

THIRD CIRCUIT 5/21/2019

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

COMMONWEALTH OF PENNSYLVANIA, Case Nos. 17-3752/18-1253

vs.

19-1129/19-1189

PRESIDENT UNITED STATES OF
AMERICA; ACTING SECRETARY
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES;
et al.

*Little Sisters of the Poor
Saints Peter and Paul Home,
Appellants in 17-3752

*(Pursuant to Rule 12(a), Fed.
R. App. P.)

AND
COMMONWEALTH OF PENNSYLVANIA,

vs.

PRESIDENT UNITED STATES OF
AMERICA; ACTING SECRETARY
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES;
et al.

Appellants in 18-1253

The Albert Branson Maris
Courtroom
James A. Byrne
U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania
Tuesday, May 21, 2019

CAPTION CONTINUED:

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1 CAPTION CONTINUES:
2 COMMONWEALTH OF PENNSYLVANIA;
3 STATE OF NEW JERSEY,
4 vs.
5 PRESIDENT UNITED STATES OF
6 AMERICA; ACTING SECRETARY
7 UNITED STATES DEPARTMENT OF
8 HEALTH AND HUMAN SERVICES;
9 et al.

10 Little Sisters of the Poor
11 Saints Peter and Paul Home
12 (Intervenor in D.C.)
13 Appellant in 19-1129
14 AND
15 COMMONWEALTH OF PENNSYLVANIA;
16 STATE OF NEW JERSEY,
17 vs.

18 PRESIDENT UNITED STATES OF
19 AMERICA; ACTING SECRETARY
20 UNITED STATES DEPARTMENT OF
21 HEALTH AND HUMAN SERVICES;
22 et al.

23 Little Sisters of the Poor
24 Saints Peter and Paul Home
25 (Intervenor in D.C.)

26 Secretary United States
27 Department of Health and
28 Human Services, United States
29 Department of Health and
30 Human Services, Secretary
31 United States Department of
32 Treasury, et al,
33 Appellants in 19-1189

34 TRANSCRIPT OF ORAL ARGUMENT
35 BEFORE THE HONORABLE THEODORE A. MCKEE,
36 THE HONORABLE PATTY SHWARTZ
37 THE HONORABLE JULIO M. FUENTES
38 UNITED STATES CIRCUIT COURT JUDGES



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1 (Proceedings commence)

2 THE COURT: Okay. And the final matter.

3 MR. MOOPPAN: May it please the Court, Hashim
4 Mooppan for the Federal Government. I would like to
5 reserve --

6 THE COURT: Would you pronounce it for me one more
7 time, slowly, and I'll do the best I can not to mispronounce
8 it. State your name again, it's?

9 MR. MOOPPAN: Hashim Mooppan.

10 THE COURT: Moopair [sic]?

11 MR. MOOPPAN: Mooppan.

12 THE COURT: Okay.

13 MR. MOOPPAN: For the Federal Government. I'd like
14 to reserve three minutes for rebuttal.

15 THE COURT: Okay.

16 MR. MOOPPAN: The briefs in these cases have
17 addressed multiple issues; I'd like to focus on three of them
18 this morning: First, that the ACA authorized the religious
19 and moral exemptions; second, that RFRA authorized the
20 religious exemption; and third, that the District Court
21 abused its discretion in granting nationwide injunctive
22 relief.

23 Starting with the first issue, the ACA's
24 preventative services mandate provides that preventative
25 services have to be covered only for services as provided for



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1 in guidelines supported by HRSA. That --

2 JUDGE SHWARTZ: So those are guidelines that were
3 going to be promulgated after this statute was enacted,
4 correct?

5 MR. MOOPPAN: Correct, Your Honor. And that
6 language, "as provided in," clearly authorizes, and at a
7 minimum does not unambiguously foreclose HRSA's discretion to
8 provide the manner in which such services are provided.

9 THE COURT: The position is that language supports
10 the view that that -- an administrative agency can decide who
11 has to comply with the law.

12 MR. MOOPPAN: I wouldn't phrase it that way, Your
13 Honor. It's not a question of who has to comply with the
14 law; it's a question of what services have to be provided in
15 the first place.

16 THE COURT: But the regulations that are under
17 review and under challenge here all talk about a "who." Who
18 needs to provide or who's exempt from providing. And your
19 legal authority for that proposition is the "as provided for"
20 language?

21 MR. MOOPPAN: That's right. But I -- again, the
22 distinction is: It's not who has to comply with the law,
23 it's what the law actually provides. The language of the
24 statute only requires plans to provide services as provided
25 for in guidelines supported by HRSA. So, if the guidelines

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1 that HRSA provides do not require contraceptive services for
2 religious objectors, then they are complying with the law.
3 It's not that they're -- the agency is exempting them from
4 what the law requires. The agency is providing what the law
5 requires.

6 THE COURT: Congress, though, knows how to speak
7 about who to grant exemptions to, right?

8 MR. MOOPPAN: It does, Your Honor.

9 THE COURT: So, here, by the grandfathering
10 provisions, it did so by rejecting the conscience amendment,
11 correct?

12 MR. MOOPPAN: That's true, Your Honor.

13 THE COURT: So, if Congress has demonstrated it is
14 going to exercise its authority about who needs to provide
15 the particular services, doesn't that speak to the fact it's
16 not the agency's job?

17 MR. MOOPPAN: No, Your Honor, because those
18 exemptions are exemptions from what Congress has already
19 provided. So, for example, the grandfathering exemption says
20 the things that the statute itself requires -- not what the
21 agency provides, but what the statute requires -- Congress
22 has created an exemption from that.

23 That is very different from here, where
24 contraceptive services never have to be provided in the first
25 place. That was a discretionary judgment call that Congress



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1 delegated to the agency. And as part of that delegation,
2 nothing in the statutory language restricts the delegation to
3 putting the agency to an all-or-nothing choice; to a choice
4 of either providing contraceptive services and requiring all
5 religious entities -- even, for example, churches -- to
6 provide those services, or not providing it at all.

7 Nothing in the language -- and I'm -- this is
8 important. This is a Chevron case. They have to show that
9 the language unambiguously forecloses creating an exemption,
10 and they simply can't do that. From the very beginning of
11 the contraceptive services mandate, there have always been
12 these sort of religious exemptions. The --

13 JUDGE SHWARTZ: Well, let's assume that the statute
14 allows some sort of regulatory activity to occur in the form
15 you're discussing, which is the "who" -- who has to provide
16 or who can exempt themselves from providing. There's a big
17 dispute about whether the APA was complied with here,
18 correct? There is a dispute about that. You may think it
19 was, but your adversaries say the APA was not complied with
20 and the District Court said there was an APA violation,
21 correct?

22 MR. MOOPPAN: So, if you're referring to the
23 procedural question, Your Honor --

24 THE COURT: Both the procedural and the substantive
25 one. We'll talk procedure first (indiscernible)

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1 MR. MOOPPAN: All right. So there is a procedural
2 challenge -- and that was relied on by the District Court
3 below -- with respect to the IFR. And then the District
4 Court further said that the IFR somehow tainted the final
5 rule, even though the final rule unquestionably went through
6 notice and comment.

7 THE COURT: You're saying the tainted the final
8 rule, or just the final rule was not sufficient? In fact,
9 the final rule was promulgated, wasn't sufficient to cure the
10 problems the District Court found in the IFR.

11 MR. MOOPPAN: Well, but I think the District Court
12 said something like that. I just don't quite understand what
13 the District Court meant because the question here isn't
14 about curing the taint of the IFR. If the final rule is
15 valid, that's all that matters. They are only seeking
16 injunctive relief. The only question in this case is: Going
17 forward, as a prospective manner, are these exemptions valid?
18 So whether the IFR was legal or illegal is utterly
19 irrelevant, at this point, in this case.

20 JUDGE SHWARTZ: How can you say that, though,
21 with -- given our precedent, where we have case law, more than
22 one case where, in the Third Circuit, the Court -- our court
23 has held a tainted IFR can infect a final regulation?

24 MR. MOOPPAN: I -- with all respect, Your Honor, I
25 don't think that's true. You -- the Court -- there are three

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1 cases in this court.

2 JUDGE SHWARTZ: Uh-huh.

3 MR. MOOPPAN: Two of them, Sharon and Reynolds, do
4 not involve a second final rule. What they talk about is
5 something very different, which is the agency first went
6 through and, without notice and comment, promulgated
7 something. Then there were further comments and that's it.
8 The agency never promulgated a second rule. So those cases
9 are just completely distinguishable. We're not arguing here
10 that, if we haven't promulgated the second rule, the mere
11 fact that there was a subsequent comment period would somehow
12 make the IFR okay.

13 JUDGE SHWARTZ: Do you concede that the IFRs in
14 this case are procedurally invalid because there was no
15 notice and comment?

16 MR. MOOPPAN: No, Your Honor. We have argued, both
17 in our briefs and in other cases, that we think that we --
18 there are multiple reasons why notice and comment wasn't
19 required for the IFR.

20 THE COURT: What was that?

21 MR. MOOPPAN: Huh?

22 THE COURT: Why -- what reason do you have for
23 that? I have the same concern.

24 MR. MOOPPAN: Right. So --

25 THE COURT: No notice, no fair comment, no



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1 opportunity for the public or any other agency --

2 MR. MOOPPAN: So --

3 THE COURT: -- to weigh in?

4 MR. MOOPPAN: -- we have two arguments, Your Honor.

5 First, we have the argument that the statute itself
6 authorizes the agency to promulgate interim final rules.

7 JUDGE SHWARTZ: But that doesn't -- that statute
8 does not do what the APA requires, which is expressly
9 authorize it to be done without regard to APA procedure.

10 MR. MOOPPAN: So there's no magic words requirement
11 under the APA, Your Honor --

12 JUDGE SHWARTZ: No words at all, though. Forget
13 magic, there's no words at all.

14 MR. MOOPPAN: No. Well, I think there is, Your
15 Honor, in the sense that the language of the statute says
16 that they can pass interim final rules where they deem
17 appropriate. That is certainly not the standard for
18 promulgating interim final rules --

19 THE COURT: Well, wait --

20 MR. MOOPPAN: -- under the --

21 THE COURT: -- wait a minute.

22 MR. MOOPPAN: -- APA.

23 THE COURT: They wouldn't -- are you suggesting
24 that the statute could otherwise have said they can
25 promulgate final rules where they deem it inappropriate? I'm



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1 not sure how -- what that gets you.

2 MR. MOOPPAN: What it gets me is it's not the
3 standard of good cause under the APA, just as in the cases
4 like the Asiana case that we've cited, where you have a
5 statute --

6 THE COURT: And where appropriate is the statutory
7 declaration that excuses you from notice and comment?

8 MR. MOOPPAN: So it's the fact that it says
9 "interim rules," "interim final rules," which is a term of
10 art that means you don't have to go through notice and
11 comment.

12 JUDGE SHWARTZ: What's the authority for that? Do
13 you have some authority that says interim final rules are --
14 can be issued without notice and comment? Do you have a --
15 like a statute, a case --

16 MR. MOOPPAN: That's the definition of an "interim
17 final rule."

18 JUDGE SHWARTZ: Where is --

19 MR. MOOPPAN: I don't think --

20 JUDGE SHWARTZ: -- the definition. Tell me where I
21 can get that definition from.

22 MR. MOOPPAN: You know, so I --

23 JUDGE SHWARTZ: Do you have a cite?

24 MR. MOOPPAN: I have -- off the top of my head, I
25 don't think I can -- I don't think it's disputed between the



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1 parties here. Everyone agrees that the interim final rule --

2 JUDGE SHWARTZ: Can be -- you're saying everyone is
3 saying interim final rules can be issued without notice and
4 comment?

5 MR. MOOPPAN: Without notice and comment. The only
6 fight is about whether the standard for invoking the interim
7 final rule authority is met. There, our argument is, even
8 under the ACA statute, the "as appropriate" language requires
9 satisfying the APA standard; namely, that you have to have
10 good cause, and if you don't have good cause.

11 JUDGE SHWARTZ: I'm with you on that. So your -- I
12 want to make sure I understand your argument. You're -- are
13 you saying they can be issued without notice and comment, but
14 only if there's good cause?

