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## Burdening "Substantial Burdens"

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### Abstract

In *Hobby Lobby v. Burwell*, the Supreme Court held that religious believers could establish that their free exercise was substantially burdened just so long as they—or the corporation they had formed—believed that it was.

This highly deferential stance paved the way for yet another challenge to the contraceptive mandate. In *Zubik*, religious organizations (ROs) contend that it is not just subsidization of contraception that can make an employer complicit in contraception use. Instead, even filling out a form registering one's objection to the mandate can do so. The government has responded by vigorously arguing that filling out a form cannot reasonably be construed as a substantial burden.

One can read the Court's per curiam opinion as an implicit endorsement of the RO's claim that the accommodation process substantially burdens their free exercise. Nonetheless, without a decision on the merits, it is not clear just why the ROs should prevail on the substantial burden question. Nor do the parties' submissions provide the needed clarity as the arguments on each side are irredeemably flawed. Or so at any rate I argue here. I nonetheless believe that there is good reason for ROs to contest the accommodation process, as it requires that the ROs ratify contraceptive use, in contravention of their religious beliefs. On these grounds, I find that the existing process imposes a substantial burden on religious exercise. But I also take seriously the rationale behind the contraceptive mandate and I conclude by seeking to vindicate women's rights to free contraception in ways that the ROs should find congenial.

### Disciplines

Business Law, Public Responsibility, and Ethics | Business Organizations Law | First Amendment | Health Law and Policy | Human Rights Law | Insurance | Insurance Law | Law | Nonprofit Organizations Law | Religion Law | Sexuality and the Law | Supreme Court of the United States

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## BURDENING “SUBSTANTIAL BURDENS”

Amy J. Sepinwall\*

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### I. INTRODUCTION

*Zubik v. Burwell* involves a conscientious challenge not to the subsidization of contraceptive use, but to the process of opting out of that subsi-

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dization.<sup>1</sup> The religious organizations (ROs) appear to “object to . . . voicing a[n] . . . objection,”<sup>2</sup> and so their challenge has been deemed, not unreasonably, “paradoxical and virtually unprecedented.”<sup>3</sup> After all, how can opting out of an activity you oppose nonetheless make you complicit in that activity? The Supreme Court’s curious per curiam opinion offers no answer to that question but it is nonetheless fair to read the opinion as implicitly endorsing the claim that the accommodation process did substantially burden the ROs’ religious exercise.<sup>4</sup> Yet, because the Court did not address the merits of the legal claims, the reasons for its endorsement—indeed the reasons for which anyone should think there is a substantial burden—remain obscure. In this contribution, I aim to advance an account of complicity that supports the ROs’ substantial burden claim.<sup>5</sup>

1. 136 S. Ct. 529 (2015).

2. See, e.g., *Little Sisters of the Poor Home for the Aged, Denver Colo. v. Burwell*, 794 F.3d 1151, 1178 n.25 (10th Cir. 2015). See also Transcript of Oral Argument at 13, line 13, *Zubik v. Burwell*, 578 U.S. \_\_\_\_ (2016) (No. 14-1418) (argued Mar. 23, 2016).

3. *Id.* at 1192 n.47.

