any outstanding issues between them.

The opinion basically said that the court was not deciding anything:

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

In case there was any question about what the court said or did not say, the court further said:

> Today's opinion does only what it says it does: "afford an opportunity" for the parties and Courts of Appeals to reconsider the parties' arguments in light of petitioners' new articulation of their religious objection and the Government's clarification about what the existing regulations accomplish, how they might be amended, and what such an amendment would sacrifice.

Many observers speculated that, with the court evenly tied between what are generally perceived to be "conservative" and "liberal" justices, the court sent the cases back to the lower courts to avoid an anticipated 4-4 deadlock.

Though the Supreme Court left the matter unsettled, parties on both sides of the argument saw the opinion as a victory. During the daily press briefing on May 16, White House Press Secretary Josh Earnest was asked by a reporter if he viewed the opinion "as a clear result of the vacancy on the court," and if he had any thoughts on whether or not he thought the court "is intentionally dodging contentious issues at this point."

Earnest replied:

> Well, let me start by saying that we obviously were pleased with the announcement from the Supreme Court today. It will allow millions of women across the country to continue to get the health care coverage that they need. So this obviously is an outcome that we are pleased to see.

However, Earnest did not waste an opportunity to use the opinion to lobby for a Senate confirmation vote for the president's nominee, Merrick Garland, to the Supreme court, stating:

> [Although] it's not obvious that an additional justice would have yielded a different result … I haven't heard anybody make the argument that leaving the Supreme Court of the United States short-staffed is somehow good for the country.

Earnest went on to accuse the Republican leadership of the Senate of refusing to hold hearings "based solely on partisan reasons."

During a May 16 interview with BuzzFeed, Obama cast the court's opinion favorably and also alluded to

the vacancy on the court.

“The practical effect is right now that women will still continue to be able to get contraception if they are getting health insurance,” said the president, “and we are properly accommodating religious institutions who have objections to contraception.”

The *Los Angeles Times* reported that Obama declined to speculate on why the high court did rule on the case before it, but added, “My suspicion is if we had nine Supreme Court justices instead of eight, we would have had a different outcome.”

The *Times* also reported that The Becket Fund for Religious Liberty, which had represented the Little Sisters of the Poor and several evangelical colleges and charities, viewed the opinion as a victory.

“The Little Sisters won, but what this unanimous ruling shows is that there was never a need for anyone to lose,” the *Times* quoted Mark Rienzi, a lawyer for the Becket Fund, as saying. “The government will be able to meet its goal of providing these free services to women who want them, and not just for those with religious plans.”

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