15 MR. MOOPPAN: No. So we have two --

16 JUDGE SHWARTZ: Because that --

17 THE COURT: (indiscernible) --

18 JUDGE SHWARTZ: -- I understand.

19 THE COURT: -- IFRs or final rules?

20 JUDGE SHWARTZ: IFRs.

21 THE COURT: Okay.

22 MR. MOOPPAN: We have two arguments. One argument
23 is, under the specific statutory language in the ACA, all
24 that is required is for the agency to deem it appropriate.
25 That's the language in the actual statute.



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1 JUDGE SHWARTZ: Okay. I'm with you.

2 MR. MOOPPAN: Our second argument is, if you don't
3 think that that's enough to displace the APA, that we satisfy
4 the APA's good cause standards here.

5 But again, I think the more important thing for
6 present purposes is none of this matters for what the relief
7 in this case --

8 THE COURT: If you dispense with notice and fair
9 comment, is it -- do you sense that there's an obligation to
10 do it later or -- is that your view or -- I mean, do you
11 dispense with them entirely?

12 MR. MOOPPAN: So, for an interim final rule, you're
13 not required to go through notice and comment.

14 THE COURT: Gotcha.

15 MR. MOOPPAN: Now --

16 THE COURT: Well, I understand your position.

17 MR. MOOPPAN: -- often, agencies will then
18 subsequently do comment because there are values to comments.

19 THE COURT: And we said --

20 MR. MOOPPAN: But --

21 THE COURT: We said that --

22 MR. MOOPPAN: But again --

23 THE COURT: Go ahead. But I think we have said
24 that that's not a good thing, NRDC v. EPA [sic] --

25 MR. MOOPPAN: Right. And so --



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1 THE COURT: -- we said you can't do it that way.

2 MR. MOOPPAN: So, again, what I want to emphasize
3 is this is not a case where we just did an interim final
4 rule, had some additional comments, and said, that's good
5 enough. We actually had a second, full rule-making. We had
6 a full notice and comment period --

7 THE COURT: All you're doing is validating what
8 you've already decided.

9 THE COURT: Right.

10 MR. MOOPPAN: The -- even the District Court here
11 concluded that we adequately responded to the comments that
12 were received. There's just no basis to say that this was
13 pre-judged. The agency fully considered the comments that
14 were received, they made some changes in response. To be
15 clear, they weren't very substantial changes; they were
16 mostly of a technical --

17 THE COURT: But they weren't substantive, were
18 they?

19 MR. MOOPPAN: Huh?

20 THE COURT: They weren't substantive changes.

21 MR. MOOPPAN: There were some substantive, they
22 were small, and there were some technical ones. But there is
23 just no basis to say --

24 THE COURT: What were the -- what were the
25 substantive changes?



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1 MR. MOOPPAN: I think the -- probably the biggest
2 substantive one turned on when you have a self-insured church
3 plan, whether at the plan level or at the employer level. I
4 don't mean to suggest that this was a major change.

5 But I think what's important to recognize is we
6 fully addressed their comments. And the idea that we would
7 have to make some substantive change -- well, what if their
8 comments are all bad? It doesn't make sense that we would --
9 could somehow be permanently disabled from promulgating this
10 rule just because we previously went through an IFR. Under
11 their theory, I just don't understand how the Government is
12 ever able, going forward, to have this rule.

13 THE COURT: Of course you could, but you have to
14 have fair comment --

15 MR. MOOPPAN: We --

16 THE COURT: -- it seems to me.

17 MR. MOOPPAN: We did.

18 THE COURT: Well --

19 MR. MOOPPAN: They had notice and comment.

20 THE COURT: They did it after you already had
21 established the rule.

22 MR. MOOPPAN: But -- so we're in that world now.
23 So, Your Honor, what I don't understand is, as I stand here
24 today, I don't understand their position, how the Government
25 could ever promulgate this rule because it was always going

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1 to be the case --

2 THE COURT: Referring to this rule.

3 MR. MOOPPAN: Huh?

4 THE COURT: This particular rule, as --

5 MR. MOOPPAN: This particular rule. Their theory
6 is, because we went through an IFR without comments, that
7 somehow taints our subsequent final rule.

8 THE COURT: Well --

9 MR. MOOPPAN: That means, I think --

10 THE COURT: -- I'm not sure --

11 MR. MOOPPAN: -- that the Government can never do
12 this.

13 THE COURT: I'm not sure that I would agree with
14 that.

15 MR. MOOPPAN: Well --

16 THE COURT: But the point -- that is, in this case,
17 there seemed to be a deficiency in following the appropriate
18 procedure.

19 MR. MOOPPAN: I guess my point, Your Honor, is when
20 you say this "this case," what can the Government do, going
21 forward? It can't be we can go through notice and comment;
22 we already did that. What else can we do?

23 THE COURT: Well, comments, you did that after you
24 had already established --

25 MR. MOOPPAN: Right. And that's always going to be



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1 the case. That -- in this very case --

2 THE COURT: You mean that it can always be the
3 case? Did I hear you right?

4 MR. MOOPPAN: I'm saying, in the facts of this
5 actual case, where the interim final rule has happened, we
6 can't unring that bell. It is the case that we went through
7 an interim final rule and didn't provide comments. So what,
8 at this point in time --

9 THE COURT: Okay.

10 MR. MOOPPAN: -- going forward --

11 THE COURT: I'm --

12 MR. MOOPPAN: -- can we possibly do?

13 THE COURT: Here's what I'm thinking, though. It's
14 a bad precedent. If we say, yes, you are right, then every
15 other agency subsequent then can do the same thing: Do the
16 rule, then do the comment, and then they say, well, you
17 can't unring the bell.

18 MR. MOOPPAN: Again, the way you deal with that is
19 to make sure that we do valid notice and comment on the
20 second step, which we did. We went through the notice and
21 comment period, we considered their comments. The District
22 Court did not disagree that we adequately responded to their
23 comments. They made that argument. They have made the
24 argument that we didn't pay attention to their comments and
25 the District Court rejected that argument. And at that

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1 point, it has surely got to be enough because, otherwise, we
2 would be permanently disabled. And that's what other
3 circuits have recognized, including the First Circuit cases
4 we've cited in our briefs.

5 THE COURT: You're saying -- you're basically
6 saying that, although you didn't follow the recommended
7 procedure, it should be excused in this case --

8 MR. MOOPPAN: That's not what I'm saying.

9 THE COURT: -- because you --

10 MR. MOOPPAN: What I'm saying --

11 THE COURT: -- cured it later.

12 MR. MOOPPAN: Well, it's not even a question about
13 curing. The final rule did comply with the procedures. We
14 promulgated a final rule. We asked -- we gave people notice,
15 we gave them comments, and then we promulgated a rule. That
16 is picture perfect APA. The only question is whether somehow
17 that is tainted by the fact -- by -- that we did something
18 else before.

19 There is not -- this isn't a question about whether
20 we're trying to use what we did subsequently to cure what we
21 did before. We don't -- it doesn't matter, at this point, in
22 this case, whether the original rule was valid or invalid
23 because they are only seeking prospective injunctive relief.
24 The only question that matters at this point is whether the
25 rule is valid going forward. And for those purposes, the



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1 final rule complied with the APA. They had notice, they had
2 comments, they had an opportunity to comment, we responded.
3 The District Court concluded we adequately responded to their
4 comments. That should be the end of the matter, as far as
5 the procedures go.

6 Just to go back to your third case because you said
7 there were multiple cases. There were three. Two of them are
8 distinguishable for the reason I said, that there was no
9 final rule. The last is the NRDC case. The reason that case
10 is critically different is, in that case, the interim final
11 rule, the invalidity with the interim final rule was that it
12 changed an effective date. So, if that interim final rule
13 was invalid, that meant that the -- some prior rule went into
14 effect right then and there. And then the question is:
15 Well, how do you then deal with the subsequent rule?

16 That's totally different from this case because all
17 -- again, all that matters in this case is, going forward,
18 what is the rule. And so there's a critical substantive
19 difference because that case, the validity of the interim
20 final rule mattered, separate and apart from the subsequent
21 rules that followed.

22 JUDGE SHWARTZ: Well, some people would say that
23 the interim final rules were out there, and it put out a view
24 that somehow showed the agency was not open minded to all the
25 comments it received that generated the final rules.



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1 MR. MOOPPAN: Well --

2 JUDGE SHWARTZ: So there is at least some case law
3 within this circuit which is difficult for you to overcome.

4 MR. MOOPPAN: Again, Your Honor, I don't think that
5 that's right because I --

6 JUDGE SHWARTZ: I understand your distinctions.

7 MR. MOOPPAN: Right.

8 JUDGE SHWARTZ: I do understand it. I do
9 understand it.

10 MR. MOOPPAN: Right.

11 JUDGE SHWARTZ: As it relates to RFRA.

12 MR. MOOPPAN: Yes.

13 JUDGE SHWARTZ: RFRA -- let's assume that we were
14 to conclude that the ACA does not provide authority to rule-
15 make on this subject for the purposes of this question, and
16 the only statutory authority you have is RFRA. Okay? If you
17 go back and look at the statute and you're looking at the
18 text -- you pointed me to text in the ACA -- if you look at
19 the statute in RFRA, RFRA creates basically a cause of action
20 to bring to a court, for a court to evaluate whether a
21 particular entity or individual belief system has been
22 substantially burdened by a federal government action,
23 correct?

24 MR. MOOPPAN: It does that.

25 JUDGE SHWARTZ: It creates that. Point me to where



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1 within the RFRA statutory scheme gives regulatory authority.

2 MR. MOOPPAN: Sure. It's the very first part of
3 RFRA. You're right that RFRA provides a cause of action. But
4 what RFRA does, first and foremost, is it's a prohibition on
5 the Government. It says the Government shall not
6 substantially burden religious exercise.

7 JUDGE SHWARTZ: I understand that.

8 MR. MOOPPAN: It defines the "Government" as an
9 agency, and it defines the scope of RFRA as the
10 implementation of federal law. By definition, if we
11 promulgate a regulation that substantially burdens religious
12 exercise, we are violating RFRA.

13 JUDGE SHWARTZ: Okay. I'm with you on that.

14 MR. MOOPPAN: So their theory has to be that, under
15 RFRA, what we are supposed to do is just violate the statute
16 and wait to be sued.

17 And by the way, in the Third Circuit, Your Honor --
18 and we don't necessarily agree with this precedent, but you
19 should know the Third Circuit has held that there are money
20 damages available against the Federal Government for
21 violations of RFRA. So, on their theory, we have to
22 promulgate a regulation that we know to violate RFRA, wait to
23 be sued, and then get hit with money damages --

24 JUDGE SHWARTZ: Okay. But here's --

25 MR. MOOPPAN: -- on top of it.



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1 JUDGE SHWARTZ: -- the situation you have. Before
2 the 2017 regulations -- the IFRs, the finals -- were in
3 place, there was a regulatory scheme of an accommodation
4 scenario that allowed to address those -- that substantial
5 burden. So there was already a regulatory scheme that took
6 care of this. Why did you need to go to this extra step?

7 MR. MOOPPAN: Well, so two things about that.
8 First of all, the mere existence of that accommodation also
9 refutes the argument that we can't do anything because that
10 accommodation itself can only be authorized, either under the
11 ACA or RFRA. From where else would it have come from?

12 And it is a departure from the ACA; it's important
13 to emphasize that point. The ACA requires that the plan and
14 the insurer provide the services. You --

15 JUDGE SHWARTZ: The mandate, right?

16 MR. MOOPPAN: Yeah, the mandate. The mandate
17 requires that the plan and the insurer provide the services.
18 The whole point of the accommodation, the whole point of it
19 was to say that the plan doesn't provide it. So that is a
20 departure from the ACA. So, if we don't have authority to
21 depart from the ACA.

22 JUDGE SHWARTZ: But the accommodation facilitated
23 the provision and complies with the statute. It just got the
24 objecting employer out of the scenario.

