
DEFERENCE TO CLAIMS OF SUBSTANTIAL RELIGIOUS BURDEN

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I. INTRODUCTION

Does filing paperwork in order to obtain a religious exemption from a law constitute a substantial burden on religious liberty? That was the main question posed by this term’s *Zubik v. Burwell*,¹ which consolidated several different cases.² In *Zubik*, religiously-affiliated nonprofit employers argued that the Affordable Care Act’s contraception benefit violated the Religious Freedom Restoration Act (RFRA) by substantially burdening their religious conscience.³ Under RFRA, religious objectors need not comply with any federal law that imposes a substantial religious burden, unless the government can demonstrate that the law passes strict scrutiny.⁴ Notably, the regulations actually exempted the nonprofits from contraception coverage. Nonetheless, these employers complained that even informing the government that they seek an exemption makes them complicit in the sin of contraception and therefore amounts to a substantial religious burden.⁵ The Supreme Court declined to reach the issue,⁶ with the concurring Justices emphasizing that “[t]he opinion does not . . . endorse [the nonprofits’] position that the existing regulations substan-

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1. *Zubik v. Burwell*, 578 U.S. ____ (2016).

2. *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015); *Geneva Coll. v. Sec’y U.S. Dep’t of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015); *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014).

3. The challenge is a statutory challenge under RFRA rather than a constitutional challenge under the Free Exercise Clause because RFRA offers more expansive protection than the Free Exercise Clause. *Zubik v. Burwell*, 578 U.S. ____ (2016).

4. 42 U.S.C. § 2000bb-1 (2012).

5. The D.C. Circuit Court of Appeals described this claim as “extraordinary and potentially far reaching.” *Priests for Life*, 772 F.3d at 245–46.

6. Actually the Court declined to rule on any substantive issue: “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.” *Zubik v. Burwell*, 578 U.S. ____ (2016) (slip op. at 4–5).

tially burden their religious exercise.”⁷ In fact, the nonprofits’ claim should have failed. If seeking a religious exemption by providing notice of religious objection were itself treated as a substantial religious burden, then almost anything would amount to a substantial religious burden.

II. THE CASE: ZUBIK V. BURWELL

A. *The Contraception Benefit*

The contraception benefit is part of the Affordable Care Act (ACA). The ACA requires that employer-sponsored health insurance plans cover basic preventive care without requiring any deductibles or co-payments from those insured. To help determine what preventive services to include, the Department of Health and Human Services commissioned a study from the independent Institute of Medicine.⁸ Finding contraception to be vital to women’s health, the Institute of Medicine recommended that preventive care include FDA-approved contraception.⁹

Zubik v. Burwell was not the first RFRA challenge to the contraception benefit to reach the Supreme Court. In *Burwell v. Hobby Lobby Stores, Inc.*, closely held for-profit corporations with religious objections to contraception won the right to a RFRA exemption from contraception coverage.¹⁰ *Hobby Lobby* focused on for-profit companies because nonprofit organizations had already been accommodated. First, the contraception requirements do not apply to houses of worship or other “religious employers” as defined by the IRS.¹¹ Thus, religious institutions that predominately serve and employ people of their own faith—such as churches, synagogues, and mosques—are completely exempt.

Second, religiously-affiliated nonprofit institutions that employ people of many different faiths and often accept significant government funding—such as schools, hospitals, nursing homes, and social service providers—do not have to pay for contraception or even include it in their health care plans.¹² Instead, once a religiously-affiliated nonprofit declared its religious opposition to contraception, the responsibility for contraception coverage passed to its insurance carrier: the nonprofit’s health care insurer (or, if the nonprofit is self-insured, a third-party ad-

7. *Zubik v. Burwell*, 578 U.S. ____ (2016) (Sotomayor, J., concurring) (slip op. at 3).

8. The Institute of Medicine, recently renamed the Health and Medicine Division, is an arm of the National Academies of Sciences, Engineering, and Medicine tasked with “help[ing] those in government and the private sector make informed health decisions by providing evidence upon which they can rely.” See *About HMD*, NAT’L ACADS. SCI., ENGINEERING, & MED., <http://iom.nationalacademies.org/About-IOM.aspx#sthash.pZMs5sBa.dpuf> (last updated Mar. 17, 2016).

