Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID A. ZUBIK ET AL.,
Petitioners,
v.

SYLVIA MATHEWS BURWELL, ET AL.,
Respondents,

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth and District of Columbia Circuits

SUPPLEMENTAL BRIEF OF THE AMERICAN HUMANIST ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTRODUCTION

The Religious Freedom Restoration Act ("RFRA") provides:

> (a) IN GENERAL
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) EXCEPTION Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.

The respondents have satisfied the requirement that the burden on the exercise of religion is in furtherance of a compelling government interest according to the findings of the Department of Health and Human Services hearings.[1] Therefore, not only can the government burden a person's exercise of religion, but they may "substantially" burden a person's exercise of religion if the burden is the least restrictive means of furthering that compelling government interest.

In this case the words "least restrictive means of furthering that compelling interest" clearly means that "furthering that compelling government interest" must be satisfied. Otherwise, the statute would have been written so as to **prohibit** any substantial burden on a person's exercise of religion by a rule of government general applicability. Thus, "least restrictive means" is not equivalent to "no restrictive means." Consequently, if there are no less restrictive means for identifying

[1] Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725, 8,728 (Feb. 15, 2012).

employers that have religious objections to the disbursement of contraceptives than the required self-certification process (in order to provide contraceptives), then the religious freedom claim must yield.

The argument in the respondent's supplemental brief is that the alternatives offered by the court are no less burdensome than the existing self-certification process or would materially undermine the benefit to employees that wanted access to contraceptives. Consequently, the only way to insure that the appellants can avoid any complicity in making contraceptives available to employees without identifying their religious objections is to deny contraceptives to all employees. It was not the intent of RFRA to cancel entirely the applicability of laws in service of a compelling government interest. Only an accommodation is required, even as that accommodation is imperfect.

I. What constitutes "substantial burden on religion" and "least restrictive means" of furthering government interests to accommodate religion are subjective opinions.

Judges of the same religion as the appellants are predisposed to read "substantial burden" and "least restrictive means" with a higher burden on the government than judges that don't share their religious affiliation. This is borne out by the judges that have ruled on this case. Consequently, there is no <u>objective</u> way of determining how "substantial" a burden is or how much restriction is "least restrictive."

According to 28 U.S. Code § 455 - Disqualification of justice, judge, or magistrate judge**: (a)** Any justice, judge, or magistrate judge of the United States

shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. **(b)** He shall also disqualify himself in the following circumstances: **(1)** Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

The reason this rule applies here is that if the public understands that the judge has a personal bias or prejudice because of his/her devoted religious affiliation, then it undermines the public confidence in the impartiality of our legal system. A judge's emotional life commitment to the faith of his/her childhood are equally compelling as are economic self interest. Therefore, the only way to impartially judge cases where religious freedom conflicts with laws that serve a compelling government interest is to defer to the legislature's collective judgment after holding hearings designed to accommodate religious freedom according to RFRA standards.

A decision other than recommended in the previous paragraph would create a standard by which a Supreme Court made up of Christian Scientists would rule that it was a substantial burden on religious freedom to require parents to seek life-saving medical treatment for their children. Similarly, a court made up of judges whose religions embraced racism, sexism, anti-Semitism or bigamy (condoned in their holy books) either would not be or not appear to be impartial in favoring their sincerely held religious beliefs.

II. What distinguishes our nation from a theocracy is that our laws of general applicability are derived from secular, collective wisdom – "We the People" – rather than divine authority.

The origin of organized religion emerged as a means of providing social and economic stability.[2] Anthropologists have found that virtually all state societies and chiefdoms from around the world have been found to justify political power through divine authority. Consequently, political authority co-opted collective religious belief to bolster itself.[3] This paradigm was changed when we adopted our constitution based on a government of the people.

In order to insure the protection of individual conscience, our bill of rights insured the freedom to think, speak and petition about ideas that could not be infringed by government. Each religion is a unique expression of speech that invoked claims of a superior relationships with God to other religions which, historically, been the cause of wars and conflict that undermined public order. This claim to a unique relationship with God provides the basis for choosing one religion over another. Therefore, a special provision in the bill of rights was provided to prohibit majority religions from using government to pass laws that interfere with the [affirmative] exercise of religion by the less powerful religions, even as those beliefs may be controversial or offensive to the majority.

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[2] Jared Diamond, Guns Germs & Steel 277 (New York: Norton 1997); A. Norenzayan & A.F. Shariff, The Origin and Evolution of Religious Prosociality, 322 Science 58–62 (2008).

[3] Michael Shermer, "Why Are We Moral: The Evolutionary Origins of Morality," *The Science of Good and Evil* (2004).

The Bill of Rights was intended as an accommodation of religious freedom with special protection from government interference. However, when the two largest and most powerful religions (Catholics and Baptists) assert that their God based beliefs should enable them to deny health benefits to people who don't share their beliefs, then they are exceeding the bounds of the exercise of religious freedom. They are imposing a theocracy in which the laws of the Bible, the Pope, the Q'uran, or a King are permitted to trump our secular democracy whose laws are based on the collective wisdom from rational discourse in service of the general welfare.

It is for these reasons that this amici recommends that this court defer to the law as written by Congress by embracing the accommodation they provided to the appellants in keeping with RFRA, rather than trying to rewrite the accommodation.

