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## What Did the Supreme Court Decide About the Contraception Mandate?

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## What Did the Supreme Court Decide About the Contraception Mandate?

### Abstract

"The main thrust of the Court's opinion, then, is that it believes compromise might be possible."

Posting about a recent Supreme Court decision from *In All Things* - an online hub committed to the claim that the life, death, and resurrection of Jesus Christ has implications for the entire world.

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### Keywords

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### Disciplines

American Politics

### Comments

*In All Things* is a publication of the [Andreas Center for Reformed Scholarship and Service](#) at Dordt College.

# What Did the Supreme Court Decide About the Contraception Mandate?

 [allinallthings.org/what-did-the-supreme-court-decide-about-the-contraception-mandate/](https://allinallthings.org/what-did-the-supreme-court-decide-about-the-contraception-mandate/)

Donald Roth

On May 16, the Supreme Court handed down its decision in [Zubik v. Burwell](#), the challenge to the “Contraception Mandate” in the Affordable Care Act (ACA). Although, perhaps it’s too much to say that the Court made much of a decision. Instead, the *per curiam* <sup>1</sup> opinion undoes the decisions where institutional challenges to the ACA failed, but it provides little clarity beyond that point. Essentially, the Court is encouraging the government and affected institutions to reach a compromise which can be affirmed in the lower courts, and the opinion leaves most of the other major questions raised by these cases unanswered. To unpack what the Court exactly did, and to reflect on what this might mean for the future, we must look more closely at exactly what the published opinions said.

## The Background

These lawsuits were born from concern over certain provisions of the ACA, which mandates that all employers provide certain minimum insurance coverage for their employees. In defining that mandated minimum coverage, the federal government required complete coverage of a number of drugs and procedures considered to be “preventive care.” While the law specified that this coverage be provided at no cost to the insured, it did not define “preventive care,” leaving that up to the Health Resources and Services Administration (HRSA).<sup>2</sup> While the subsequent HRSA regulations defined the term to include things like routine health screenings, physicals, and certain drugs, such as those used to control degenerative diseases like diabetes, the agency also included a range of contraceptives within the scope of “preventive care.” Since there are many religious groups that oppose all or certain forms of contraception, [regulations](#) under the law permitted a total exemption for churches and religious orders who do not have to file a tax return with the federal government, calling these groups “religious employers.”<sup>3</sup> For other organizations, called “eligible organizations” by the regulations, an accommodation was made which allowed the groups to opt out of paying for contested contraceptive coverage, although the insurance providers for those eligible organizations would continue to provide the coverage at no cost.

[Zubik](#)<sup>4</sup> *v. Burwell* and its companion cases represent a number of organizations and institutions that objected to the accommodation. Among concerns were the drawing of lines that made these groups “eligible organizations” and not “religious employers” and the nature of accommodation provided. Specifically, there was concern that contraceptive coverage was still being triggered by the organization’s actions, namely filing for an exemption, and that this still enlisted the organizations in the process of providing contraception. Many different organizations filed suit, and, with the [exception of Dordt College](#), where I serve, and other organizations covered by the 8<sup>th</sup> Circuit Court of Appeals, these lawsuits failed. The decision issued on May 16 resolves the appeals from those cases.

## Not a Punt, maybe an On-side Kick

In its opinion, the Court vacated decisions made by the Courts of Appeal below and remanded several cases back down to those courts for further determination. The Court was very careful to clarify that this decision did not reflect the Court’s opinion on any of the substantive issues raised by the appeal.<sup>5</sup> Instead, this decision rested on the Supreme Court’s unusual, but not unprecedented, [request for supplemental briefs](#) on whether there might be some accommodation other than total exemption that would be acceptable to those challenging the regulations. The organizations challenging the government said that the alternative was fairly simple: [allow eligible organizations to purchase insurance that did not include contraception](#), then permit insurers to provide that coverage separately as a supplemental plan to women<sup>6</sup> who choose to sign up for it. While the Government acknowledged that this was an

option, it still argued that this option was [undesirable](#). The main thrust of the Court's opinion, then, is that it believes compromise might be possible, and it undid contrary lower court opinions so that the two parties could negotiate those issues and possibly resolve things without needing to come back in front of the Supreme Court.