9. INSTITUTE OF MEDICINE, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 10 (2011), available at <https://iom.nationalacademies.org/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx> [hereinafter “CLINICAL PREVENTIVE SERVICES FOR WOMEN”].

10. 134 S. Ct. 2751 (2014).

11. 26 U.S.C. § 6033(a)(3) (2012).

12. 45 C.F.R. § 147.131(b) (2016).

ministrator) must provide and pay for a separate policy. As it happens, the Supreme Court in *Hobby Lobby* pointed to this accommodation as a reason why the contraception benefit's application to religious for-profits like Hobby Lobby Stores failed strict scrutiny.¹³ If this accommodation worked for religious nonprofits, the Court suggested, then why not for religious for-profits?

A nonprofit had two ways to obtain its exemption. It could have either signed a short self-certification form declaring that it is a religious nonprofit "that has a religious objection to providing coverage for some or all of any contraceptive services that would otherwise be required to be covered" and mailed the form to its health insurance company (or its third-party administrator for self-insured plans);¹⁴ or the nonprofit could have provided a similar notice, along with the name and contact information of its insurer (or third-party administrator), directly to the Department of Health and Human Services.

B. The Claim

Despite the ability to opt out of contraception coverage, multiple religiously-affiliated nonprofit employers complained that the religious accommodation itself imposes a substantial religious burden in violation of RFRA. According to these employers, signing a two-page form or sending a letter triggered the provision of contraception to their employees, thus making them complicit in sin. For example, some complain "that taking the actions required of them under the regulations would make them complicit in wrongdoing and create 'scandal' in violation of Catholic moral teaching."¹⁵

Although the sincerity of the nonprofits' objections is not in question, eight of the nine courts of appeals to consider the question have held that filing the exemption paperwork did not impose a substantial religious burden.¹⁶

13. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2782.

14. This two-sided, single sheet of paper is known as EBSA Form 700. *EBSA Form 700—Certification*, U.S. Dep't of Health & Human Servs. (Aug. 2014), available at <http://www.dol.gov/ebsa/healthreform/regulations/coverageofpreventiveservices.html>; see also *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1205 (2015) (reprinting form).

15. Brief for Petitioners in Nos. 14-1418, 14-1453, & 14-1505 at 2, *Zubik v. Burwell*, 136 S. Ct. 891 (2016) (No. 14-1418).

16. See, e.g., *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606 (7th Cir. 2015); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014); *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372 (6th Cir. 2014).

III. SUBSTANTIAL BURDEN IS A LEGAL QUESTION FOR COURTS TO DECIDE

Who decides what counts as a substantial religious burden for purposes of RFRA is central to the substantial burden analysis in *Zubik*.¹⁷ The nonprofits claiming a RFRA violation insist that substantial burden is a subjective religious question for the religious objector to decide. They assert that once a religious objector claims that a particular statutory requirement amounts to a substantial burden as a matter of religious belief, then, as long as they are sincere,¹⁸ it amounts to a substantial burden under RFRA as a matter of law. According to those nonprofits, “courts have neither the authority nor the competence to second-guess the reasonableness of those sincere beliefs.”¹⁹ Failure to defer to the objectors’ assessment of substantial burden is akin to passing judgment on their religious faith, which is barred by the Establishment Clause.²⁰

Most circuit courts have rightly rejected this approach to substantial burdens. Automatic deference to religious objectors seeking religious exemptions (1) misreads the language of RFRA and (2) overlooks the courts’ authority to rule on factual and legal matters that are well within their institutional authority and competence. Ultimately, “[w]hether a law imposes a substantial burden on a party is something that a court must decide, not something that a party may simply allege.”²¹

A. RFRA’s Language

As RFRA’s language makes explicit, strict scrutiny is triggered only by substantial burdens on religion, not by all burdens on religion. To simply assume a substantial burden whenever a sincere religious objector claims one exists essentially reads the substantial burden requirement out of RFRA. “If plaintiffs could assert and establish that a burden is ‘substantial’ without any possibility of judicial scrutiny, the word ‘substantial’ would become wholly devoid of independent meaning.”²² In-

17. *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 456 (5th Cir. 2015) (“A preliminary question—at the heart of this case—is the extent to which the courts defer to a religious objector’s view on whether there is a substantial burden.”).

18. RFRA only protects sincere religious beliefs. See *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2774 n.28. The sincerity of the nonprofits’ beliefs is not at issue in *Zubik*. *Zubik v. Burwell*, 578 U.S. ____ (2016).