25 MR. MOOPPAN: It doesn't comply with the statute,

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1 that's my point. The threat --

2 JUDGE SHWARTZ: Oh, yes -- if it doesn't comply,
3 then how can your regulation comply?

4 MR. MOOPPAN: That's my point, as well, Your Honor.
5 What I'm --

6 JUDGE SHWARTZ: Well, then your regulation can't
7 comply with --

8 MR. MOOPPAN: No.

9 JUDGE SHWARTZ: -- the statute.

10 MR. MOOPPAN: What I'm trying to say, Your Honor,
11 is that, if you look at the plain text of the mandate, it
12 says the plan and the insurer.

13 JUDGE SHWARTZ: Uh-huh.

14 MR. MOOPPAN: The accommodation doesn't involve the
15 plan, so they've departed from the language of the mandate.
16 Either --

17 JUDGE SHWARTZ: You said the accommodation doesn't
18 apply to the plan?

19 MR. MOOPPAN: Yes, that --

20 JUDGE SHWARTZ: It applies to the issuer? It
21 applies to the issuer?

22 MR. MOOPPAN: Yeah. The whole point is to take the
23 employer out --

24 JUDGE SHWARTZ: Right.

25 MR. MOOPPAN: -- and to say the plan doesn't have



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1 to provide the coverage --

2 JUDGE SHWARTZ: Okay. We're saying the same thing.

3 MR. MOOPPAN: Right.

4 JUDGE SHWARTZ: Go ahead.

5 MR. MOOPPAN: So, either we have authority to do
6 that under the ACA, right?

7 JUDGE SHWARTZ: Uh-huh.

8 MR. MOOPPAN: To -- notwithstanding the plain text
9 of the statute, which said the plan and the issuer, we had
10 the authority under the ACA to take it away, or we had
11 authority to do that under RFRA. It had to be one --

12 JUDGE SHWARTZ: Taking it away?

13 MR. MOOPPAN: -- or the other.

14 JUDGE SHWARTZ: You're not taking it away, though.
15 You're just taking the employer's responsibility to
16 facilitate it all.

17 MR. MOOPPAN: Right. So we are taking out their
18 statutory obligation under the ACA.

19 JUDGE SHWARTZ: But your regulation here, making
20 that accommodation experience voluntary, makes nobody
21 responsible --

22 MR. MOOPPAN: Again, Your Honor --

23 JUDGE SHWARTZ: -- except the State --

24 MR. MOOPPAN: The point --

25 JUDGE SHWARTZ: -- from their point of view.



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1 MR. MOOPPAN: I'll say a couple of things about
2 that, but the first, just to finish the point on this, is:
3 On the theory that we don't have authority to create
4 exemptions under either the ACA or RFRA, that would mean the
5 accommodation itself was illegal.

6 Second is the accommodation itself actually left
7 people not covered, right? Because the accommodation -- the
8 way the accommodation works is, once the employer is out,
9 either the insurer or the third-party administrator has to
10 come in and provide the services --

11 JUDGE SHWARTZ: Correct. Uh-huh.

12 MR. MOOPPAN: -- for so-called "self-insured church
13 plans," and to clarify what that means. You have churches
14 who are categorically exempt under the religious exemption
15 there's also a church plan which can involve entities that
16 aren't themselves the churches, but they are controlled by
17 associations, organizations affiliated with churches.

18 JUDGE SHWARTZ: Would you consider those -- that
19 fall into that category of auxiliaries or --

20 MR. MOOPPAN: No, it's different --

21 JUDGE SHWARTZ: -- you're --

22 MR. MOOPPAN: -- from that.

23 JUDGE SHWARTZ: -- you're putting it in a different
24 category?

25 MR. MOOPPAN: It's totally -- it's separate --



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1 think, for example, like a Catholic hospital.

2 JUDGE SHWARTZ: I understand.

3 MR. MOOPPAN: It might not even be an auxiliary, if
4 not sufficiently intertwined --

5 JUDGE SHWARTZ: Got it.

6 MR. MOOPPAN: -- as a matter of corporate
7 structure.

8 JUDGE SHWARTZ: I understand.

9 MR. MOOPPAN: That sort of entity, a church plan,
10 it's exempt from ERISA. When --

11 JUDGE SHWARTZ: Exempt from ERISA. Okay.

12 MR. MOOPPAN: Right.

13 JUDGE SHWARTZ: I'm with you.

14 MR. MOOPPAN: And what that means is that, under
15 the accommodation itself, the women who work for one of those
16 entities will not receive contraceptive services, even under
17 the accommodation. So it has --

18 JUDGE SHWARTZ: Because they're getting the same
19 benefit as the church exemption, generally?

20 MR. MOOPPAN: Well, so there are two, right?
21 There's the church exemption --

22 JUDGE SHWARTZ: Uh-huh.

23 MR. MOOPPAN: -- then there's the accommodation.
24 Now they have tried to say that the accommodation, all the
25 women are going to get the coverage. And what I'm pointing



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1 out is that's simply not true that --

2 JUDGE SHWARTZ: Because people who work for
3 churches and women who work for churches or this other
4 category --

5 MR. MOOPPAN: Right. The church plan. And --

6 JUDGE SHWARTZ: Right.

7 MR. MOOPPAN: And why that's very important is --

8 JUDGE SHWARTZ: That's materially different than a
9 publicly traded corporation. Wouldn't you agree?

10 MR. MOOPPAN: Again, I don't think it's materially
11 different. In fact, if anything, it sort of cuts the other
12 way.

13 JUDGE SHWARTZ: Well, isn't it materially different
14 because like the Supreme Court precedent that has tremendous
15 respect for religious organizations and protects their
16 internal decision-making, Hosanna-Tabor, et cetera, correct?

17 MR. MOOPPAN: So I'll say two things about that.
18 First, the church exemption applies to churches that don't
19 even have a religious objection to contraception. Every
20 mosque and every synagogue in this country can invoke the
21 church exemption.

22 JUDGE SHWARTZ: Can.

23 MR. MOOPPAN: Can.

24 JUDGE SHWARTZ: Okay.

25 MR. MOOPPAN: Even though they don't have a



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1 religious objection to contraception. So the idea that that
2 makes sense, but you can't provide a religious objection to
3 someone who actually has a religious objection to
4 contraception, I don't think it makes sense to point out
5 church autonomy.

6 The other point about church autonomy is the church
7 exemption only applies to contraceptive services. All the
8 other preventative services that are covered by the ACA,
9 churches are subject to. So you cannot say that that
10 exemption is based on some sort of belief in church autonomy.
11 It just -- it is --

12 JUDGE SHWARTZ: So you're saying --

13 MR. MOOPPAN: -- completely --

14 JUDGE SHWARTZ: -- that if there --

15 MR. MOOPPAN: -- untailored [sic] to that.

16 JUDGE SHWARTZ: -- was a religious organization
17 that objected to transfusion, organ transplants, et cetera,
18 those organizations, those religious entities, would have to
19 comply with the ACA.

20 MR. MOOPPAN: I'm saying that the church exemption
21 does not exempt them. They might well have a RFRA claim,
22 then we'd adjudicate that or the agency would consider
23 creating an exemption for them, but the existing exemption
24 doesn't cover them.

25 And the reason why this matters is the Supreme

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1 Court has recognized repeatedly -- in cases like O Centro and
2 Holt v. Hobbs -- that, when the Government provides
3 exemptions for some people, but not for others, that's going
4 to undermine its claim that there's a compelling interest and
5 it's narrowly tailored.

6 And here, that's particularly true because they've
7 provided exemptions for religious objectors, but it's just a
8 complete misfit because the religious objectors they have
9 provided it to are churches, even when they don't have a
10 church -- a religious objection, and they've done it for
11 these church plans. Both of those things have nothing to do
12 with the ACA. They have --

13 THE COURT: Well, but the --

14 MR. MOOPPAN: -- to do with --

15 THE COURT: -- that they've --

16 MR. MOOPPAN: -- the scope --

17 THE COURT: -- provided the exemption doesn't mean
18 the church has to avail itself of the exemption.

19 MR. MOOPPAN: But it means that they can.

20 THE COURT: Well --

21 MR. MOOPPAN: And the fact that the Government made
22 it possible for them to do that suggests that it was not
23 narrowly tailored to a compelling interest.

24 But Judge Shwartz, if I could get back to your
25 basic, original question, which is what --



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1 THE COURT: Well, then we need to move on because
2 Mr. Rienzi still hasn't even started, and we haven't even
3 gotten into --

4 MR. MOOPPAN: I apologize.

5 THE COURT: -- standing yet and --

6 MR. MOOPPAN: Yeah, and if I can just make one
7 point --

8 THE COURT: Go ahead.

9 MR. MOOPPAN: -- because it is a very fundamental
10 point here.

11 You asked the question of why the Government had to
12 do anything, given that the accommodation was there. And I
13 think what's important to recognize is that the mandate
14 imposes a substantial burden. There's no dispute about that;
15 the Supreme Court held that in Hobby Lobby. So then the
16 question is: How does the Government deal with the
17 substantial burden it has imposed. Nothing in RFRA says that
18 we have to pick the accommodation, rather than the exemption,
19 as the means of solving the substantial burden that we have
20 imposed.

21 The statute says we can't substantially burden
22 religion and we have the discretion to solve that problem by
23 using the exemption, particularly when the validity of the
24 accommodation was subject to significant legal dispute.
25 There was a circuit split over whether the accommodation was



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1 valid. It --

2 JUDGE SHWARTZ: Well, there was this one outlier;
3 the rest agreed it was fine.

4 MR. MOOPPAN: It was one Circuit Court. And the
5 District Courts --

6 JUDGE SHWARTZ: One Circuit Court, and the rest of
7 the Circuit Courts found the accommodation not to be a
8 substantial burden.

9 MR. MOOPPAN: Right. And at the District Court, it
10 was much more varied.

11 More importantly, it then went to the Supreme
12 Court, which found the issue sufficiently difficult that they
13 punted on it. They -- the Supreme Court couldn't resolve
14 this issue. The idea that --

15 THE COURT: What about Real Alternatives, where we
16 relied upon the reasoning in -- clearly, it's dicta, but we
17 relied upon the Geneva College reasoning, even after Zubik.

18 MR. MOOPPAN: Right. My point is, whether or not
19 the accommodation was valid, the idea that we are somehow
20 required to go with the accommodation, rather than the
21 exemption, there's nothing in the text of RFRA that says
22 that. There's --

23 JUDGE SHWARTZ: There is case law that says you do
24 need to -- you need to consider the impact of an
25 accommodation to address the concerns of one group, what the



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1 consequences are on the non-beneficiaries of that exemption.

2 I'm sure you're familiar with all this case law, right?

3 MR. MOOPPAN: That's right, Your Honor.

4 JUDGE SHWARTZ: And so doesn't the accommodation do
5 just that? It respects the religious objectors without
6 having this consequence on those who are seeking these
7 particular services.

8 MR. MOOPPAN: So a couple of things, Your Honor.

9 First of all, no, in part, it doesn't because of the self-
10 insured church plans. For the self-insured church plans, the
11 women don't get the coverage. Second, there's nothing that
12 requires us to pick that option, rather than the other,
13 especially because this isn't a -- this is a case where the
14 Government is removing a burden it has imposed on religious
15 objectors.

16 JUDGE SHWARTZ: I understand the position. Thank
17 you.

18 MR. MOOPPAN: Thank you, Your Honor.

19 (Panel confers)

20 THE COURT: Okay. You just answered that was being
21 asked of you, and that's it.

22 MR. MOOPPAN: Correct.

23 THE COURT: It still has to do with our precedent,
24 Mr. Mooppan, and it has to do with the failure to engage in
25 notice and rule-making, and we do have precedent that says



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1 you have to do it that way. And you say you can be excused
2 in this circumstance?

3 MR. MOOPPAN: No, Your Honor.

4 THE COURT: You --

5 MR. MOOPPAN: What I'm saying is that we went
6 through notice and comment. This is a challenge to a final
7 rule. The final rule went through notice and comment. It --
8 the final rule was preceded by comments, and then we
9 initiated the final rule.