While this opinion does nothing to resolve the underlying issues relating to religious freedom, the Court isn't completely punting on the issue. By vacating and remanding the order, it is at least encouraging the Obama Administration to come to some sort of compromise with the affected religious organizations. Similarly, the Court reemphasizes that the Government has a legitimate interest in seeing that women have access to FDA approved contraceptives. Finally, the Court did resolve one minor question by forbidding the Government from imposing taxes or penalties on the organizations who sued them for failing to give proper notice of opposition to contraception under HRSA regulations.<sup>7</sup>

### **Moving Forward: Who Do We Imagine is Affected?**

Ultimately, the signs coming from this case are rather mixed. If the Administration chooses to play ball, then this issue may be broadly resolved without further litigation, but Justice Sotomayor issued an [opinion](#) concurring with the decision where she and Justice Ginsburg specifically criticized the 8<sup>th</sup> Circuit for siding with the affected organizations and signaled their willingness to vote in favor of the Government if the issue comes up again. In doing so, the justices expressed concern that the new proposed accommodation would "leave in limbo all of the women now guaranteed seamless preventive-care coverage under the Affordable Care Act."

This expressed concern strikes at what seems to be the heart of this issue: who do we imagine is being affected by this law? If we think of the Little Sisters of the Poor, Dordt College, or many other religious organizations, these organizations typically limit their employment to those who share their religious belief and who agree to restrict their behavior in line with certain beliefs of the organization. From this perspective, the Government's position seems silly: why are we going through so much hassle to make sure nuns have contraception? Those on the other side seem to be envisioning things like Catholic-run hospitals and other organizations which may hire extensively without regard to personal faith convictions. From this perspective, it looks like oppressive religionists are seeking to enforce their views on employees who don't share them. I think we could move forward much more effectively if we first addressed this underlying matter of perceptions.

Personally, it makes more sense to me that the regulations be tied to hiring practices of the affected employers, rather than their tax filing status. If an organization has exemptions from existing nondiscrimination laws so that they can limit their hiring to those who share their religious beliefs (including things like contraception), then they should be exempted just like a church would be. If an organization has a religious character, but hires on a nondiscriminatory basis, then the concern for these nonaligned employees justifies the accommodation. What do you think?

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### **Footnotes**

1. That is, an opinion issued jointly by the justices, rather than authored by any one justice. [↩](#)
2. [42 U.S.C. § 300gg-13](#). The HRSA is a division of the U.S. Department of Health and Human Services. [↩](#)
3. This is different than being simply tax-exempt, since the [regulations](#) refer to the filing requirement provisions of the tax code ([IRC § 6033](#)), rather than the tax exemption qualifications under the more-well-known [IRC § 501\(c\)\(3\)](#). [↩](#)

4. [David Zubik](#) is a Roman Catholic Bishop of the Pittsburgh Diocese who oversees a charitable trust associated with the diocese. [↩](#)
5. This included questions regarding the application of the Religious Freedom Restoration Act, namely, whether this regulation substantially burdened the organizations' free exercise of religion, and, if it did, whether this regulation was the least restrictive means of pursuing a compelling governmental interest. For more on how courts analyze this issue, see [my article](#) covering the Dordt v. Burwell decision. [↩](#)
6. The ACA does not cover male contraception. [↩](#)
7. That is, after losing in the lower courts, many of the challengers continued to refuse to go through the certification process that the HRSA developed, and the Administration had given some indications that it would then treat these plans as noncompliant with the ACA, triggering significant retroactive sanctions for noncompliance. [↩](#)