

IN THE UNITED STATE COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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NO. 14-12696-CC

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ETERNAL WORD TELEVISION NETWORK, INC.,

Plaintiff - Appellant,

versus

SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN  
SERVICES,  
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,  
SECRETARY OF THE U.S. DEPARTMENT OF LABOR,  
U.S. DEPARTMENT OF LABOR,  
SECRETARY OF THE U.S. DEPARTMENT OF THE TREASURY,  
U.S. DEPARTMENT OF THE TREASURY,

Defendants - Appellees.

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Appeal from the United States District Court for the  
Southern District of Alabama  
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NOS. 14-12890 & 14-13239-CC

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THE ROMAN CATHOLIC ARCHDIOCESE  
OF ATLANTA,  
an association of churches and schools,

THE MOST REVEREND WILTON D. GREGORY,  
and his successors, Archbishop of the Roman  
Catholic Archdiocese of Atlanta,  
CATHOLIC CHARITIES OF THE ARCHDIOCESE  
OF ATLANTA, INC.,  
a Georgia non-profit corporation,  
THE ROMAN CATHOLIC DIOCESE OF SAVANNAH,  
an ecclesiastical territory,  
THE MOST REVEREND JOHN HARTMAYER,  
and his successors, Bishop of The Roman  
Catholic Diocese of Savannah, et al.,

Plaintiffs - Appellees,

versus

SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,  
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,  
U.S. DEPARTMENT OF LABOR,  
U.S. DEPARTMENT OF TREASURY,  
SECRETARY, U.S. DEPARTMENT OF LABOR,  
SECRETARY, U.S. DEPARTMENT OF TREASURY,

Defendants - Appellants.

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Appeal from the United States District Court for the  
Northern District of Georgia  
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Before TJOFLAT, JILL PRYOR and ANDERSON, Circuit Judges:

BY THE COURT:

The plaintiffs in these consolidated appeals challenge the regulations implementing what is known as the “contraceptive mandate” of the Affordable Care Act (“ACA”)—the requirement that employers provide health insurance

coverage for preventive care (including contraception) to women. On February 18, 2016, a majority of this panel, over a dissent, held that the contraceptive mandate did not violate the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000bb, *et seq.* Because the Supreme Court was considering the same question in *Zubik v. Burwell* and other consolidated cases, we stayed enforcement of the mandate and accommodation against the plaintiffs until the Supreme Court rendered a decision in *Zubik*.

After oral argument, the Supreme Court directed the parties in *Zubik* to submit supplemental briefs addressing “whether contraceptive coverage could be provided to petitioners’ employees, through petitioners’ insurance companies without any such notice from petitioners.” *Zubik v. Burwell*, No. 14-1418, \_\_ S. Ct. \_\_, 2016 WL 1203818 (Mar. 29, 2016). Importantly, the Court’s directive focused on eligible organizations that have insured, not self-insured, plans. *See id.* at \*2 (“Petitioners with insured plans are currently required . . .”). On May 16, 2016, the Supreme Court issued a decision in *Zubik* in which it explained that the supplemental briefs “confirm[ed] that such an option [of providing coverage without notice] is feasible” but noted that the government’s concession applied only to insured plans. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). In light of the parties’ concessions in their supplemental briefs, the Supreme Court vacated and remanded *Zubik* and its companion cases to the

respective circuits so that the courts of appeals could “address[] the significantly clarified views of the parties in the first instance.” *Id.* at 1560.<sup>1</sup>

Given the *Zubik* decision, we VACATE our February 18, 2016 opinion in these cases so that we may consider supplemental briefing from the parties on issues that are similar, but tailored to the facts of the cases before us, which concern self-insured rather than insured plans. Accordingly, we direct the parties to submit supplemental briefs that address the following issues:

- (1) Whether contraceptive coverage may be obtained by plaintiffs’ employees through plaintiffs’ third party administrators, but in a way that does not require any involvement of plaintiffs beyond their own decision to provide health insurance without contraceptive coverage to their employees; and
- (2) Assuming contraceptive coverage may be obtained by plaintiffs’ employees through plaintiffs’ third party administrators, but in a way that does not require any involvement of plaintiffs beyond their own decision to provide health insurance without contraceptive coverage to

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<sup>1</sup> In *Zubik* and the other consolidated cases before the Supreme Court, the circuit courts had upheld the accommodation and contraceptive mandate under RFRA. In a separate case, *Sharpe Holdings v. United States Department of Health & Human Services*, the Eighth Circuit held that the accommodation and mandate violated RFRA. 801 F.3d 927 (8th Cir. 2015). When *Zubik* was decided, the Secretary of Health and Human Services’ petition for certiorari in *Sharpe Holdings* was before the Supreme Court. On the same day that the Supreme Court issued its *Zubik* decision, it granted *certiorari*, vacated the Eighth Circuit’s decision in *Sharpe Holdings*, and remanded for the same reasons as set forth in *Zubik*.

their employees, state your respective positions following the Supreme Court's remand to the United States Courts of Appeals in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

The plaintiffs' opening supplemental brief shall be due 21 days from the date of this order. The plaintiffs shall file a single opening brief of no more than 7,000 words. The government's responsive supplemental brief shall be due 21 days from the filing of the opening supplemental brief. The government shall file a single responsive brief of no more than 7,000 words. The plaintiffs' supplemental brief in reply shall be due 10 days after the filing of the government's responsive supplemental brief. The plaintiffs shall file a single reply brief of no more than 3,500 words.

We continue to enjoin the Secretary of Health and Human Services from enforcing against EWTN, Catholic Charities, and CENGI the substantive requirements set forth in 42 U.S.C. § 300gg-13(a)(4) and from assessing fines or taking other enforcement action against EWTN, Catholic Charities, or CENGI for non-compliance. This stay shall remain in effect until further order of the Court.

The purpose of this is order is to afford the parties an opportunity to address the issues raised in *Zubik*. Through this order, the Court expresses no view on the merits of the cases.

**IT IS SO ORDERED.**

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303

David J. Smith  
Clerk of Court

For rules and forms visit  
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May 31, 2016

**MEMORANDUM TO COUNSEL OR PARTIES**

Appeal Number: 14-12696-CC; 14-12890 & 14-13239 -CC

Case Style: Eternal Word Television Network v. U.S. Department of Health and Human Services, et al, The Roman Catholic Archdiocese of Atlanta v. U.S. Department of Health and Human Services

District Court Docket No: 1:13-cv-00521-CG-C

**This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.**

The enclosed order has been ENTERED. The order moots the petitions for rehearing en banc.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Joe Caruso  
Phone #: (404) 335-6177

MOT-2 Notice of Court Action