19. Brief for Petitioners in Nos. 15-35, 15-105, 15-119, & 15-191 at 2, *Zubik v. Burwell*, 578 U.S. ____ (2016).

20. *Cf. Emp’t Div. v. Smith*, 494 U.S. 872, 887 (1990) (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.”); *Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680, 699 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”).

21. *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 807 F.3d 738, 747 (6th Cir. 2015).

22. *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1176 (2015); see also *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 218 (2d Cir. 2015) (“[T]he fact that a RFRA plaintiff considers a regulatory burden substantial does not make it a substantial burden. Were it otherwise, no burden would be insubstantial.”).

deed, one would be hard-pressed to find exemption-seekers likely to argue that a challenged law burdens their practice of religion, but not substantially.

Without some objective evaluation of burden, all burdens imposed by federal laws would become eligible for accommodation. For example, Washington, D.C. parishioners could argue that issuing traffic tickets or adding a bicycle lane in front of their church imposes a substantial religious burden on them by making it much more difficult to park for Sunday services.²³ In short, every sincere religious protestor would be entitled to a religious exemption from any federal law that did not pass strict scrutiny.²⁴

B. Courts' Authority

Although courts cannot and should not rule on theological questions, claims of substantial religious burden often depend on purely secular factual and legal assumptions courts can and should resolve. For example, imagine a vegetarian opposes a compulsory vaccination law because her religion condemns animal slaughter and she thinks (erroneously) that animals were killed to make the mandated vaccine. She argues she is entitled to a religious exemption because facilitating any animal death imposes a substantial burden on her religious conscience. Although she believes that animals were killed in the manufacture of the vaccine, she is wrong. She has made a factual mistake: vaccine production does not involve animals at all. While it would be inappropriate for a court to question whether her religion truly bans all animal slaughter, it is well within a court's competence to find that the vaccine is animal-free and therefore simply does not implicate the vegetarian's sincere religious opposition to animal slaughter. In short, while courts may not draw conclusions about the objector's religion, they should draw conclusions about the underlying legal or, as in this hypothetical, factual, bases for the religious claims.

In fact, courts possess not only the ability, but also the responsibility to evaluate whether burdens are substantial enough to merit accommodation under RFRA, including the burdens caused by the contraception regulatory scheme. After all, it is not just the rights of religiously affiliated nonprofit employers that are at stake, but the rights of those who may be affected by a religious accommodation, such as the nonprofits' employees and students. In any event, subjecting to strict scrutiny laws that impose only negligible burdens on those seeking to circumvent them is

23. See, e.g., Perry Stein, *D.C. Church Says a Bike Lane Would Infringe upon Its Constitutional 'Rights of Religious Freedom'*, WASH. POST (Oct. 14, 2015), <https://www.washingtonpost.com/news/local/wp/2015/10/14/d-c-church-says-a-bike-lane-would-infringe-upon-its-constitutional-rights-of-religious-freedom/>.

24. Cf. Transcript of Oral Argument at 14–15, *Zubik v. Burwell*, 578 U.S. ____ (2016) (No. 14-1418) (argued Mar. 23, 2016) (Justice Sotomayor posed the question, “[I]f [every burden is] substantial, how will we ever have a government that functions?”).

not the balance RFRA, with its substantial burden requirement, envisions. And as the next part explains, the religious burden in this case was indeed slight, notwithstanding the sincere beliefs of the religious objectors.

IV. THE ACCOMMODATION DOES NOT IMPOSE A SUBSTANTIAL BURDEN

In evaluating whether the contraception regulatory scheme imposed a substantial burden on the objecting nonprofit employers, it is important to remember that the objection was not to mandatory contraception coverage but to the mechanism allowing nonprofits to opt out of any coverage.²⁵ This accommodation made *Zubik v. Burwell* fundamentally different from *Hobby Lobby Stores, Inc. v. Burwell*, where the for-profit corporation was not excused from providing contraception coverage.²⁶ Here, in contrast, no religiously-affiliated nonprofit was required to include objectionable contraception in its health care plan. Instead, all they had to do was provide notice of their religious objections and the contact information of their insurance company or third-party administrator if they notified the Department of Health and Human Services instead of their insurance carriers.²⁷