10 THE COURT: Thank you.

11 MR. MOOPPAN: Thank you.

12 THE COURT: Mr. Rienzi? Did I get your name
13 correct?

14 MR. RIENZI: Yeah, Mark Rienzi --

15 THE COURT: Okay.

16 MR. RIENZI: -- for the Little Sisters. May I also
17 reserve two minutes for rebuttal? Would that be permissible?

18 THE COURT: Well, why don't you just decide -- this
19 came up in an en banc a little while ago --

20 MR. RIENZI: I --

21 THE COURT: -- where we've got two different
22 rebuttals being reserved.

23 MR. RIENZI: Okay.

24 THE COURT: Why don't you just -- how much time did
25 Mr. Mooppan reserve?



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1 THE CLERK: Three minutes.

2 THE COURT: Why don't you take four minutes, and
3 then decide who's going to take the rebuttal time.

4 MR. RIENZI: That's fine.

5 THE COURT: Okay.

6 MR. RIENZI: Mr. Mooppan can have it. That's fine.

7 THE COURT: Okay.

8 MR. RIENZI: May --

9 THE COURT: Well, that was easy.

10 MR. RIENZI: May it please the Court. What I'd
11 like to do is address --

12 THE COURT: He may not want it now, if he's --

13 MR. RIENZI: If he cedes it, I will happily take
14 it, Your Honor.

15 May it please the Court. I'd like to address Judge
16 Fuentes and Judge Shwartz's procedural questions about the
17 IFR and then move to why the RFRA analysis, the substance of
18 the RFRA analysis, actually overwhelms and takes over the
19 procedural analysis; in other words, ultimately, the RFRA is
20 the answer --

21 THE COURT: Is anyone going to get to standing
22 here? Which is kind of the --

23 MR. RIENZI: Well --

24 THE COURT: -- preliminary hurdle we have to jump
25 through?



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1 MR. RIENZI: Your Honor, I'd be happy to leave
2 standing to the briefs, but let me make this point about the
3 states' standing arguments, though.

4 THE COURT: If you want to leave it to the briefs,
5 that's fine. I just wanted to (indiscernible)

6 MR. RIENZI: Yeah, so I'm happy to leave it to the
7 briefs. I'll make one argument --

8 THE COURT: Because it's -- it cannot be waived,
9 obviously.

10 MR. RIENZI: -- that gets to the merits.

11 JUDGE SHWARTZ: Can I ask you, before you get to
12 the procedure?

13 MR. RIENZI: Sure.

14 JUDGE SHWARTZ: I just have a question about the
15 Colorado injunction.

16 MR. RIENZI: Sure.

17 JUDGE SHWARTZ: Does the Colorado injunction only
18 apply to the Colorado and Maryland Little Sisters components
19 or does it apply to the intervenors in Pittsburgh, too?

20 MR. RIENZI: It applies to the intervenors in
21 Pittsburgh, to the extent that they remain on the particular
22 plan that's at issue in the Colorado case. So the wording of
23 the injunction --

24 JUDGE SHWARTZ: Right.

25 MR. RIENZI: -- says for the named plaintiffs and



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1 all present and future participants in this plan, so --

2 JUDGE SHWARTZ: So there are some participants,
3 some members of the Pittsburgh organization that is not part
4 of that plan?

5 MR. RIENZI: No. Currently --

6 JUDGE SHWARTZ: I'm -- this is --

7 MR. RIENZI: -- the Pittsburgh --

8 JUDGE SHWARTZ: -- all about appellate standing.

9 MR. RIENZI: Sure. So, currently, the Pittsburgh
10 Sisters are on the Colorado plan.

11 JUDGE SHWARTZ: So, if that's the case, then how do
12 you have appellate standing here?

13 MR. RIENZI: Sure. So, first, as the prior panel
14 in this case held --

15 JUDGE SHWARTZ: I totally understand why they're
16 intervenors, I get it.

17 MR. RIENZI: Right.

18 JUDGE SHWARTZ: But now they're -- they can't --
19 they've already gotten whatever benefit they're entitled to
20 get --

21 MR. RIENZI: No, Your Honor.

22 JUDGE SHWARTZ: -- through the Colorado injunction.

23 MR. RIENZI: No, Your Honor. So --

24 JUDGE SHWARTZ: And if I'm wrong, tell me what more
25 relief they could get here.



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1 MR. RIENZI: Great. So they could get, in addition
2 to their judicial relief that's tied to one particular plan
3 in the Colorado case and tied to one particular judge, they
4 can get regulatory relief, which, among other things, would
5 allow them to switch plans or go call up Blue Cross and try
6 to get something else.

7 As the prior panel held, they have an interest in
8 preserving the results of the Zubik case, which this is.
9 They have an interest in getting regulatory relief, in
10 addition to judicial relief. And they have an issue [sic] in
11 getting the correct answer to the RFRA question, which, of
12 course, is going to govern, not only how HHS deals with them
13 in this case, but in others. That's all in the prior
14 panel's --

15 THE COURT: But nothing really came out of this,
16 wasn't the Zubik case basically, as Mr. Mooppan said, the
17 Supreme Court punting to try to get folks to work it out, but
18 it didn't very successfully get worked out, and so we're
19 here?

20 MR. RIENZI: Well, I -- so I disagree. I disagree.
21 I actually think it was quite successfully worked out. The
22 Government eventually acknowledged that it could not defend
23 the accommodation under RFRA, after it had conceded how it
24 actually works, and they did precisely what they're obligated
25 to do.



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1 JUDGE SHWARTZ: That they couldn't defend it?

2 Where did they concede that?

3 MR. RIENZI: They conceded that it was actually the
4 same plan, so -- or they conceded the facts that made it
5 utterly indefensible, which is why they haven't won any of
6 these cases since 2016.

7 JUDGE SHWARTZ: We're talking about the
8 accommodation, right?

9 MR. RIENZI: The accommodation.

10 JUDGE SHWARTZ: You're saying that the Government
11 has conceded the accommodation -- the Federal Government has
12 conceded accommodation doesn't work, as manifested by what?

13 MR. RIENZI: In these regulations, the --

14 JUDGE SHWARTZ: These regulations.

15 MR. RIENZI: -- HHS acknowledges that the
16 accommodation violates RFRA.

17 JUDGE SHWARTZ: So it's --

18 MR. RIENZI: Prior to that --

19 JUDGE SHWARTZ: So the current version of -- since
20 2017, they say it violates RFRA, but before that --

21 THE COURT: Since the executive order.

22 JUDGE SHWARTZ: Thank you. That's what I was
23 thinking of. Since the executive order --

24 MR. RIENZI: I --

25 JUDGE SHWARTZ: -- that's your pivot point?



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1 MR. RIENZI: I'd say it's after the executive
2 order, it's in the IFR and in the regulation. They have now
3 taken the position that they agree that they were violating
4 RFRA. Now it wasn't just --

5 JUDGE SHWARTZ: And now the Court could -- should
6 say, no, we think it's -- it --

7 MR. RIENZI: Oh --

8 JUDGE SHWARTZ: -- it meets the statute, right?

9 MR. RIENZI: Sure.

10 JUDGE SHWARTZ: Okay.

11 MR. RIENZI: Dozens of courts have said yes, right?
12 So they were doing that, not in a vacuum, but with dozens of
13 courts that had already said it violated RFRA. And the two
14 thousand --

15 JUDGE SHWARTZ: But not most Circuit Courts, right?

16 MR. RIENZI: No, but those cases were vacated, and
17 there are dozens of courts which have, both --

18 JUDGE SHWARTZ: And then --

19 MR. RIENZI: -- before --

20 JUDGE SHWARTZ: -- Real Alternatives --

21 MR. RIENZI: -- and since.

22 JUDGE SHWARTZ: -- as Judge McKee was just saying.

23 Our circuit has already re-embraced our analysis of the --

24 MR. RIENZI: Well --

25 JUDGE SHWARTZ: -- accommodation.



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1 MR. RIENZI: -- two important points about Real
2 Alternatives, Your Honor. First, in Real Alternatives, the
3 Court specifically said that they didn't view Geneva College
4 as binding, and they knew they were deciding a different
5 question.

6 THE COURT: Uh-huh.

7 MR. RIENZI: Chiefly, Real Alternatives was about
8 employees, not employers.

9 But second, and most important, here's -- you know,
10 the State wants to rely a lot on Real Alternatives. Here's
11 what Real Alternatives says:

12 "Even when noninterference is not strictly
13 required, the Government has discretion to grant
14 certain religious accommodations, subject to
15 constitutional limitations."

16 That's at Page 352 of Real Alternatives.

17 JUDGE SHWARTZ: Uh-huh.

18 MR. RIENZI: That is irreconcilable, irreconcilable
19 with the view of the ACA and RFRA that the States are
20 offering you here. This Circuit has said -- and by the way,
21 Hobby Lobby and Zubik clearly view the world this way -- that
22 of course the Federal Government has discretion to grant
23 exemptions to comply with RFRA. It would be crazy for
24 Congress to impose this obligation on each and every part of
25 the Federal Government -- every actor, every agency, every



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1 department -- and say you shall not burden religion --

2 JUDGE SHWARTZ: Uh-huh.

3 MR. RIENZI: -- but then fail to give them
4 authority to obey it, right? It's a prescription. It says,
5 you may not do this.

6 JUDGE SHWARTZ: Uh-huh.

7 MR. RIENZI: You don't need a separate grant of
8 authority after Congress tells you, you can't do it, and say,
9 oh, well, where do I look for my authority to not do it.
10 That's not the question, right? And that's why Hobby Lobby,
11 the majority opinion says that RFRA, quote:

12 " -- surely allows modification of existing
13 programs."

14 And Zubik, Zubik is a -- I mean, if the States were
15 right that RFRA only lets the Government fix a problem after
16 they've lost the RFRA case, then Zubik is nonsense, right?
17 In Zubik, the Supreme Court didn't decide the RFRA question,
18 right? It expressly said, I am not deciding the RFRA
19 question. But it sent the parties away for them to come up
20 with a new approach. Obviously, the Supreme Court understood
21 what this Court, in Real Alternatives, understood, which is
22 that of course the Government is permitted to respect
23 religion, they're obligated to respect religion. That's the
24 point of RFRA.

25 If I can -- if I can focus on the RFRA analysis.



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1 And Judge Shwartz, you mentioned the Courts of Appeals. That
2 was 2015, and the world is quite different and the facts are
3 quite different after what -- and this is not even a switch
4 of administrations from the Obama Administration to the Trump
5 Administration -- after what the Obama Administration
6 acknowledged to the Supreme Court in Zubik.

7 If you go back and read your Geneva College
8 opinion, it is all about, and the briefing for that opinion
9 is all about the idea that, well, if we do the accommodation,
10 it's separate from the employer. You can have your plan, and
11 we're going to do something else. It's separate, it's -- I
12 think the Geneva College opinion used the phrase "totally
13 disconnected."

14 JUDGE SHWARTZ: Uh-huh.

15 MR. RIENZI: Right? It's not your plan, stop
16 worrying about it, Sister, just sign the piece of paper.

17 Well, what eventually came to light at the Supreme
18 Court was that it was your plan. And that is what the
19 Federal Government told the Supreme Court in Zubik. They
20 said, it is actually part of the same plan. That is what
21 they told them at oral argument in Zubik when the Chief
22 Justice said, so you want it to be in one insurance package,
23 and they said, yes, one insurance package. That is what they
24 boasted about in the regulations, when they said, look,
25 people won't have to have two separate plans, it's great,



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1 it's seamless, right? That was what they were aiming at was
2 seamless, part of the same thing.

3 Well, once they acknowledge that, it all collapses
4 into Hobby Lobby. Hobby Lobby says it is a substantial
5 burden to make an employer hand somebody a policy that comes
6 with things that violate their religion. All right. Hobby
7 Lobby establishes that none of us have any freedom to vary
8 from it. If you're making the employer hand somebody a plan
9 that comes with stuff that violates their religion, that's a
10 substantial burden.

11 What happened after the concessions in Zubik and
12 why the Federal Government could never defend and could never
13 win another RFRA case about it, is that, once they've
14 acknowledged it actually is the same plan under the
15 accommodation, too, then the accommodation is a substantial
16 burden. Then, when this Court in Geneva College said, oh,
17 you should sign that piece of paper because it's totally
18 disconnected, well, the facts are different. It turns out it
19 actually the same. That's how they achieved seamlessness.