4. Efforts to speculate about each of the Justices’ positions in a per curiam opinion are notoriously fraught. In this case, however, there are numerous clues that strongly suggest that there were at least four, and probably five, votes in favor of the view that there was a substantial burden here. For one thing, the Court vacated the six lower courts’ opinions from which the petitioners appealed, all of which had found no substantial burden. For another, at oral argument, Justice Breyer seemed to join his four conservative brethren in expressing sympathy for the claim that there was a substantial burden. See, e.g., Transcript of Oral Argument at 62, line 17–63, *Zubik v. Burwell*, 578 U.S. \_\_\_\_ (2016) (No. 14-1418) (argued Mar. 23, 2016); Cf. Nelson Tebbe, Micah Schwartzman, & Richard Schragger, *Zubik and the Demands of Justice*, SCOTUSBLOG, (May 16, 2016, 9:07 PM), <http://www.scotusblog.com/2016/05/symposium-zubik-and-the-demands-of-justice/> (noting astutely that Justice Breyer “is now the swing vote in cases where the government wins below”). Finally, the Court would not have instructed the lower courts to find a compromise that “accommodates the petitioners’ religious exercise,” if the Court did not think the petitioners’ concerns warranted accommodation. *Zubik v. Burwell*, 578 U.S. \_\_\_\_ (2016) (slip op. at 4). Thus, as Michael McConnell writes, the Court’s “decision was basically a quiet, face-saving, non-precedent-setting defeat for the government.” Eugene Volokh, *Prof. Michael McConnell on Zubik v. Burwell (Yesterday’s Supreme Court RFRA / Contraceptive Decision)*, WASH. POST, VOLOKH CONSPIRACY, (May 17, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/17/prof-michael-mcconnell-on-zubik-v-burwell-yesterdays-supreme-court-rfra-contraceptive-decision/> (quoting Michael McConnell). See also Chad Flanders, *Symposium: Into the Weeds*, SCOTUSBLOG, (May 16, 2016, 3:04PM), <http://www.scotusblog.com/2016/05/symposium-into-the-weeds/> (arguing that the Court’s opinion should be read as a victory for petitioners on the substantial burden question); Erin Morrow Hawley, *Symposium: The Return of Chief Justice Roberts*, SCOTUSBLOG, (May 16, 2016, 5:33 PM), <http://www.scotusblog.com/2016/05/symposium-the-return-of-chief-justice-roberts/> (arguing the same). But see Tebbe, Schwartzman & Schragger, *supra* (casting the decision as a victory for the government).

5. I note that I take the ROs’ complicity claim as a good-faith expression of a genuinely and deeply held conviction. Others have argued that some of those who raise religious objections to facilitating contraception (or abortion or gay marriage) aim not to dissociate from conduct they oppose but instead to marginalize, condemn and impede that conduct. See, e.g., Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *Yale L.J.* 2516, 2576 (2015); Katherine Franke, *Giving Obergefell the “Roe-Treatment,”* COLUMBIA LAW SCHOOL PUB. RIGHTS PRIVATE CONSCIENCE PROJECT, (Jul. 13, 2015), <http://blogs.law.columbia.edu/publicrightprivateconscience/2015/07/13/giving-obergefell-the-roe-treatment/>. While I find their arguments convincing, I nonetheless bracket them here, for my objective is to get clear on what a *principled* justification for sincere complicity claims might be. I leave for another day the task of ensuring sincerity, and addressing the more opportunistic or obstructionist claims for exemptions.

To be clear, the account I advance is nowhere to be found in the *Zubik* petitioners’<sup>6</sup> submissions. Their arguments, I contend here, are unconvincing. But so too, I maintain, are the arguments on the other side.

The problem is that both sides are unduly beholden to a causal conception of complicity—i.e., the view that one can be complicit in another’s act if and only if one has played a necessary causal role in bringing the other’s act about.<sup>7</sup> I argue that the current accommodation process does not have objectors play a necessary causal role in their employees’ contraceptive coverage. This would seem to sound the death knell for the *Zubik* petitioners.<sup>8</sup> But, I contend, to require a showing of causation is to unfairly constrain the scope of complicity claims; it is, as the title here suggests, to improperly burden RFRA’s substantial burden inquiry.<sup>9</sup> For there is a separate, non-causal ground of complicity, and it alone suffices to implicate the petitioners in the conduct they oppose. I refer to that ground as “ratification.” Understanding the burden as a matter of ratification allows us both to see why the petitioners reasonably believe their free exercise is substantially burdened and to evaluate the proffered alternatives with an eye to minimizing that burden, even while providing women with free and easy access to the contraception to which they are entitled. Both of these elements should prove useful should the Court encounter *Zubik II*, as many commentators predict it will.<sup>10</sup>

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6. I refer to the religious non-profit institutions challenging the accommodation process as “the *Zubik* petitioners,” or “the petitioners” for short. *Zubik* itself consolidates seven cases in which the non-profits lost in the courts below. See, e.g., Lyle Denniston, *Appeals Courts Now Split on Birth Control Mandate*, SCOTUSBLOG (Sept. 17, 2015, 8:13 PM), <http://www.scotusblog.com/2015/09/appeals-courts-now-split-on-birth-control-mandate/>. The Eighth Circuit, whose decision is not among those consolidated, is the only circuit to have found in favor of the religious non-profits. See *id.*

7. See *Little Sisters*, 794 F.3d at 1208 (Baldock, J., dissenting) (“[T]he accommodation scheme forces the self-insured plaintiffs to perform an act that causes their beneficiaries to receive religiously objected-to coverage.”); Brief for the States of California et. al. at 17, *Zubik v. Burwell*, 135 S. Ct. 1544 (2016) (No. 14-1418) (“[T]here is no causal link between the required action and the objected-to result. If there is no causation, there can be no substantial burden.”). Cf. Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There A Middle Ground?*, 9 HARV. L. & POL’Y REV. 161, 185–90 (2015) (arguing that the relevant consideration is proximity of causal contribution and adducing several bodies of law as support).