The opt-out procedure relieved the religiously-affiliated nonprofit employers of all responsibility for contraception coverage.²⁸ Once a nonprofit expressed its objection, the law shifted responsibility to the insurance companies, who were required to step in and provide, pay for, and inform employees and students of the separate contraception coverage they are offering. Not only was the insurance company's contraception policy unconnected to the nonprofit's health care plan, but also the insurance company was barred from charging the nonprofits in any way for the costs of the contraception. Finally, the insurance company's notice to employees and students had to be separate from any materials distributed on behalf of the nonprofit, and it had to clarify that the nonprofit played no part in the contraception coverage. "In sum, both opt-out mechanisms let eligible organizations extricate themselves fully from the burden of providing contraceptive coverage to employees, pay nothing toward such coverage, and have the providers tell the employees that

25. See *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1171 ("Before we present our analysis of the issues, we wish to highlight the unusual nature of Plaintiffs' central claim, which attacks the Government's attempt to accommodate religious exercise by providing a means to opt out of compliance with a generally applicable law:").

26. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

27. See, e.g., *Priests for Life v. U.S. Dep't of Health and Human Servs.*, 772 F.3d 229, 237 (D.C. Cir. 2014) (noting "[t]hat bit of paperwork is more straightforward and minimal than many that are staples of nonprofit organizations' compliance with law in the modern administrative state").

28. See, e.g., *id.* at 236 ("Delivery of the requisite notice extinguishes the religious organization's obligation to contract, arrange, pay, or refer for any coverage that includes contraception.").

their employers play no role and in no way should be seen to endorse the coverage.”²⁹

At the most basic level, the objecting nonprofits misunderstand how the contraception benefit works. Their belief that they are complicit in the sin of contraception use rests on the assumption that their written refusal triggered the provision of contraception. For example, one college argues, “as the trigger-puller or facilitator the college shares responsibility for the extension of [contraception] coverage to its students, faculty, and staff.”³⁰ As a matter of law, they are wrong.³¹ Their paperwork did not cause contraception coverage. The Affordable Care Act does. It is federal law, not the completion of any form, that created the insurance companies’ obligation to cover contraception. All the paperwork did was extricate the nonprofit organizations from the coverage.³²

Equally erroneous is the nonprofits’ claim that the accommodation forced them to facilitate contraception use because the government essentially commandeered their health care plans. This claim of plan “hijacking” is baseless.³³ In fact, as explained, the government exempted their plans. Instead, the government required insurance companies to issue separate plans. These insurance companies are not owned by the nonprofits but are private companies like Aetna and Blue Cross Blue Shield. “So when [a nonprofit] tells us that it is being ‘forced’ to allow ‘use’ of its health plans to cover emergency contraceptives, it is wrong. It’s being ‘forced’ only to notify its insurers . . . whether directly or by notifying the government . . . that it will *not* use its health plans . . .”³⁴ Just as the government does not hijack your automobile when it commandeers the neighbor’s car, it does not hijack the nonprofits’ plans by ordering separate plans from independent companies like Aetna and Blue Cross Blue Shield.

29. *Id.* at 250.

30. *Wheaton Coll. v. Burwell*, 791 F.3d 792, 796 (7th Cir. 2015); *see also* *Geneva Coll. v. Sec’y U.S. Dep’t of Health & Human Servs.*, 778 F.3d 422, 435 (3d Cir. 2015) (“The appellees’ essential challenge is that providing the self-certification form to the insurance issuer or third-party administrator ‘triggers’ the provision of the contraceptive coverage to their employees and students.”).

31. The circuit courts did not mince their words in rejecting this assumption. *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1180 (10th Cir. 2015) (“[Plaintiffs] contend that, by delivering the Form or notifying HHS, they nevertheless ‘trigger’ or cause contraceptive coverage. They do not.”); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 459 (5th Cir. 2015) (“[P]laintiffs claim that their completion of Form 700 or submission of a notice to HHS will authorize or trigger payments for contraceptives. Not so.”); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 613 (7th Cir. 2015) (responding to plaintiff’s argument with, “[t]hat’s not correct.”); *see also* *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 807 F.3d 738, 750 (6th Cir. 2015) (“Plaintiffs are fundamentally wrong in their understanding of how the law actually works.”); *Geneva Coll.*, 778 F.3d at 438 (“However, this purported causal connection is nonexistent.”).

32. *Geneva Coll.*, 778 F.3d at 441 (“Far from ‘triggering’ the provision of contraceptive coverage to the appellees’ employees and students, EBSA Form 700 totally removes the appellees from providing those services.”).