20 Why does that matter? Well, it matters because,
21 since the Federal Government has an obligation -- right?
22 This is not a discretionary policy choice, like whether or
23 not to have a contraceptive mandate. It is an obligation, a
24 statutory and constitutional obligation to respect religious
25 differences.



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1 Well, once the agency comes face to face with its
2 obligation, of course it's empowered to say, okay, I'm not
3 going to do that anymore, okay, I'm going to stop burdening
4 the religious objectors. That is -- they have --

5 JUDGE SHWARTZ: Can you --

6 MR. RIENZI: -- the discretion --

7 JUDGE SHWARTZ: -- reconcile that --

8 MR. RIENZI: -- to do that --

9 JUDGE SHWARTZ: -- with Congress' decision not to
10 have a conscience amendment, though? Congress didn't think
11 that that was worthy of congressional enactment. So how can
12 an administrative agency do something that seems to be
13 contrary to Congress' will?

14 MR. RIENZI: Because Congress told them to, Your
15 Honor, because --

16 JUDGE SHWARTZ: Congress told them to do something
17 that they, themselves, don't want to do --

18 MR. RIENZI: No, Your Honor.

19 JUDGE SHWARTZ: -- or were rejecting doing?

20 MR. RIENZI: How -- so two years after the
21 Affordable Care Act -- you are correct and the States are
22 correct -- Congress didn't pass an additional conscience
23 amendment.

24 JUDGE SHWARTZ: Right.

25 MR. RIENZI: But Congress, when it passed RFRA,



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1 said this applies to every single future law that we pass,
2 unless there's an express carveout. And there is not. And
3 that's why, in Hobby Lobby, the Supreme Court found the
4 religious exemption and did not say, oh, well, Congress --

5 JUDGE SHWARTZ: Yeah, but the Supreme Court did
6 that, not an administrative agency. And this is a question
7 more about the power of the people in the Government. Who's
8 got authority to do what? That's really what my question
9 goes to, not -- it doesn't go to anything other than that.

10 MR. RIENZI: Great. So --

11 JUDGE SHWARTZ: If Congress spoke and said, no
12 conscience amendment --

13 MR. RIENZI: They --

14 JUDGE SHWARTZ: -- how could its regulators do
15 something different? It's different when a coequal branch of
16 the Government -- when the Supreme Court says, this is what
17 we must do, and thereafter, the regulators implement a
18 mechanism by which it effectuates a Supreme Court directive,
19 that, to me, is different than what's happened here. So
20 explain this to me. What's the authority of the regulators
21 to do this?

22 MR. RIENZI: The authority is RFRA and the
23 Affordable Care Act. And again, this is something the Obama
24 and Trump Administrations both agree on, which is rare these
25 days, right? They both agree that, under the ACA, they have



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1 authority to have exemptions, they both agreed to that. But
2 the --

3 THE COURT: Regarding the --

4 MR. RIENZI: -- authority is --

5 THE COURT: -- moral part --

6 MR. RIENZI: -- RFRA.

7 THE COURT: -- of the exemption, also, or the
8 religious exemption only?

9 MR. RIENZI: The Obama Administration did not have
10 a moral exemption; they lost some court cases and won some
11 court cases about it, so -- but I'm speaking about the
12 religious exemption. I don't think the Obama Administration
13 said that about moral.

14 But my point is the authority is RFRA. I don't
15 think the fact that Congress chose, later on, two years after
16 the Affordable Care Act, to not add an additional conscience
17 amendment tells you that RFRA doesn't apply. Congress told
18 you how to figure out if RFRA doesn't apply, and it's if
19 Congress writes it in a later law, then RFRA doesn't apply.
20 But the baseline law --

21 JUDGE SHWARTZ: Isn't the sequence -- RFRA was --
22 predated the ACA, no?

23 MR. RIENZI: Yes, it did.

24 JUDGE SHWARTZ: Right? It was RFRA, the ACA, the
25 conscience amendment rejected.



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1 MR. RIENZI: Sure.

2 JUDGE SHWARTZ: Right?

3 MR. RIENZI: Sure. So a law that didn't get passed
4 is just a law that didn't get passed. They could have not
5 passed it because they said, oh, I don't need it, we have
6 RFRA.

7 JUDGE SHWARTZ: But doesn't that -- but again,
8 we're talking about the power of the administrative agency to
9 make what some people have argued to be a pretty big -- a big
10 change from what the statute contemplated.

11 MR. RIENZI: Sure.

12 JUDGE SHWARTZ: I mean --

13 MR. RIENZI: So I disagree.

14 JUDGE SHWARTZ: -- so that's --

15 THE COURT: What the statue even allows

16 MR. RIENZI: I mean --

17 THE COURT: (indiscernible)

18 JUDGE SHWARTZ: Right.

19 MR. RIENZI: So, one, I disagree. It's not a big
20 change at all. The States still can't find a soul who's been
21 impacted by the new rule, so I don't actually think it's a
22 big change. But the point is that RFRA tells the agency, it
23 says, the Government shall not impose a burden.

24 JUDGE SHWARTZ: Uh-huh.

25 MR. RIENZI: What is the agency supposed to do when



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1 they conclude that, wait, I'm violating a federal civil
2 rights statute --

3 JUDGE SHWARTZ: And I know --

4 MR. RIENZI: -- if I --

5 JUDGE SHWARTZ: -- your position.

6 MR. RIENZI: -- continue?

7 JUDGE SHWARTZ: And my response to you, if we were
8 debating this -- and we're not, I'm asking you --

9 MR. RIENZI: Right.

10 JUDGE SHWARTZ: -- questions, right? But the
11 response, I guess, would be, well, the accommodation
12 addressed that concern.

13 MR. RIENZI: Great.

14 JUDGE SHWARTZ: And your position is that
15 accommodation is insufficient to address the concern.

16 MR. RIENZI: It is --

17 JUDGE SHWARTZ: Do I understand --

18 MR. RIENZI: -- insufficient --

19 JUDGE SHWARTZ: -- your position correctly?

20 MR. RIENZI: Yes, Your Honor.

21 JUDGE SHWARTZ: Okay.

22 MR. RIENZI: It's insufficient. That's my view,
23 that's dozens of courts; dozens of courts told the agency the
24 same thing. I agree with you, they weren't all final, some
25 of them were reversed by later-vacated Courts of Appeals



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1 decisions. But the agency wasn't out on a limb, thinking,
2 hmm, I'm making up a substantial burden. There were dozens
3 or hundreds --

4 JUDGE SHWARTZ: I am --

5 MR. RIENZI: -- of entities --

6 JUDGE SHWARTZ: I am --

7 MR. RIENZI: -- in court --

8 JUDGE SHWARTZ: -- not questioning --

9 MR. RIENZI: Yeah.

10 JUDGE SHWARTZ: -- the motivations for why one
11 would do this.

12 MR. RIENZI: And so my point is simply, under RFRA,
13 when they've concluded that they are imposing a substantial
14 burden, they have an obligation because they must follow the
15 statute.

16 JUDGE SHWARTZ: Okay.

17 MR. RIENZI: They are not allowed to say my own
18 discretionary policy choice to put contraceptive coverage in
19 the bucket -- which is what it was, it's a discretionary
20 policy choice for HRSA to include contraceptives; they could
21 choose the opposite tomorrow. Congress left it entirely to
22 their discretion.

23 JUDGE SHWARTZ: The executive -- when the executive
24 order got issued, it was a change in -- change of -- a
25 discretionary change, correct?



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1 MR. RIENZI: It was, as was the contraceptive
2 mandate itself. My point is RFRA is higher than that.

3 JUDGE SHWARTZ: I understand.

4 MR. RIENZI: RFRA sits above that. And so they're
5 not allowed to say, well, I prefer my own regulatory policy
6 choice to have a contraceptive mandate, over Congress telling
7 me stop imposing those burdens.

8 Judge McKee, you asked about standing. Just a
9 brief point about how the standing analysis -- how the
10 standing arguments play into the merits here because I think
11 it's really important. For the most part, I'm happy to just
12 rest on the briefs on standing. But the State's entire
13 standing argument --

14 THE COURT: Well, you touched upon this because you
15 said they hadn't produced a single person who's been impacted
16 by this. But you've also argued that no one is being denied
17 because they'll get coverage elsewhere, which they're saying,
18 yeah, they'll get coverage elsewhere, that's going to hit us
19 in the pocket and that's why there's Article III injury.

20 MR. RIENZI: Great. And so my view is simply they
21 have to lose one way or the other, right? So, either, A, no
22 employee --

23 THE COURT: Explain how that works because, when I
24 go home, I want to use this with my wife.

25 MR. RIENZI: Great.



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1 (Laughter)

2 THE COURT: You know? They have to --

3 MR. RIENZI: And I'm happy to --

4 THE COURT: -- lose one way or the other. How does
5 that work?

6 MR. RIENZI: I'm happy to discuss it with you here
7 and after, too. So they have to lose one way or the other,
8 there's only two possibilities: Either, A, no employers are
9 going to take this because all of the religious employers are
10 already grandfathered, they have the church exemption, they
11 all have injunctions; therefore, it's not going to change
12 anything on the ground for women. If that state of world is
13 true, then no one is going to come knocking at their door,
14 they're not going to spend a penny, they lose because they
15 have no standing.

16 If, in fact, someone is going to come knocking at
17 the door, right? If, in fact, what they say in all their
18 declarations, we have all these great programs to give people
19 contraception and people will come beating down the door, if
20 that's true, then the rule actually has an impact and the
21 Federal Government was obligated under RFRA to let the
22 employers out of it.

23 And by the way, that's why the Government couldn't
24 possibly ever win a RFRA case. Strict scrutiny under RFRA is
25 an affirmative defense, right? The Government has actually



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1 got to walk into court and assert the affirmative defense to
2 take advantage of it. Well, they eventually decided, quite
3 rightly, that the idea that -- I mean, I'm surrounded by
4 governments here, right? New Jersey and Pennsylvania over
5 here, the Federal Government over here. They all --

6 THE COURT: There's an even bigger one behind all
7 that.

8 MR. RIENZI: Well, I've got a more important one
9 behind all them. The idea that all of these governments have
10 a compelling interest, and it's the least restrictive way to
11 get people contraception, to say the nuns have to give it out
12 is and has always been preposterous. Of course the
13 governments can get people contraceptives without nuns.
14 That's ridiculous. Before 2012, no one ever would have
15 thought that the way we need to do this is to involve nuns.

16 Pennsylvania has got all sorts of programs, New
17 Jersey has all sorts of programs. The Federal Government set
18 up healthcare exchanges, right? Where any employee who
19 doesn't like what they're offered by their employer can go
20 and get plans through the Federal Government, all of which
21 cover contraception, right? The idea that the one and only
22 way we can actually give people who want contraception
23 contraception is to say the nuns have to be involved is
24 ridiculous. And when the States come in and say, I have all
25 these programs, the right answer should be, great, you have



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1 all these programs, you love contraception, use your
2 programs, you do it, and let the nuns go home and stay out of
3 it.

4 The last point, Your Honor, if I may. There is no
5 consistent or intellectually honest view of these statutes
6 that can get to the relief that the States are asking for.
7 They say the ACA only allows what, but not who distinctions.
8 But yet, they ask you to reimpose a system that has plenty of
9 who distinctions: The accommodation, the exception, right?
10 If the ACA doesn't allow it, then the whole thing comes down,
11 and they lose under RFRA, right?

12 Judge Shwartz, the only answer to the RFRA claim is
13 maybe the accommodation is good enough. I don't think that's
14 true, but that's their answer. But if they have a world in
15 which the ACA doesn't allow who, but not what, or RFRA
16 doesn't allow changes other than for a client-specific and a
17 case-by-case basis, then they can't have the system they're
18 trying to get to.

19 And ultimately, I mean, the real question is: What
20 kind of injunction are they asking for? I take them, at
21 times in their brief, to be asking you to order the
22 Government to enforce the old system. But that would have
23 you ordering them to enforce a system that is built on a
24 series of IFRs that came out without notice and comment; that
25 has who, but not what distinctions; and has the agency, on



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1 its own, making RFRA decisions. I don't think you can get
2 there; and, therefore, we'd ask you to reverse the lower
3 court's decision. Thank you.