8. I have elsewhere argued that, for purposes of RFRA’s substantial burden inquiry, courts should defer to the religious adherent’s determination that she is complicit, even if her conception of complicity is more expansive than the law’s. See Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby’s Wake*, 82 U. CHI. L. REV. 1897 (2015). I do not retreat from that position here, but neither do I take the petitioners’ arguments at face value. The fact that courts should defer does not entail that we, concerned citizens and scholars, may not criticize the bases of religious objectors’ complicity claims. The efforts here seek to engage in just this critical enterprise.

9. 42 U.S.C. § 2000bb-1 (2012).

10. Virtually all court-watchers predict that this is not the last of *Zubik*. See, e.g., Marty Lederman, *What to Expect from the Zubik Remand: A Possible Solution for “Church Plans,” but Otherwise no Obvious Common Ground*, BALKINIZATION, (May 17, 2016, 11:03 AM), <http://balkin.blogspot.com/2016/05/what-to-expect-from-zubik-remand.html>; Tebbe, Schwartzman & Schragger, *supra* note 4; Michael C. Dorf, *Qualms About a (Henry) Friendly Court*, DORF ON LAW, (May 18, 2016, 7:00 AM), <http://www.dorfonlaw.org/2016/05/qualms-about-henry-friendly-court.html>.

## II. CAUSATION AND COMPLICITY

The *Zubik* petitioners' central concern is that the accommodation process requires them to "facilitate" contraceptive provision,<sup>11</sup> because submitting the form "triggers" a third party's obligation to perform the objectionable act in their stead,<sup>12</sup> or "highjacks" their plan architecture to get the contraception to their employees.<sup>13</sup> All of these are causal notions of complicity: The petitioners become complicit because they do something, or provide something, necessary for the plan beneficiaries to obtain the contraception that the petitioners morally oppose.<sup>14</sup>

Facilitation is a garden-variety form of complicity,<sup>15</sup> so casting the accommodation process as a kind of facilitation has the advantage of domesticating the petitioners' complicity claim. Unfortunately, it also has the disadvantage of rendering that claim implausible. The government and lower courts persuasively point out that there is no "triggering" since the insurance companies providing coverage are already under a pre-existing, independent legal obligation to pay for the contested contraception.<sup>16</sup> And the claim of "highjacking" is at best an exaggeration, and at worst inapt. The accommodation does not have the insurance companies completely take over and control the petitioners' insurance plans, which is what the highjacking metaphor implies. "Joyriding" would be more accurate, except that joyriders temporarily deprive the car's owner of its use, whereas here, the insurance companies' use of the plan architecture does not prevent the petitioners from using it at the same time.<sup>17</sup> Moreover, there may be no joyriding at all, for the accommodation process has the petitioners effectively consent to the insurance companies' coming to incur the obligation the petitioners oppose. Of course, it is just this consent that the petitioners have reason to contest. I shall return to this point below.<sup>18</sup> For now, it is enough to notice that, if there is consent, there cannot be joyriding (let alone hijacking). And because whatever consent exists is not caus-

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11. See, e.g., *Little Sisters*, 794 F.3d at 1167.

12. See, e.g., *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 237 (D.C. Cir. 2014); *Sharpe Holdings, Inc. v. U.S. Dept. of Health & Human Servs.*, 801 F.3d 927, 939 (8th Cir. 2015).

13. Lyle Denniston, *Argument Analysis: On New Health Care Case, a Single Word May Tell It All*, SCOTUSBLOG (Mar. 23, 2016 3:49 PM), <http://www.scotusblog.com/2016/03/argument-analysis-on-new-health-care-case-a-single-word-may-tell-it-all/> (noting that the words "hijack" and "hijacking" were used seven times at the *Zubik* oral argument).

14. *Geneva College v. Secretary U.S. Dept. of Health & Human Servs.*, 778 F.3d 422, 435 (3d Cir. 2015).

