

What Does This Supreme Court Opinion Mean for Religious Liberty?

Monday morning, the U.S. Supreme Court issued a lengthy per curium order, remanding the case *Zubik v. Burwell*—also known as the “Little Sisters of the Poor” case—back down to the lower courts, where the two sides are expected to find a solution:

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 ...

The government has confirmed that the challenged procedures “for employers with insured plans could be modified to operate in the manner posited in the Court’s order while still ensuring that the affected women receive contraceptive coverage seamlessly, together with the rest of their health coverage.”

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. Given the gravity of the dispute and the substantial clarification

and refinement in the positions of the parties, the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans "receive full and equal health coverage, including contraceptive coverage." ... We anticipate that the Courts of Appeals will allow the parties sufficient time to resolve any outstanding issues between them.

The Court finds the foregoing approach more suitable than addressing the significantly clarified views of the parties in the first instance. Although there may still be areas of disagreement between the parties on issues of implementation, the importance of those areas of potential concern is uncertain, as is the necessity of this Court's involvement at this point to resolve them. This Court has taken similar action in other cases in the past.

The order to remand takes no side in the underlying argument, that the contraceptive mandate created a "substantial burden" to the religious nonprofit groups' First Amendment-protected rights to practice their faiths freely. It also refused to determine whether or not attorneys for the federal government had a compelling counterargument.

This would indicate the court was divided on the issue, 4-4, and saw an opportunity to let the parties settle it instead.

Associate Justice Sonia Sotomayor, with Associate Justice Ruth Bader Ginsburg concurring, wrote an explanation for her decision to support the per curiam order. She said lower courts should not use it as a barometer of the court's opinion regarding either side's arguments, but noted that lower courts have ignored those "explicit disclaimers" in the past:

Today's opinion does only what it says it does: "afford[s] 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. ... As enlightened by the parties' new submissions, the Courts of Appeals remain free to reach the same conclusion or a different one on each of the questions presented by these cases.