US Supreme Court "Punts" Affordable Care Act Contraceptive Mandate Cases

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This morning, in a short unsigned opinion read from the bench by Chief Justice John Roberts, the U.S. Supreme Court vacated and remanded seven Affordable Care Act (ACA) contraceptive mandate cases. *Zubik v. Burwell*, Case No.14-1418 *et al*. Bringing its total ACA mandate remands to 13, the Court also issued orders today simultaneously vacating and remanding six additional ACA contraceptive mandate cases to their respective federal Courts of Appeal.

In all 13 cases, primarily non-profit religiously affiliated organizations (whether universities or colleges or hospitals or charities) contended that submitting the short notice of religious exemption form required by Federal regulations substantially burdened the exercise of their religion in violation of the federal Religious Freedom Restoration Act of 1993 (RFRA). All of the federal Courts of Appeals hearing those cases, except one, had upheld the challenged procedure.

In an unusual move in the seven cases on full appeal, the Supreme Court had called for additional briefing *after* it heard oral argument. The Court sought clarification on one key issue: "whether contraceptive coverage could be provided to petitioners' employees, through petitioners' insurance companies, without any such notice from petitioners."

The non-profit organizations 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." (Slip op., p. 3) The Government clarified that it could modify the challenged procedures for insured plans "while still ensuring that the affected women receive contraceptive coverage seamlessly, together with the rest of their health coverage." (*Id.*) After the parties submitted the

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requested clarifications, the Supreme Court sent all 13 cases back to the Courts of Appeal and "anticipated" that the appellate courts would allow the parties sufficient time to resolve any outstanding issues raised by these clarifications.

In today's short opinion and orders, the Court stated that it expressed no view on the merits of the cases. Quoting its 2014 opinion in *Wheaton College v. Burwell*, the Court cautioned that nothing in today's opinion or the lower courts' opinions "is to affect the ability of the Government to ensure that women covered by petitioners' health plans 'obtain, without cost, the full range of FDA approved contraceptives.'"

The news media has already begun to speculate that Justice Scalia's death left the Court without a clear majority on the RFRA issues. If taken at its word, the Court punted these cases in the hope that the parties would reach a compromise. Without a doubt, the Court's action likely postpones any decision (assuming that the lower courts allow time for compromise and/or request additional briefing) until after this year's presidential election, which itself may change the dynamic on ACA on the Hill.

For now, even as states continue to proliferate mini-RFRAs, it appears as if the ACA contraceptive mandate remains enforceable, and insurers of religiously affiliated organizations objecting to the mandate or the Government may provide employees of such organizations cost-free access to the full range of FDA approved contraceptives.

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