15. See, e.g., CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* 166–72 (2000).

16. See, e.g., 42 U.S.C. 300gg-13(a)(4); *Priests for Life*, 772 F.3d at 252; *Michigan Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 385 (6th Cir. 2014); *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 554 (7th Cir. 2014).

17. At oral argument, Justice Alito compared the scheme to having the insurance companies infiltrate the home of the Little Sisters of the Poor and turn one room into a birth control clinic. Transcript of Oral Argument at 63, *Zubik v. Burwell*, 578 U.S. \_\_\_\_ (2016) (No. 14-1418) (argued Mar. 23, 2016). The metaphor is different but the notion of conversion of property, and its moral meaning, is the same, and so is subject to a similar response: The so-called infiltration would be more like a permission to occupy a part of the house where its owner has no intention or desire to spend any time.

18. See *infra* Part IV.

ally necessary for the insurance companies to step in,<sup>19</sup> neither does the consent trigger or otherwise facilitate the contraceptive mandate.

### III. (DIS)-ANALOGIES

If the religious petitioners hamstring their ability to establish a substantial burden by hewing to causal accounts of complicity, the government and Courts of Appeals proceed in ways that unduly advantage their side, by cherry-picking analogies that beg the question in their favor.

For example, the *Zubik* opponents rely on *Bowen v. Roy*<sup>20</sup> and *Lyng v. Northwest Indian Cemetery*<sup>21</sup> for the proposition that “religious exercise is not substantially burdened merely because the Government spends its money or arranges its own affairs in ways that petitioners find objectionable.”<sup>22</sup> But *Bowen* and *Lyng* govern only if the religious objectors here, like the plaintiffs in those two cases, are not themselves put upon to participate in the conduct they oppose. Yet the outstanding question here is just whether the petitioners are put upon in this way. So to think that *Bowen* and *Lyng* are apt is already to prejudge the matter.

Hypotheticals invoking conscientious objectors (COs) to the military are similarly flawed. The standard analogy describes a pacifist who not only seeks an exemption from the draft but also objects to having someone drafted in his stead.<sup>23</sup> The objection is unreasonable, the *Zubik* opponents contend.<sup>24</sup> Instead, not only may the government find a replacement for the CO, COs were, historically, required to find or hire their own replacement as a condition of their exemption.<sup>25</sup>

Here too, though, the analogy falters. For one thing, COs benefit from the protection of the military even if they do not participate, so it is fair that they be asked to contribute something in return. The *Zubik* petitioners, by contrast, do not benefit from the contraceptive mandate.<sup>26</sup> And at any rate, our more evolved views recognize that requiring a CO to hire a replacement is a “monstrosity,”<sup>27</sup> both because it commodifies military

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19. The one exception arises in the case of the self-insured petitioners whose complicity I briefly address above, see *supra* notes 5–6.

20. 476 U.S. 693 (1986).

21. *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988). See also Ira Lupu and Robert Tuttle, *Symposium: Religious Opt-outs or Religious Vetoes?*, SCOTUSBLOG (Dec. 15th, 2015, 9:33 AM), <http://www.scotusblog.com/2015/12/symposium-religious-opt-outs-or-religious-vetoes/>.

22. *Little Sisters of the Poor Home for the Aged, Denver Colo. v. Burwell*, 794 F.3d 1151, 1184 (10th Cir. 2015); see also *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229, 252 (D.C. Cir. 2014).

23. See, e.g., *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2812 (2014) (Sotomayor, S., dissenting) (quoting *Notre Dame*, 743 F. 3d, at 556).

24. *Id.*

25. See Brief of Military Historians as Amici Curiae in Support of Respondents at 3, *Zubik v. Burwell*, 135 S. Ct. 1544 (2016) (No. 14-1418).

26. Cf. Supplemental Brief for Petitioners at 15, *Zubik v. Burwell*, 2135 S. Ct. 1544 (2016) (No. 14-1418) (underscoring that petitioners have moral objections to contraceptive use and so would not endorse any policy that provides it).

27. *Little Sisters*, 794 F.3d at 1214 n.7 (Baldock J., dissenting).

service,<sup>28</sup> and because it undermines the CO's ability to meaningfully object.<sup>29</sup> So the historical precedent is illuminating, if at all, only as a lesson in how *not* to structure an opt-out regime.

