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Zubik V. Burwell: The Supreme Court As Mediator?

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The media, court watchers and interest groups eagerly awaited the U.S. Supreme Court's latest foray (its fourth) into the Affordable Care Act. This would involve not a dry analysis of the details of an insurance structure and associated tax code provisions, but a clash between religious principles and government-mandated insurance coverage for contraceptives. Four federal appellate courts had split on the question whether a federal regulation issued under the ACA violated religious groups' rights under the Religious Freedom Restoration Act of 1993. The Supreme Court was poised to decide a case that combined three incendiary topics: religion, birth control and Obamacare. What could make for better headlines?

Then the Supreme Court issued its opinion on May 16, 2016. And disappointment ruled the land.[1] The court did not decide the disputed issues, but instead sent all seven cases back to the appellate courts from which they had come for those courts to decide whether there was a middle ground that both the government and the nonprofit groups could live with.

Many characterized the court's decision in Zubik as a "punt." Much of the resulting hubbub in the media and the punditocracy focused on two things: (1) the court's decision not to decide, and (2) that the outcome may have resulted from Justice Antonin Scalia's absence from the court, and the court's desire to defer decision until it has its full complement of nine justices.

But as the court itself pointed out, it is not all that uncommon for it to decide not to decide. From time to time the court vacates judgments and sends cases back for another look in light of new factual or legal developments, or to consider the views of the solicitor general when he or she weighs in on the matter. So that's not the real story. And neither is the fact that the court may have found itself in a pickle with Justice Scalia gone. In other cases this term where the court found itself tied 4-4 after Justice Scalia's death, the court simply issued one-sentence orders affirming the lower court's judgment by an equally divided court.[2] It did not send those cases back to the lower courts with hope that they would return when the court is back at full strength.

The real story in Zubik is that the court acted in the role of a mediator, not as a court seeking to resolve a concrete legal dispute presented to it. The court actively sought a middle ground, appeared to find one that both parties could live with, then sent the case back to the lower courts with instructions to "allow the parties sufficient time to resolve any outstanding issues between them."[3] This Supreme-Court-as-mediator is extremely unusual — if not unprecedented.

Zubik arose out of an ACA requirement that requires employers that offer health plans to their employees to cover certain contraceptives as part of those health plans. Most churches are exempt from the requirement, but the federal government recognized that some religious nonprofits would object on religious grounds. Thus, the government issued a regulation allowing an employer to opt out of the coverage requirement if it submitted a form either to the insurer providing the coverage or to the federal government stating that it objected on religious grounds to providing contraceptive coverage. If that happened, the government would step in and pay the insurers to provide contraceptive coverage.

Several nonprofit religious organizations objected to this opt-out arrangement, explaining that the very act of submitting the form would lead to contraceptive coverage under the health plans that they provided, thus making them complicit in providing contraception despite their religious objections to it. The organizations argued that the form requirement substantially burdened the exercise of their religion, in violation of the Religious Freedom Restoration Act of 1993 (RFRA). The government argued that simply filing the form was not a substantial burden, and that even if it were, there was no less-restrictive way for the government to achieve its interest in people being able to obtain contraceptive coverage through their employers' health plans without having to get a second source of coverage specifically for contraception (what the government dubbed "seamless" coverage).

The case was argued to the Supreme Court on March 23, 2016, and as the argument went on, some of the justices began asking whether there might be ways to satisfy both sides' concerns — i.e., for the employers to be allowed to contract for coverage that does not include contraceptives, while the government can fill that gap through their employers' insurance companies without requiring the employers to take action to make it happen.

Six days after oral argument, on March 29, the court issued an order directing the parties to file supplemental briefs. The court asked the parties to tell the court "whether and how contraceptive coverage may be obtained by the petitioners' employees through the petitioners' insurance companies, but in a way that does not require any involvement of the petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees."[4] Then the court went on to offer its own suggestion:

> For example, the parties should consider a situation in which petitioners would contract to provide health insurance for their employees, and in the course of obtaining such insurance, inform their insurance company that they do not want their health plan to include contraceptive coverage of the type to which they object on religious grounds. Petitioners would have no legal obligation to provide such contraceptive coverage, would not pay for such coverage, and would not be required to submit any separate notice to their insurer, to the federal government or to their employees. At the same time, petitioners' insurance company — aware that petitioners are not providing certain contraceptive coverage on religious grounds — would separately notify petitioners' employees that the insurance company will provide cost-free contraceptive coverage, and that such coverage is not paid for by petitioners and is not provided through petitioners' health plan.[5]

The court then invited the parties to "address other proposals along similar lines" if they wished.[6]

An order from the court requesting supplemental briefing is not unusual. But an order giving the parties an idea for resolving their dispute, followed by an invitation for more brainstorming on a potential solution, is extremely unusual — again, perhaps unprecedented.

In its May 16 per curiam opinion, the court announced the parties confirmed that the court's suggestion "is feasible."[7] The religious organizations confirmed that their religious exercise would not be infringed if all they needed to do was contract for a plan that does not include contraceptive coverage, and the government confirmed that the challenged regulations "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."[8]

The court therefore vacated the lower courts' judgments and remanded all seven cases with instructions that "the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates the petitioners' religious exercise while at the same time ensuring that women covered by he petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage'" and that the lower courts "allow the parties sufficient time to resolve any outstanding issues between them."[9]

The court closed with the somewhat usual caveat that the court expressed no view on the merits of the cases, along with a somewhat unusual recitation of some specific things that the court was not addressing (for example, that nothing the court said affects the government's ability to ensure that women covered by the petitioners' health plans obtain the full range of U.S. Food and Drug Administration-approved contraceptives without cost).[10]

The Supreme Court said of itself in 2004: "We take the case as it comes to us."[11] That is not a new sentiment; the court said the same thing 128 years earlier.[12] The court may not have taken the case as it came to the court in Zubik. At the very least, it sent a different case back to the lower courts than the one that came to the court. It remains to be seen whether the court's unusual approach as "Supreme Mediator" was driven by a shorthanded court reluctant to end up in a 4-4 deadlock in a high-profile case, or is a sign of things to come.

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[1] This article will refer to the case as Zubik v. Burwell or just Zubik, as it was the "lead" case of the seven that were consolidated for appeal.

[2] See, e.g., Hawkins v. Community Bank of Raymore, No. 14-520 (March 22, 2016); Friedrichs v. California Teachers Association, No. 14-915 (March 29, 2016).

[3] Zubik, slip op. at 4.

[4] Order dated March 29, 2016, in Zubik v. Burwell, No. 14-1418, et al.

[5] Id.

[6] Id.

[7] Zubik, slip op. at 3.

[8] Id.

[9] Id. at 4.

[10] Id. at 4-5.

[11] McCutcheon v. Federal Election Commission, 134 S. Ct. 1434, 1447 n.4 (2004).

[12] Gunn v. Plant, 94 U.S. 664, 669 (1876) “Our decision must be upon the case as it comes to us, and not upon what it may have been below.”) .