4 THE COURT: Thank you.

5 JUDGE SHWARTZ: Thank you.

6 MR. FISCHER: Good afternoon, Your Honors. Michael
7 Fischer for the Commonwealth of Pennsylvania and the State of
8 New Jersey.

9 The District Court's injunction here was based on
10 the procedural flaws with the rule-making and the substantive
11 illegalities in the rule itself.

12 THE COURT: Yeah, take the first part first. Mr.
13 Mooppan says that -- and I don't want to misstate you, so
14 he'll let me know when he comes back up if I'm stating this
15 incorrectly -- that, in terms of a regulation going forward,
16 that it has to be that, if the initial IFRs are pursuant to
17 invalid notice and comment, but you have notice and comment
18 for the final, permanent rules, then that has to cure -- he
19 used the term "taint." I'm not sure you're saying they're
20 tainted. I think you're saying they're insufficient, in and
21 of themselves, but --

22 MR. FISCHER: Absolutely, yes. The final rules are
23 invalid under the APA. Mr. Mooppan asked repeatedly, I think
24 his question was what else could we do.

25 THE COURT: Right.



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1 MR. FISCHER: The answer is simple. They could
2 withdraw the IFRs. That's all they needed to do, withdraw
3 the IFRs and start a new rule-making process. But what
4 they --

5 THE COURT: But then you're still stuck with the
6 final rule, aren't you, if they withdraw the IFRs?

7 MR. FISCHER: No, because if they withdraw the
8 IFRs, issue a notice of proposed rule-making, and then issue
9 a final rule based on that, the presumption of regularity
10 attaches and the final rule is presumed to be valid.

11 THE COURT: And if --

12 JUDGE SHWARTZ: His point is that they went through
13 that exercise except for removing the --

14 THE COURT: Right.

15 JUDGE SHWARTZ: -- that they had a notice of
16 comment before the final rules were promulgated, so, from
17 their point of view, we have accomplished that which you're
18 now proposing they should do.

19 MR. FISCHER: And that distinction makes all the
20 difference in the world under NRDC and under this Court's
21 precedents. And the reason for that is actually set out in
22 Sharon Steel, which NRDC relies on. If the agency is out
23 there --

24 THE COURT: You can't --

25 MR. FISCHER: -- enforcing the rule --



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1 THE COURT: -- unring the bell.

2 MR. FISCHER: -- you have to come hat in hand,
3 actually. I apologize, I --

4 THE COURT: Well, you're saying, basically, you
5 can't unring the bell.

6 MR. FISCHER: You -- exactly. You can't unring the
7 bell, and the agency has already made up its mind. And here,
8 actually, that point is especially valid because what
9 happened is the IFRs are issued, they're challenged by
10 several states, including Pennsylvania at the time. They are
11 in court arguing that the IFRs are valid. They are making
12 arguments in court that our claims were wrong, while at the
13 same time they're purporting to consider comments raising
14 those same claims.

15 So, on the one hand, they're saying you're
16 completely wrong; on the other hand, they're saying we're
17 open-minded to all of these arguments that are coming in. So
18 the fact that the --

19 THE COURT: They really --

20 MR. FISCHER: -- IFR was --

21 THE COURT: -- believe that they're wrong. They
22 believe that they're wrong. I mean, the fact that they
23 believe they're wrong at the final stage doesn't mean that
24 they have to step back and entertain a position which they
25 think is invalid just because, procedurally, they have to go



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1 back now and entertain new comments.

2 MR. FISCHER: Well, the I -- the APA requires that
3 they consider comments with an open mind. They are presumed
4 to do so if they follow the procedure. They did not here.
5 They started with a final rule. They started with a rule
6 that went into effect the day it was issued. Before it was
7 even in the Federal Register, they said this rule is in
8 effect. So the fact that they took comments on that rule
9 while it was in effect does not cure that problem.

10 And that's what this Court recognized in NRDC. It
11 invalidated both the initial interim final rule and the final
12 rule. And Mr. Mooppan's point about, well, that was
13 different because that dealt with suspending earlier
14 amendments, that's simply, actually, not the case. The Court
15 in NRDC could have said, we'll invalidate the earlier rule,
16 the IFR, but we're going to -- we're going to say the final
17 rule is valid; and that, therefore, those amendments went
18 into effect on the date they originally went into effect, and
19 then they were suspended as of the date they were suspended
20 under the final rule. They could have done that.

21 And in fact, the NRDC Court, at the very end of its
22 opinion, says the agency is free to make changes to these
23 rules, to adjust them further if it follows the correct
24 process, so --

25 JUDGE SHWARTZ: What if they walked outside in the

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1 hall and said to you at the conclusion, you know something,
2 we're going to pull the final regulations, we're going to
3 pull them, and we're going to initiate a brand-new APA
4 process, and we're going to tell you right now the regulation
5 is going to be exactly the same, but we're going to pull it
6 all and start anew? Would it be your position that those --
7 even that new regulatory activity would be tainted by what
8 had happened up until now?

9 MR. FISCHER: No, it wouldn't be tainted by that.
10 It would be tainted by that last comment you mentioned. If
11 they say we're not going to make a change at the beginning of
12 the rule-making process, then I think we could carry our
13 burden of showing that they approached the process --

14 JUDGE SHWARTZ: If they don't say those words, but
15 when they put out the proposed rule-making and they say this
16 is what the rule is going to look like --

17 MR. FISCHER: Uh-huh.

18 JUDGE SHWARTZ: -- and every single word and every
19 single piece of punctuation is exactly the same, are you
20 saying that that subsequent act has been tainted by the
21 prior --

22 MR. FISCHER: No.

23 JUDGE SHWARTZ: -- such that they could never do
24 it.

25 MR. FISCHER: No.



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1 JUDGE SHWARTZ: Okay.

2 MR. FISCHER: Not in that case. In that case, what
3 would happen is that the presumption of regularity would
4 attach. And if we wanted to challenge it, we would have to
5 show that they approached the issue with an unalterably
6 closed mind --

7 JUDGE SHWARTZ: I see.

8 MR. FISCHER: -- which is a high burden for a
9 plaintiff to bear in an APA case.

10 THE COURT: Well, Mr. Mooppan -- and if I'm
11 mispronouncing it, I apologize. I'm doing it phonetically,
12 which is not what I heard when you told me how to pronounce
13 your name. But he is saying that there were some substantive
14 changes. Were there substantive changes in the finals, as
15 opposed to the interim?

16 MR. FISCHER: There were some changes from the
17 interim final rules to the final rules. They were very minor
18 changes.

19 THE COURT: Well, he conceded they were minor, but
20 they don't have to be major if they were substantive, insofar
21 as it would suggest that that subsequent notice and comment
22 provision really did have some significance, it wasn't just a
23 CYA action.

24 MR. FISCHER: Well, the fact that they made only
25 sort of some technical changes, that really, frankly, didn't

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1 respond to any of the concerns raised by the objectors --

2 THE COURT: Uh-huh.

3 MR. FISCHER: -- including the States -- I mean,
4 we -- you know, one thing that's been brought up a couple of
5 times is that the District Court did not grant us an
6 injunction on the basis of a -- the agency has adequately
7 responded to comments. We had included that argument in our
8 motion. We received the administrative record three days
9 before the injunction hearing, so we weren't in an ideal
10 position to support it.

11 We have since been able to go through the comments.
12 We have filed for summary judgment. And what those comments
13 show is that the overwhelming majority, 99.9 something
14 percent, opposed the rule, thought it was a bad idea. They
15 made some technical changes that dealt entirely with -- dealt
16 primarily with sort of agent -- with entities that were able
17 to take advantage of the rule, made it a little broader for
18 church plans. They did not change the rules in any way
19 that suggested they were responding to the substantive
20 comments, particularly the ones from medical professionals,
21 from organizations that talked about the importance of
22 seamless access of contraception toward women. That talked
23 about states and the impact on states programs.

24 And I would say, on this point, both the Government
25 and the Little Sisters cite a First Circuit case as support



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1 for their argument that post-promulgation comments cure. I
2 would actually suggest you look at that case because what
3 that case says --

4 THE COURT: What case is that?

5 MR. FISCHER: Levesque. Levesque v. Block, 723
6 F.2nd 175. I'll just read, actually, from it. It says:

7 "The general rule that frowns upon post-
8 promulgation comment periods reflects the concerns
9 that underlie Section 553. Public comments
10 contribute importantly to self-government. It will
11 help ensure that administrative agencies will
12 consider all relevant factors before acting. To
13 serve these purposes, notice and opportunity for
14 comment must come at a time when they can feasibly
15 influence the final rule. Ordinarily, this can
16 only take place before a rule takes effect."

17 And then they go on to say that, "When post-
18 promulgation" -- or I'm sorry.

19 "When pre-promulgation is impossible, comment after
20 the fact is better than none at all."

21 That's not the situation here. Then they say:

22 "When pre-promulgation comment is possible,
23 however, one does not want to encourage the
24 circumvention of Section 553 by accepting post-
25 promulgation procedures."



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1 So what the First Circuit said -- and this is a
2 case they rely on -- is that, if we said you could cure an
3 invalid rule just by accepting post-promulgation comments,
4 then we'd be telling the agencies, essentially, there's
5 really no reason to follow the APA in the first instance,
6 ever, because the worst that could happen is the IFR gets
7 enjoined, but your final rule will be valid, and you'll be no
8 worse off, and if the IFR remains, then you're better off
9 than you were.

10 THE COURT: That's the essence of your case. It
11 makes it rather simple if we follow what you're suggesting;
12 that we invalidate the rule because of failure to follow the
13 APA.

14 MR. FISCHER: Yes, absolutely.

15 THE COURT: That's it?

16 MR. FISCHER: Invalidate both rules -- well, uphold
17 the injunction. The injunction --

18 THE COURT: Well, then you get --

19 THE COURT: Right. You have nationwide --

20 MR. FISCHER: Yes.

21 THE COURT: The scope of the injunction --

22 MR. FISCHER: Yeah, the scope of --

23 THE COURT: -- really, takes it kind of --

24 MR. FISCHER: -- injunction -- well, but I think
25 that's relevant because, when -- a final remedy -- we're



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1 here, obviously, on an interlocutory basis. The final remedy
2 that we believe is appropriate is vacatur of the final rules,
3 and that's what we've asked for.

4 THE COURT: Is it always the case? I think Mr.
5 Mooppan suggested that you can cure it with subsequent notice
6 and comment.

7 MR. FISCHER: You cannot, as long as the rule
8 remains in effect. That's the key distinction here. They
9 did not --

10 THE COURT: You have to --

11 MR. FISCHER: -- withdraw the rule.

12 THE COURT: -- invalidate the rule first, then you
13 can have notice and comment.

14 MR. FISCHER: Well, they would have to -- they
15 would have to say we are no longer -- you know, they would
16 have to say we are no longer attempting to enforce this rule.
17 They presumably would withdraw their appeal because they
18 couldn't continue to litigate the legality of the rule that
19 they're saying is no longer in effect.

20 THE COURT: But you're -- I mean, the Court could
21 say that the rule is -- the ultimate rule is invalid because
22 of failure to follow the APA.

23 MR. FISCHER: Yes, absolutely, and that's the
24 remedy that we have asked for.

25 THE COURT: That's what you're asking.



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1 MR. FISCHER: Uh-huh.

2 JUDGE SHWARTZ: If we could talk about the
3 substantive --

4 MR. FISCHER: Yes. Uh-huh.

5 JUDGE SHWARTZ: -- APA challenge? As I understand
6 it, your -- Plaintiff States' position is that the ACA
7 authorizes the types of services to be provided, but does not
8 allow the administrative agency to decide who's responsible
9 for providing those services. Is that your argument?

10 MR. FISCHER: Absolutely, yes.

11 JUDGE SHWARTZ: So how do we reconcile that with
12 the fact that the agency has done certain things to address
13 the who question in certain circumstances, like the church
14 exemption, like the closely held company exemption post-Hobby
15 Lobby --

16 MR. FISCHER: The --

17 THE COURT: -- and the accommodation, which your
18 adversary brought up?

19 MR. FISCHER: Uh-huh. The agency has created both
20 the exemption and the accommodation, earlier. Our position
21 is that the ACA, as is written, does not authorize the
22 agencies to promulgate exceptions to the mandate. So, to the
23 extent the agencies did, they would have to rely on some
24 other authority, other than the ACA; or perhaps what they
25 should have done was gone to Congress and said, we think



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1 there's a problem here that needs to be addressed, and sought
2 a legislative solution. There was an effort, as Your Honor
3 mentioned earlier, to pass a conscience protection amendment,
4 and it did not succeed. But what's important in this case is
5 that the legality of those earlier rules is not at issue.