A separate effort to show up the *Zubik* petitioners invokes the conception of complicity found in the criminal law.<sup>30</sup> On that conception, the culpable accomplice must not only contribute to a crime but also intend to participate *because* the crime is something he wishes to bring about.<sup>31</sup> Obviously, the *Zubik* petitioners do not want to bring about contraceptive use. So, the opponents conclude, the *Zubik* petitioners are not complicit. But it is already begging the question to assume that the criminal law's conception of complicity is relevant. After all, that conception is appropriately narrow, given how consequential a criminal conviction is. Yet moral complicity need not be so narrowly construed. The gun merchant who sells a weapon to someone he knows will use it in a crime is correctly thought complicit in the crime even if he would not be deemed complicit under criminal law.<sup>32</sup> Here too, then, the *Zubik* opponents rely on a legal frame of reference that unduly stacks the deck against the petitioners.

#### IV. RATIFICATION

Notwithstanding the failure of either side to offer a persuasive argument establishing that the petitioners are, or are not, complicit, there is a rather straightforward, albeit unarticulated, ground of complicity at hand: The accommodation process, it might be argued, has the petitioners *ratify* the contraceptive mandate even if it does not have them play a causal role therein.

The notion of ratification at issue here arises where one fails to condemn a wrong that one has a moral duty to condemn. To elaborate, there are some acts whose moral permissibility we are prepared to see as a matter about which reasonable minds can disagree. Some people view killing animals for food in this way: they believe that it would be a good thing if people were to stop consuming meat, but they do not believe that anyone is under a moral requirement to do so. Instead, vegetarianism is for them *supererogatory*—over and above the call of duty.<sup>33</sup> By contrast, genuine

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28. Cf. Michael Sandel, The Tanner Lectures on Human Values, What Money Can't Buy: The Moral Limits of Markets 109–14 (May 11–12, 1998).

29. See Sepinwall, *supra* note 8, at 1900 n.90.

30. See, e.g., Frederick Gedicks, *Symposium: Adjudicating "Substantial" Burdens*, SCOTUS BLOG (Dec. 14, 2015, 4:06 PM), <http://www.scotusblog.com/2015/12/symposium-adjudicating-substantial-burdens>; Brief Amici Curiae of Former State Attorneys General et al., *Zubik v. Burwell*, 135 S. Ct. 1544 (2016) (No. 14-1418).

31. See Brief Amici Curiae of Former State Attorneys General et al. at 15, *Zubik v. Burwell*, 135 S. Ct. 1544 (2016) (No. 14-1418). (quoting *Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014) (citing *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949))) (emphasis added).

32. Sepinwall, *supra* note 8, at 1916–17; Kutz, *supra* note 15, at 166–73.

33. See, e.g., Elizabeth Harman, *Eating Meat As a Morally Permissible Moral Mistake*, in PHILOSOPHY COMES TO DINNER (Andrew Chignell, Terence Cuneo & Matthew Halteman eds., 2016). Of course, others view vegetarianism as a moral requirement. See, e.g., Tom Regan, *The Moral Basis of Vegetarianism*, 5 CAN. J. PHIL. 181 (1975). For at least some of these people, it will be important not just to refrain from



wrongs are ones we have a duty not to perform, and a subset of these are properly seen as offenses against the moral community as a whole—most obviously those acts that count as *malum in se*.<sup>34</sup> We have a moral duty not just to refrain from committing *malum in se* acts; we also have a moral duty to *condemn* them, or at least a moral duty not to blithely assent to their commission by others. To do this last would be to *ratify* the *malum in se* act. Of course, just what should count as a *malum in se* act can be contested.

Take for example killing in a just war. A pacifist conscripted to fight in a just war will want an exemption from military service. But he may well want more than that too. To see this, one need only think about Americans drafted into the Vietnam War who burned their draft cards.<sup>35</sup> If a pacifistic draftee was concerned only for his own moral purity, he could have sought conscientious objector (CO) status, and thereby received dispensation from service.<sup>36</sup> Why then take the further—and illegal<sup>37</sup>—step of burning his draft card? Presumably because appealing for CO status in the established way would have meant business as usual; it would have signaled that his objection was an instance of supererogation, not condemnation. But if killing in war is a grave moral wrong, this CO cannot merely seek to extricate himself, especially if in extricating himself he registers his assent for the system as a whole. To assent in this way is just to ratify war, which contravenes his deeply held moral convictions.