III. For most of the Appellees, their objections to the use of contraceptives are not "sincerely held religious beliefs."

Among women who are currently at risk of unintended pregnancy, 87 percent of Catholics use contraception: 68 percent of them employ sterilization, the IUD, the pill: four percent using other methods, such as withdrawal.[4] Catholics for choice stated in 1998 that 96 percent of U.S. Catholic women had used contraceptives at some point in their lives and that 72 percent of Catholics believed that one should use birth control. According to a nationwide poll of 2243 U.S. adults surveyed

[4] Guttmacher Statistic on Catholic Women's contraceptive Use, GUTTMACHER INST. (Feb. 15, 2012), http://www. Guttmacher.org/media/inthenews/2012/02/15/ (last visited Jan. 25, 2016)

online in September 2005 by Harris Interactive 90 percent of Catholics supported the use of birth control/contraceptives.[5]

The way to test whether a belief is "sincerely held religious belief" is by the conduct of the people maintaining that belief. If their conduct is inconsistent with what they claim to be their "sincerely held belief," then it can't be said to be "sincerely held."

The solicitor general in representing the appellants did not engage in discovery through the use of depositions or interrogatories to explore the behavior of the appellants. Therefore, it is necessary to look at the Guttmacher Institute and the Harris Polls above to discern the likely behavior of the Catholic appellants.

The professional religious appellants, nuns and priests, made a pledge to celibacy as part of their oath to become religious leaders. However, birth control pills are prescribed for a wide variety of health problems, such as irregular menstrual bleeding, that have nothing to do with preventing pregnancy—and many of these health problems are widespread among older women, including nuns. Beyond the practical health care applications of contraception, birth control also does prevent unwanted pregnancies. And, in rare occasions, religious women require this as well.

The officials of the Church many decades ago permitted nuns in the Congo who were in danger of being raped to take hormones that prevent ovulation (which is what the "pill" does). In this case the hormones would be taken with the intent of

[5] Harris Interactive, *The Harris Poll #78,* (2005) http://www.theharris poll.com.

avoiding a pregnancy, but not a pregnancy that would be the result of a spousal act of sexual intercourse. They would not be altering the purpose of a spousal act of sexual intercourse. Rather, they would be defending themselves against the possible consequences of an act of rape. Keep in mind that it is justifiable for a woman to inflict great physical harm, even death, on a man threatening rape. Her act of killing the rapist is not justified as a "lesser evil" because killing is not a lesser evil than enduring rape. Rather, her act of using hormones is an act of just and moral self-defense. Furthermore, the Church permits the use of the hormones that are in the contraceptive pill to treat certain physical conditions. For instance, a woman who has ovarian cysts or who suffers from endometriosis may find that taking the hormones that are present in the contraceptive pill relieve her from some of the pain that results from such conditions. Women who use those hormones with the intent of reducing pain and not with the intent of rendering their sexual acts infertile are not engaging in acts of contraception. In the terminology of the principle of double effect, they are using hormones in pursuit of the good effect of reducing pain and, as a secondary effect, they are tolerating the infertility caused by the hormones they are taking.

However, the Catholic appellants (other than nuns and priests) are likely to reflect the statistics mentioned above indicating that 87 percent of Catholics use contraceptives. Belgian Cardinal emeritus Godfried Danneels believes that the

Catholic church should support condoms used to prevent serious diseases such as HIV because non-use is tantamount to murder.[6]

As for the Baptist appellants, they do not object to the use of contraception within a marriage. Baptists accept the Bible as the inerrant word of God and the Bible doesn't condemn the use of contraception in marriage. They are opposed to the use of contraception outside of marriage because they do not condone premarital or extramarital sexual activity. Therefore, in order to satisfy Baptists restrictions on the use of contraceptives it would be necessary to accommodate their faith by enabling them to police whether the recipients used contraceptives to engage in premarital or extramarital sex. This would enable the employer to investigate the sexual practices of his employees in violation of their privacy rights.

Since the solicitor General in representing the Respondent did not engage in discovery, the only evidence that exists for determining whether Baptists use contraceptives is the new Guttmacher report that indicates that contraceptive use by Catholics and Evangelicals – including those who attend religious services is the norm. The report's key findings include the following points:

- Among all women who have had sex, 99% have ever used a contraceptive method other than natural family planning. This figure is virtually the same among Catholic women (98%).

[6] Marcella Alsan, *The Church & AIDS in Africa: Condoms & the Culture of Life,* 133 COMONWEALS 8 (April 21, 2006)

- Among sexually active women of all denominations who do not want to become pregnant, 69% are using a highly effective method (i.e., sterilization, the pill or another hormonal method, or the IUD).
- Some 68% of Catholic women use a highly effective method, compared with 73% of Mainline Protestants and 74% of Evangelicals.
- Only 2% of Catholic women rely on natural family planning; this is true even among Catholic women who attend church once a month or more.
- More than four in 10 Evangelicals rely on male or female sterilization, a figure that is higher than among the other religious groups.

Consequently, the appellants' assertion of "religious freedom" as an excuse for objecting to the dissemination of contraceptives is a pretext for a political agenda opposing the Affordable Care Act.

Respectively submitted this 3rd day of May, 2016,

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