

# Supreme Court hears arguments regarding contraceptive mandate accommodation

March 23, 2016

WASHINGTON—The U.S. Supreme Court considered arguments March 23 in a case that challenges whether the government can require religious nonprofit organizations to accept a portion of Obamacare they claim makes them indirectly complicit in providing access to contraceptive drugs.

*Zubik v. Burwell* combines seven cases that challenge required coverage of contraceptives under the Affordable Care Act, including drugs some religiously affiliated nonprofits assert cause abortions.

Specifically, the case challenges the government's accommodation procedure that allows religious nonprofits to avoid paying or contracting for contraception by shifting the responsibility to a third party.

The court will to determine if the accommodation violates the 1993 Religious Freedom Restoration Act, which bars the federal government from substantially burdening free exercise of religion unless it can demonstrate it has a "compelling interest" and is using the "least restrictive means" to further that interest.

## **Baptists on both sides**

Baptists are represented on both sides of the dispute. Challengers to the accommodation procedure include East Texas Baptist University, Houston Baptist University and GuideStone Financial Services of the Southern

Baptist Convention.

In January, three Southern Baptist entities—the Ethics & Religious Liberty Commission, the International Mission Board and Southern Baptist Theological Seminary—filed a brief urging the high court to rule the accommodation violates religious freedom.

The Baptist Joint Committee for Religious Liberty, on the other hand, filed a friend-of-the-court brief along with Douglas Laycock, professor at the University of Virginia School of Law, that supports the government’s effort to accommodate religion.

### **BJC argues no ‘substantial burden’**

The BJC brief asserts the far-reaching claims of the nonprofits can harm religious liberty.



Jennifer Hawks and Brent Walker of the Baptist Joint Committee for Religious Liberty talk with Walter Dellinger, a law professor at Duke University and former U.S. solicitor general. (Photo / Jordan Edwards / Baptist Joint Committee) “The religious groups have been relieved of providing, paying for—or even appearing to approve of—services they find objectionable. But they aren’t taking ‘yes’ for an answer,” said Brent Walker, executive director of the Baptist Joint Committee. “Their claims cannot thwart the government’s regulation of secular insurance companies to make sure those services are delivered.”

“The government has provided a careful system of exemptions that responds to religious objections about contraception without depriving thousands of employees important health care benefits,” said Holly Hollman, general counsel of the Baptist Joint Committee. “This is the win-win solution the Court pointed to in the Hobby Lobby case.”

The BJC brief argues the procedure—which requires written notification of a religious objection—does not amount to a substantial burden on the exercise of religion. The organizations have been wholly exempted from providing contraception themselves, and the objection is to the government’s efforts to deliver contraception separately through secular insurers, with segregated funds and segregated communications.

### **Applying RFRA’s balancing test**

The BJC and Laycock have worked more than 25 years—often together—to enact, implement and defend the Religious Freedom Restoration Act, which provides legal protection against government actions that substantially burden the exercise of religion. The BJC chaired the diverse coalition of organizations that pushed for the RFRA legislation, providing a high legal standard for all free exercise claims without regard to any particular religious practice.

The statute was intended to restore the “compelling interest” standard, which the Supreme Court used prior to its 1990 decision in *Employment Division v. Smith*. The law creates a balancing test between substantial burdens on religion and the compelling interests of the government.

The BJC brief responds to the claim that courts must give absolute deference to the religious objectors. While deference should be given to religious understandings, too much deference produces its own set of problems, the brief contends.

“Absolute deference to claimants would produce absurd results that would

discredit the cause of religious liberty,” the brief states. It notes a standard of absolute deference would go beyond this case and apply to any religious claim.

Additionally, the brief highlights the importance of specific legislative and administrative exemptions for the protection of religious liberty. The government must be able to draw reasonable lines when it creates religious exemptions, which exist in local, state and federal law.

“If legislatures and administrative agencies cannot enact a narrow religious exemption without it being turned into a much broader religious exemption, many of them will not enact any religious exemptions at all, and many existing religious exemptions will be repealed,” the brief states.

### **Religious nonprofits ‘face a dilemma’**

During arguments before the court, Paul Clement, representing those challenging the accommodation, told the justices the religious nonprofits “face a dilemma.” They can abide by their religious beliefs and pay millions of dollars of penalties or obey the government, he said.

“My clients would love to be a conscientious objector, but the government insists they be a conscientious collaborator,” Clement said.

Clement, a former U.S. solicitor general, told the court the religious organizations have no objection “to signing an opt-out form,” but they do object to what amounts to an authorization form for coverage of abortion-causing and other contraceptives.

Donald Verrilli, the current solicitor general, argued on behalf of the federal government the accommodation constitutes a “sensible balance” between religious freedom and the government’s interest.

*Compiled from reporting by Cherilyn Crowe of the Baptist Joint Committee*

*for Religious Liberty and Tom Strode of the Ethics & Religious Liberty  
Commission for Baptist Press.*