6 JUDGE SHWARTZ: And is it fair to say that part of
7 the reason why they might be different is because, at least
8 as it relates to the church exemption -- and I'm using that
9 as a shorthand, forgive me.

10 MR. FISCHER: Uh-huh.

11 JUDGE SHWARTZ: But you know what I'm talking
12 about.

13 MR. FISCHER: Uh-huh.

14 JUDGE SHWARTZ: Organizations that have religious
15 purposes and the closely held company exemptions came about
16 to actualize Supreme Court precedent. Is that a fair
17 distinction?

18 MR. FISCHER: Yes, in the context of the church
19 exemption. So Real Alternatives has a lengthy discussion of
20 the church exemption and it grounds it squarely in the
21 historical practice of respect for church autonomy --

22 JUDGE SHWARTZ: Right.

23 MR. FISCHER: -- and you know, essentially what's
24 been referred as the "ministerial exemption."

25 JUDGE SHWARTZ: Right. Hosanna-Tabor.



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1 MR. FISCHER: Yes.

2 JUDGE SHWARTZ: So out of Supreme Court precedent
3 and --

4 MR. FISCHER: Yes.

5 JUDGE SHWARTZ: -- stemming from First Amendment --

6 MR. FISCHER: Exactly.

7 JUDGE SHWARTZ: -- principles.

8 MR. FISCHER: And we're not -- to be clear, we are
9 not taking a position, one way or another, on how the
10 ministerial exemption applies, exception -- it's a difficult
11 question, but it's not at issue in this case.

12 JUDGE SHWARTZ: Okay. Then let's just focus on the
13 accommodation then.

14 MR. FISCHER: Uh-huh.

15 JUDGE SHWARTZ: The agency created this method of
16 accommodation. What is there -- and it goes back to power.
17 What is the agency's power to do that if the reading of the
18 ACA is thou shall not dictate the who. Provide services as
19 listed in the preventative care and screening guidelines, but
20 you, agency, can't dictate who provides them.

21 MR. FISCHER: Well, the agency believed that it was
22 actually complying with what's in the ACA by ensuring that
23 the same who would provide the services. You know, in the
24 case of insurance carriers, they would be -- they would still
25 be providing contraceptive services, just apart from the



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1 underlying plan that the employer wanted to offer without
2 contraceptive services and --

3 JUDGE SHWARTZ: So you're saying, in that case, the
4 who is the insurance company --

5 MR. FISCHER: Yes, exactly.

6 JUDGE SHWARTZ: -- not the employer.

7 MR. FISCHER: Yes.

8 JUDGE SHWARTZ: I see.

9 MR. FISCHER: Now, in the -- it gets a little more
10 complicated in the ERISA context, which is where you have
11 self-insured plans. And this is where Mr. Rienzi sort of
12 bases his argument that, well, the Government, you know,
13 reversed position or something. None of that is accurate,
14 it's not actually what happened. But they've tried to argue
15 that, under ERISA, technically speaking, as an ERISA legal
16 matter, the contraceptive services would be provided under
17 the same "health plan," as the term of art is under ERISA.

18 So the agencies believe -- correctly or not -- but
19 they believe that they were complying with the language of
20 the ACA. And certainly, they were complying with the goal
21 and the purpose of the Women's Health Amendment, which was to
22 get, as has been referred to repeatedly, "seamless" access to
23 contraception to women. And I'll -- I'm happy to sort of
24 talk a little bit more about what that means because I think
25 it was glossed over a little bit in some of the earlier



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1 arguments.

2 But just to return to your point, real quickly, you
3 know, there are difficult questions, we concede, about the
4 legality of the earlier rules. We are simply challenging
5 these current rules. And our argument is, whatever the
6 status of those earlier rules, these go too far. These are
7 illegal. They violate the ACA, they -- they're not justified
8 under RFRA, and they are procedurally invalid.

9 JUDGE SHWARTZ: Well, let's go back.

10 MR. FISCHER: And --

11 JUDGE SHWARTZ: Let's talk about your RFRA --

12 MR. FISCHER: Okay.

13 JUDGE SHWARTZ: -- the RFRA argument.

14 MR. FISCHER: Certainly.

15 JUDGE SHWARTZ: Assume, for the purposes of this
16 discussion, that somehow, under RFRA, a regulator can
17 promulgate regulations that sort of embody compliance with
18 the RFRA statute. Okay? So we'll just assume that there's
19 some authority. Why don't these comply with RFRA? Aren't
20 they a method by which it ensures that there isn't a
21 substantial burden on an objector?

22 MR. FISCHER: Because these go much further than
23 what RFRA would require. And --

24 JUDGE SHWARTZ: Explain how.

25 MR. FISCHER: And let me step back and just say for



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1 a minute, even with that assumption, we still have to
2 remember here that we are operating in the context of a
3 congressional mandate, that these services are mandatory.
4 You know, they delegated to HRSA the responsibility to
5 identify which services, which they did for obvious reasons.
6 But Congress said these services are mandatory.

7 So there was some discussion -- you know, I think,
8 you know, like counsel on the other side sort of indicated,
9 well, you know, agencies giveth, agencies taketh away. This
10 is not the agency imposing this mandate; this is Congress.
11 And that has to frame the entire RFRA analysis.

12 But beyond that, RFRA depends on the finding of a
13 substantial burden, that's the first step in any RFRA
14 analysis. This Court, in Geneva College, rejected the
15 argument that the accommodation which then existed imposed a
16 substantial burden. Now Geneva College was vacated, along
17 with all of the other cases before Zubik --

18 THE COURT: And Real Alternatives really is dicta,
19 isn't it?

20 MR. FISCHER: It is. I mean, it -- I would say it
21 is and it isn't. I mean, it's very important to --

22 THE COURT: Well, it relies --

23 MR. FISCHER: The logic --

24 THE COURT: -- upon a case --

25 MR. FISCHER: -- the case --



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1 THE COURT: -- that was vacated.

2 MR. FISCHER: Yes.

3 THE COURT: And it gets into the -- it relies upon
4 the reasoning of that case, almost as though it were
5 precedential, but it clearly realized that it was not binding
6 anymore because of the Court's action in Zubik.

7 MR. FISCHER: Well, what Judge Rendell said in Real
8 Alternatives was Zubik vacated Geneva, it did nothing to
9 undercut the logic of that decision, and we continue to
10 believe that the logic of that decision was correct. We
11 believe that, for instance, the existence of a substantial
12 burden is a matter for courts, it's a question of law; that's
13 clearly part of the holding of Real Alternatives. We
14 continue to believe that the mere assertion of a substantial
15 burden does not necessarily satisfy the burden of showing
16 that there is one.

17 Now, in a footnote in Real Alternatives, the Court
18 says and we also continue to believe that the accommodation
19 in Geneva College did not impose a substantial burden. That,
20 I would agree, was not necessary to the holding. But I don't
21 think Real Alternatives just said, this is what we said in
22 Geneva, we'll say it again. It wrestled with the fact that
23 Zubik had vacated Geneva and simply said we continue to think
24 the logic was correct. And Real Alternatives was a
25 precedential opinion. They petitioned for en banc review. I



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1 believe only the original dissenter voted for en banc. So it
2 certainly has significant persuasive weight.

3 And as Judge Shwartz mentioned earlier, there were
4 nine circuits that addressed this issue prior to Zubik.
5 Eight of them ruled that the accommodation was not a RFRA
6 violation; one of them, the eighth, ruled the other way. The
7 agencies in their discussion of RFRA in the final rule rely
8 on that ninth opinion in arguing that there is a substantial
9 burden. They don't even mention in the rule that it was
10 vacated. They don't mention Real Alternatives at all, except
11 to cite to the dissent.

12 Now Real Alternatives was not vacated by Zubik. It
13 was one of, I believe, two decisions after Zubik that sort of
14 addressed issues related to this case. You would think the
15 agencies would look to that as, perhaps, some sort of
16 guidance. They did not. As I mentioned, they simply cited
17 the dissent and relied on the vacated decision from the
18 Eighth Circuit.

19 Just to continue with the chronology a little bit,
20 Mr. Rienzi said, I think, dozens of courts imposed injunctions
21 that the agencies had to follow. All of these are either
22 pre-Hobby Lobby and relate -- or relating to the issues
23 presented in Hobby Lobby or post these new rules. So what
24 happened, following the new rules, the agencies basically
25 stopped defending these cases. So they're all pretty much,



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1 you know, post-Zubik, uncontested injunctions from District
2 Courts.

3 You know, I think, you know, this Court is aware
4 that, in the absence of adversarial briefing, you know, a
5 decision from a District Court probably isn't that
6 persuasive, especially when you're looking at issues like
7 substantial burden, compelling interest, least restrictive
8 means, which are fairly tricky and technical in this case.
9 So all of those injunctions, we think are simply not
10 relevant to this case.

11 The Courts that have looked at the rule, the
12 District Court here and the District Court in California,
13 both decided that it was unlawful, that both rules were
14 unlawful.

15 JUDGE SHWARTZ: And let me just ask you -- and
16 again, assume, for the purposes of this question, that we
17 conclude that there is a problem with the regulation. The
18 Ninth Circuit rejected a nationwide injunction, despite what
19 the District Court wanted to do. We have a District Court
20 here who has decided a nationwide injunction is warranted.
21 Why should we do something different from our sister circuit,
22 should we agree with its analysis on the merits of the case?

23 MR. FISCHER: The reason that the nationwide
24 injunction should be affirmed in this case is because the
25 record is very different --

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1 JUDGE SHWARTZ: How so?

2 MR. FISCHER: -- and the analysis below is very
3 different. The ninth -- or the District Court in California
4 originally imposed a nationwide injunction, I believe without
5 a great deal of discussion given to the issue. This is in
6 the first case, in the IFRs. The Ninth Circuit vacated -- or
7 reversed that aspect of the decision and said, simply, there
8 isn't enough here to support this.

9 Here, the Government made the same argument below
10 that they make in their briefs. Here, they challenge the
11 issuance of a nationwide injunction. The District Court went
12 through all of the factors that they identify and said,
13 simply, that only a nationwide injunction will afford
14 complete relief to the parties. She did so pursuant to her
15 equitable authority. Courts have consistently recognized
16 that they have -- you know, the Courts of Appeals recognize
17 that District Courts have broad equitable authority to
18 fashion the scope of an injunction.

19 And where the District Court, in particular,
20 addressed all of the arguments that were raised -- you know,
21 this concern about letting certain issues percolate among the
22 Circuits, you know, the question of whether a nationwide
23 injunction would be over-broad, she addressed all of these,
24 considered them, ultimately rejected the concerns. They're
25 free to disagree with those conclusions, but she did not

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1 abuse her discretion.

2 JUDGE SHWARTZ: Okay.

3 MR. FISCHER: And the reason -- and part of the
4 reason for this is it's worth asking the question of what
5 would an injunction that only applied to Pennsylvania and New
6 Jersey look like. How would that --

7 JUDGE SHWARTZ: That sort of segues into my next
8 question. If the relief granted is vacatur --

9 MR. FISCHER: Uh-huh.

10 JUDGE SHWARTZ: -- is what you're looking for --

11 MR. FISCHER: Yes.

12 JUDGE SHWARTZ: -- that means thou shalt not -- the
13 rule is void --

14 MR. FISCHER: Yes.

15 JUDGE SHWARTZ: -- and unenforceable. If that's
16 what this Court were to hypothetically rule, is it
17 enforceable by anybody else if we vacated the rule?

18 MR. FISCHER: Well, to be clear, in this appeal,
19 this interlocutory appeal, we are only focused on the
20 preliminary injunction.