33. Transcript of Oral Argument at 48, *Zubik v. Burwell*, 578 U.S. ____ (2016) (No. 14-1418) (argued Mar. 23, 2016) (Chief Justice Roberts noted, “the Petitioner has used the phrase ‘hijacking,’ and it seems to me that that’s an accurate description of what the government wants to do.”).

34. *Wheaton Coll.*, 791 F.3d at 795.

Thus, the courts' rejection of the complicity claim did not turn on any evaluation of the religious doctrine of complicity. Rather, it stemmed entirely from the courts' rejection of the erroneous legal conclusions on which the complicity claim is based. As Judge Posner observed, "[t]his is an issue not of moral philosophy but of federal law. Federal courts are not required to treat . . . erroneous legal interpretation as beyond their reach."³⁵ Whatever deference might be owed to a nonprofit's interpretation of its own religious beliefs, courts should not defer to the nonprofit's interpretation of federal law.³⁶ After all, if there is one area over which federal courts have authority, it is the interpretation of federal law. The nonprofits' opposition is based on legal error.³⁷ Courts should not be, and for the most part have not been, deferential when they encounter obvious legal error.³⁸

V. CONCLUSION

The religiously affiliated nonprofit organizations argue that their religion bars them from providing contraception. The challenged contraception regime ensured that they did not have to. Instead, an accommodation allowed the nonprofits to opt out. Once they gave notice, the sole responsibility shifted to third parties to fulfill the contraception mandate. The nonprofits argued that this religious accommodation still forced them to facilitate sin because their notice triggers contraception coverage by their health insurance infrastructure. As a matter of federal law, they are simply wrong. Although religious objectors' interpretation of their religious beliefs is entitled to deference, their interpretation of federal

35. *Univ. of Notre Dame*, 786 F.3d at 623.

36. *See id.* at 612 ("Although Notre Dame is the final arbiter of its religious beliefs, it is for the courts to determine whether the law actually forces Notre Dame to act in a way that would violate those beliefs."); *Geneva Coll.*, 778 F.3d at 436 ("[T]here is nothing about RFRA or First Amendment jurisprudence that requires the Court to accept [the appellees'] characterization of the regulatory scheme on its face.") (quoting *Mich. Catholic Conference & Catholic Family Servs.*, 755 F.3d at 385).

37. Mistakes of law are not the only errors underlying the nonprofits' complicity claims. Some of the objecting nonprofits, such as East Texas Baptist University and Oklahoma Baptist University, are not religiously opposed to contraception, but are opposed to abortion. Their objections to the contraception benefit flow from the erroneous belief that four of the FDA-approved contraceptives act as abortifacients and kill fertilized eggs. *See, e.g., E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 455 (5th Cir. 2015). However, neither of the two morning-after pills, Plan B and Ella, work in the way the nonprofits think the medicine works. Although the FDA approved them before fully understanding whether they prevented fertilization or implantation, numerous reputable scientific studies that examined the pills' mechanism concluded that these pills prevent ovulation—and therefore fertilization—from occurring in the first place. *See, e.g., INT'L FED'N OF GYNECOLOGY & OBSTETRICS & INT'L CONSORTIUM FOR EMERGENCY CONTRACEPTION, MECHANISM OF ACTION: HOW DO LEVONORGESTREL-ONLY EMERGENCY CONTRACEPTIVE PILLS (LNG ECPS) PREVENT PREGNANCY?*, (2011), available at http://www.figo.org/sites/default/files/uploads/MOA_FINAL_2011_ENG.pdf (summarizing studies on how contraceptive pills prevent pregnancy); JAMES TRUSSELL ET AL., EMERGENCY CONTRACEPTION: A LAST CHANCE TO PREVENT UNINTENDED PREGNANCY, PRINCETON UNIV. (Mar. 2016), available at <http://ec.princeton.edu/questions/cc-review.pdf>. In sum, the scientific consensus is that morning-after pills prevent fertilization, not implantation. As with legal error, courts should not be deferential when they encounter obvious scientific error.

38. *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1191 (10th Cir. 2015) ("RFRA does not require us to defer to their erroneous view about the operation of the ACA and its implementing regulations.").

law is not. Because the accommodation did not impose a substantial religious burden, the nonprofits' RFRA claim should have failed.