Written by **Warren Mass** on July 2, 2015

Supreme Court Temporarily Stops Enforcement of Contraceptive Mandate

The Supreme Court issued an order on June 29 that temporarily stops the Department of Health and Human Services (HHS) from enforcing the ObamaCare mandate that employers must provide contraceptive coverage for their employees against a group of Pennsylvania faith-based charities while their suit against HHS continues. The order remains in effect pending final disposition of the plantiffs' petition to have their case reviewed.

The plaintiffs in the case — *Zubik v. Burwell* — include David A. Zubik, the bishop of the Catholic Diocese of Pittsburgh; Lawrence T. Persico, bishop of the Catholic Diocese of Erie; Catholic Charities of the Diocese of Pittsburgh; and several other charities and schools that come under the jurisdiction of those two dioceses. The respondents are Sylvia Mathews Burwell, in her capacity as secretary of Health and Human Services, *et al*.

The order read, in part:

> [The] respondents are enjoined from enforcing against the applicants the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of their petition for certiorari [review of the case].

The order was not a victory for the plaintiffs, however, but only what amounts to a "time out," since it did not permanently relieve them from providing the contraceptive coverage. It continued,

> Nothing in this interim order affects the ability of the applicants' or their organizations' employees to obtain, without cost, the full range of FDA approved contraceptives. Nor does this order preclude the Government from relying on the information provided by the applicants, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act.

As the *Christian Post* noted in a June 30 article, *Zubik v. Burwell* "is one of dozens of lawsuits from groups across the nation seeking exemption from the controversial HHS preventive services mandate."

The *Post* reported that a three-judge panel from the Third Circuit Court of Appeals ruled against the plaintiffs in February, arguing that the current mandate requirement that they submit a self-certification form requesting exemption did not represent an undue burden on their religious practices. The ruling stated, "As Judge Posner has explained, this is not a situation where the self-certification form enables the provision of the very contraceptive services that the appellees find sinful."

The court's argument, therefore, was that since all the charity has to do is fill out a form passing the burden of coverage over to their insurers, the charity was not being forced to violate its conscience by doing anything sinful. However, people of faith generally believe that complicity with sinful actions is as troublesome as committing the sinful acts themselves, particularly since the school's or charities' insurance premiums are indirectly used to pay for the contraceptive services.

The ruling continued:

> Federal law, rather than any involvement by the appellees in filling out or submitting the self-certification form, creates the obligation of the insurance issuers and third-party administrators to provide coverage for contraceptive services.

Having been denied relief by the Third Circuit Court, the plaintiffs appealed to the Supreme Court for review of the case (a writ of certiorari). On April 15, Supreme Court Justice Samuel Alito recalled and stayed the circuit court's decision. This, in effect, allowed the Supreme Court to further review *Zubik v. Burwell,* which is still pending.

The June 29 Supreme Court order first denied the plaintiffs' petition for a writ of certiorari, as submitted to Alito, who, in turn, referred it to the High Court. But it then enjoined (prohibited) HHS from enforcing the challenged contraceptive mandate provisions of the Patient Protection and Affordable Care Act (ObamaCare) and related regulations pending final disposition of their petition.

The order, therefore, is neither a clear-cut victory nor defeat for either side, but basically a pause until things are sorted out and a final decision is made. It even concludes: "This order should not be construed as an expression of the Court's views on the merits [of the case]."

As for how the Supreme Court will eventually rule in the case of *Zubik v. Burwell,* past ruling may provide some clues. In a 5-4 decision last year, on June 30, 2014, the Court ruled that even some for-profit companies can cite religious convictions to opt out of the contraception mandate that would have required all businesses to provide free contraceptives to their employees. That ruling was issued in favor of two family-held companies — Hobby Lobby and Conestoga Wood Specialties.

Shortly after that ruling, on July 3, 2014, the Court gave Wheaton College in Illinois temporary emergency relief from the mandate while the Christian college's suit against the "Affordable Healthcare Act" rule is pending in the courts.

Though not related to the issue of contraceptive coverage, the Supreme Court's recent ruling in the case of *King v. Burwell* effectively rewrote the Affordable Care Act in a manner that guaranteed that ObamaCare will survive. This is troubling for those institutions which seek to defend themselves from the Act's intrusiveness.

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