21 JUDGE SHWARTZ: I see.

22 MR. FISCHER: We have moved for summary judgment in
23 the District Court, just last week, I believe, asked for
24 vacatur. So, if that's granted --

25 JUDGE SHWARTZ: I understand --



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1 MR. FISCHER: -- we'll be --

2 JUDGE SHWARTZ: -- what you're saying.

3 MR. FISCHER: -- back here.

4 JUDGE SHWARTZ: So your position is that a
5 preliminary injunction of a nationwide scope is necessary
6 because you're not -- you can't get the ultimate relief of
7 vacatur. All we would be doing, if we were to affirm, would
8 be there's a reasonable likelihood of success that that would
9 be your ultimate remedy.

10 MR. FISCHER: Yes. And that, therefore, to
11 preserve the status quo --

12 JUDGE SHWARTZ: Right.

13 MR. FISCHER: And in this Court, vacatur is the
14 default remedy for an invalid rule. There was --

15 THE COURT: What about --

16 MR. FISCHER: -- a decision --

17 THE COURT: -- Mr. Rienzi's -- well, he didn't
18 phrase it this way -- the heads, I win; tails, you lose
19 argument, insofar as the injunction is concerned? It's a
20 lose/lose proposition for you.

21 MR. FISCHER: Well, I think that was on standing,
22 as I understand it. And actually, I mean, this is an
23 important point that I want to -- that I --

24 THE COURT: That it -- it was on standing. It
25 was tied into the scope of the relief, I thought.



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1 MR. FISCHER: Well, I think the argument he was
2 making was that, you know, we've argued that we all have --
3 we have government programs that will be required to fill in
4 the gap in some cases where women are denied coverage; and,
5 therefore, if that happens, there will be no harm for the
6 rule. One does not follow from the other.

7 We have programs, but if you look at the evidence
8 in the record and the amicus briefs, they are not an adequate
9 substitute for what the ACA required. The Congressional
10 debate on this was very clear. The goal was to eliminate the
11 preventive services gap that women suffered. Senator
12 Mikulski said:

13 "What we want to do is ensure the decisions about
14 preventative services are between a woman and her
15 doctor."

16 So, by requiring plans and insurers to provide
17 these services, we're seeing to it that women can go to their
18 primary care doctor and get advice about contraception, they
19 can get a prescription.

20 What they're saying is, well, it's adequate if a
21 woman gets insurance for everything but contraception from
22 her employer. So she goes to her doctor, she can talk about
23 everything, but she can't get a prescription for
24 contraception; she has to go to a Title 10 clinic for that,
25 or she has to enroll in a separate state program. That may



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1 be -- you know, that alleviates some of the problem, but it
2 does not achieve the goals of the Women's Health Amendment,
3 and what Congress was really trying to do when it imposed
4 these obligations without cost-sharing requirements.

5 And that last part is important. Congress wanted
6 to see to it that women actually did use these services when
7 they needed them, so it prevented insurance companies from
8 charging anything. Clearly, Congress' goal was not simply
9 seeing to it that women had "access," broadly defined but
10 that they could get these services from their primary care
11 physicians and in a way that would not increase the burdens
12 on them. So to say, well, you know, these other options are
13 a substitute simply ignores what was going on here.

14 (Panel confers)

15 THE COURT: Thank you.

16 MR. FISCHER: Thank you, Your Honor.

17 MR. MOOPPAN: Your Honor, I have four quick points,
18 if I may. One, on the procedural issue. He recognized that
19 we can't be permanently disabled from having this rule, so
20 his only suggestion was what we have to do was, first,
21 withdraw the IFR before we went through the notice and
22 comment rule-making. Nothing in the APA says we have to do
23 that, and it would be completely form over substance,
24 particularly in this case, where the IFR was already
25 enjoined. So his position is that our -- somehow, our notice



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1 and comment rule-making was no good because we didn't
2 withdraw and enjoin the IFR. That makes no sense. Nothing
3 in the APA supports that.

4 Second, on the substantive authority question. He
5 basically admitted that both the church exemption and the
6 accommodation itself would violate the ACA on his position.
7 We -- this is a Chevron case. Unless the statute
8 unambiguously forecloses it, the agency has authority to
9 interpret the preventative services mandate the way it did.
10 And under his position, the Supreme Court in Hobby Lobby
11 relied on the accommodation, and that was actually ultra
12 vires because the accommodation was illegal under the ACA.
13 That's just not a reasonable interpretation of the statute
14 and shows why we should win under the ACA alone.

15 Under RFRA, the third point, his position is it
16 essentially boils down to the Government has to thread the
17 needle exactly perfectly. If we get it a little bit wrong on
18 one side, we violate RFRA; if we get it a little bit wrong on
19 the other side, we violate the ACA; if we don't get it
20 perfectly down the middle, we're going to be in violation of
21 one or the other.

22 And what the Supreme Court made clear in Ricci is
23 that's just now how you interpret statutes. The Government
24 should be given latitude where we know that we've got a
25 problem under the -- under RFRA because there's a

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1 substantial burden from the mandate. We should be given
2 latitude to eliminate that substantial burden without being
3 forced into what is essentially interminable litigation.

4 JUDGE SHWARTZ: So your view is that women's
5 healthcare is on different footing than religious freedom.

6 MR. MOOPPAN: That's not the position, Your Honor.
7 What the position is, is that RFRA says that we can't impose
8 a substantial burden on religious exercise. The mandate
9 clearly imposes a substantial burden on religious exercise.
10 Hobby Lobby told us that was true. We have discretion in how
11 we eliminate that burden.

12 And to be clear, as I mentioned earlier, even the
13 accommodation led to some women not receiving care, the ones
14 who were in self-insured church plans. So they simply cannot
15 say that the accommodation managed to solve both problems
16 because there were women under the accommodation who didn't
17 receive healthcare -- contraception services.

18 My last point is the nationwide injunction point.
19 I think it's very important that, as Your Honor recognized,
20 in the Ninth Circuit, not only has the Ninth Circuit said
21 nationwide injunctions are inappropriate, that case involves
22 14 states.

23 JUDGE SHWARTZ: Uh-huh.

24 MR. MOOPPAN: If we win that appeal, it will be
25 utterly meaningless if this Court affirms the nationwide

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1 injunction on behalf of these two states. Fourteen states
2 could sue us, all lose, and they will still -- it will
3 make --

4 JUDGE SHWARTZ: You already won that appeal. You
5 won on the injunction, anyway, right? It's only a fourteen-
6 state injunction.

7 (Panel confers)

8 JUDGE SHWARTZ: You already won on the nationwide
9 part, right?

10 MR. MOOPPAN: That -- yes, and that's my point.
11 Those 14 states are now -- they have the same claim on the
12 merits as the plaintiffs here.

13 JUDGE SHWARTZ: Uh-huh.

14 MR. MOOPPAN: We could win that appeal.

15 JUDGE SHWARTZ: I understand.

16 MR. MOOPPAN: It's being argued in two weeks.

17 JUDGE SHWARTZ: Right. I'm with you.

18 MR. MOOPPAN: We could win. The Ninth Circuit
19 could say these rules are totally valid, those 14 states are
20 entitled to no relief, and they would still all get complete
21 relief, courtesy of this injunction, and that is a gross
22 abuse of discretion. Even if you hypothesize there might be
23 some cross-border harms of the type that they're saying, the
24 idea that those small cross-border harms are enough to
25 justify imposing a nationwide injunction with respect to

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1 religious employers throughout the country, who have no
2 connection to Pennsylvania and New Jersey, who have no effect
3 on Pennsylvania and New Jersey, that is, at a minimum, a
4 gross abuse of discretion.

5 THE COURT: You make a very good point. But what
6 is the remedy for us to say that a U.S. District Court Judge
7 has no power, no authority to issue a nationwide injunction?

8 MR. MOOPPAN: Well, so I would say two things, Your
9 Honor. First, the basic bedrock principle is that, as a
10 matter of both Article III and equity, injunctions should go
11 no broader than necessary to address the plaintiff's own
12 injuries. This Court itself has recognized that in cases
13 like Ameron and CUNA. So you've already basically held that
14 you can't issue a nationwide injunction, unless it's
15 necessary to address the plaintiff's injuries.

16 Now, here, to be fair, they have said that it is
17 necessary to address their injuries because they've
18 hypothesized that there are some small number of people who
19 don't live in Pennsylvania and New Jersey; and, therefore,
20 there's some amount of cross-border harm.

21 THE COURT: And so it's okay in this case.

22 MR. MOOPPAN: Right -- no, we don't think it's
23 okay. Well, they're -- that's how they're trying to justify
24 it. What I would say is two things about that. One is that
25 it adds yet another layer of speculation over the already



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1 significant speculation in their theory of harm. They need
2 to say that, not only is there an employer who would invoke
3 this, who would then have women who would lose coverage, who
4 would then go and get state funding, that all has to happen
5 with respect to a cross-border employer or a cross-border
6 student. That's a whole lot of speculation. They don't
7 actually have any concrete evidence that anyone like that
8 exists.

9 But even if you grant them that there may be some
10 people like that, so that maybe there is some amount of harm
11 that this injunction is picking up, the injunction is also
12 wiping out these rules nationwide for countless employers who
13 don't pose that harm. And it is, at a minimum, an abuse of
14 discretion to impose such a grossly excessive relief. That
15 would mean that, just because these two plaintiffs have shown
16 injury to themselves, by hypothesis, you could wipe out the
17 injunction for everyone; such that, for example --

18 THE COURT: Are you --

19 MR. MOOPPAN: -- if we win in the Ninth Circuit,
20 that win is completely and utterly meaningless.

21 THE COURT: Are you addressing the power of a
22 District Court Judge to issue a nationwide injunction, or are
23 you saying that, in this case, it should not be done?

24 MR. MOOPPAN: So it's twofold. Our point is that,
25 as a matter of power, you can never issue an injunction



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1 that's broader than necessary to address the plaintiff's --

2 THE COURT: Okay.

3 MR. MOOPPAN: -- own injuries.

4 THE COURT: But that doesn't really answer the
5 question.

6 MR. MOOPPAN: And then -- so then the second point
7 is, here, we think that, as a matter of power, because their
8 cross-border harms are too speculative, the Court didn't even
9 have the power to do it.

10 But if you disagree with us and you think that
11 their cross-border harms are not too speculative, then we
12 agree that the Court, as a matter of Article III power, could
13 consider granting a nationwide injunction. But we think it
14 would be a gross abuse of discretion to -- based on just
15 those minimal cross-border harms, to impose a nationwide
16 injunction with respect to countless employers who have
17 religious objections, who don't have any effect whatsoever --

18 THE COURT: All right.

19 MR. MOOPPAN: -- on Pennsylvania --

20 THE COURT: There is --

21 MR. MOOPPAN: -- or New Jersey.

22 THE COURT: no constitutional prohibition, you're
23 saying that it depends on the case.

24 MR. MOOPPAN: There is a part of it that is of
25 constitutional significance. They have to identify some harm



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1 to them. We don't think that they have. But if you disagree
2 with us about that, then there is no further constitutional
3 issue. But we do think there is one if they haven't
4 identified harm to themselves.

5 THE COURT: Thank you. If I can get a transcript
6 in this case.

7 (Unrelated matters discussed)

8 THE COURT: And it may not be necessary. If not,
9 let us know. But as to the last argument, in terms of the
10 scope of the nationwide injunction having an impact on the
11 Ninth Circuit case if the Government wins that appeal, that
12 would be a helpful -- if you could respond to that in a 28(j)
13 letter, unless you don't think it's necessary or you think
14 it's covered in the briefs; then just send a note letting us
15 know that, but that would be helpful.

16 MR. FISCHER: We'd be happy to, Your Honor.

17 THE COURT: Okay. Thank you.

18 (Proceedings concluded)

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1 CERTIFICATION

2 I certify that the foregoing is a correct
3 transcript from the electronic sound recording of the
4 proceedings in the above-entitled matter, prepared to
5 the best of my knowledge and ability.

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/s/Coleen Rand

May 29, 2019

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Coleen Rand, AAERT Cert. No. 341

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CERTIFICATE OF ACCURACY

I hereby certify, on behalf of all counsel, that this transcript is accurate.

s/Lowell V. Sturgill Jr.

Lowell V. Sturgill Jr.

Designated Liaison Counsel