I submit that the *Zubik* petitioners' refusal to go along with the accommodation process is best understood along similar lines. For the *Zubik* petitioners, contraceptive use is an outright wrong, and so not something about which reasonable minds can disagree. The *Zubik* petitioners might resign themselves to having lost their battle against contraception in the public domain; the government will facilitate access to contraception (as it should) no matter what the petitioners do.<sup>38</sup> But that does not mean that the petitioners need give themselves over to a regime that treats contraceptive use as morally benign. Acceding to the government's accommodation process makes them cogs in what they deem to be an abominable wheel. Far better (from their vantage point, although not necessarily others'), to be a thorn in the government's side. Only by refusing to go along can they avoid the wrong of ratification.

Insofar as the accommodation process involves ratification, it is a species of compelled expression, even though voices on both sides of the

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meat-eating but also to refrain from ratifying others' meat-eating, as I use the term "ratify" in what follows.

34. Cf. R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW (2007) (describing the distinctive feature of criminal law as addressing public wrongs).

35. Lily Rothman, *This Photo Shows the Vietnam Draft-Card Burning That Started a Movement*, TIME (Oct. 15, 2015), <http://time.com/4061835/david-miller-draft-card/>.

36. See *United States v. Seeger*, 380 U.S. 163 (1965) (allowing conscientious exemptions on moral grounds).

37. See *United States v. O'Brien*, 391 U.S. 367 (1968).

38. See *infra* Part V.

debate have denied that there is compelled speech here.<sup>39</sup> To be sure, what the accommodation compels is not speech supporting contraceptive use. But it does compel expressive support for a regime in which contraceptive use is treated as morally benign. And the petitioners cannot in good conscience sign on to that expression any more than the war protester can sign on to the idea that war is morally benign.<sup>40</sup>

#### V. THE LEAST RATIFYING MEANS

If the best understanding of the petitioners' complicity claim is as a grievance against compelled ratification, then one might conclude that any accommodation process will be unacceptable to them because any process will involve ratification. But this appears not to be true of the arrangement the Court proposed in its order for supplemental briefing.<sup>41</sup> On the Court's proposal, the RO would, from the moment it sought insurance, contract for a plan that excluded contraceptive coverage, in light of its religious objection. The insurance company would then notify the plan beneficiaries of their right to obtain contraceptive coverage directly through the insurance company, with no involvement of the RO at all. This arrangement is not so much an accommodation as an exemption insofar as it protects the RO from having anything to do with subsidizing contraception.

The *Zubik* plaintiffs appear satisfied with this arrangement.<sup>42</sup> But it is possible that other ROs, not represented in the *Zubik* consolidated cases, would not be.<sup>43</sup> And at any rate, most court-watchers are not as sanguine as the Court about the prospects for compromise.<sup>44</sup> In anticipation of further challenges to the government's efforts to accommodation, it may be worth noting one mechanism that does seem to avoid compelled ratification. This is the form of notice the Court approved in its temporary stay in

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39. See, e.g., *Little Sisters of the Poor Home for the Aged, Denver Colo. v. Burwell*, 794 F.3d 1151, 1203–04 (10th Cir. 2015). In a highly subtle and compelling account of the nature of complicity at issue in *Hobby Lobby v. Burwell*, Nomi Stolzenberg argues that the owners' objection to the contraceptive mandate should be construed as an interest in avoiding material, not expressive, support. Nomi Maya Stolzenberg, *It's About Money: The Fundamental Contradiction of Hobby Lobby*, 88 S. CAL. L. REV. 727, 744–51 (2015). But it strikes me that there is expressive support here—again, not of contraceptive use itself, but instead of the normalization of public support for contraceptive use, which the petitioners have reason to protest.

40. In its Supplemental Brief in *Zubik*, the government makes plain that it is blind to the expressive component of submitting the accommodation form. Supplemental Brief for Respondents at 15, *Zubik v. Burwell*, 2135 S. Ct. 1544 (2016) (No. 14-1418). There, the government describes the arrangement the Supreme Court proposed in its Order of March 29, 2016—wherein the petitioners would contract from the start for a plan that excluded contraceptive coverage—as being no different from the existing accommodation since both would have the same result: the insurer would subsidize contraception, not the religious organization. See *id.* at 2; see also *id.* at 11. Crucially, however, both arrangements would not have the same process and it is the expressive dimension of the existing process—the ratification it entails—that makes that process reasonably objectionable.

41. Order of Mar. 29, 2016, *Zubik v. Burwell*, 2135 S. Ct. 1544 (2016) (No. 14-1418).

42. *Id.*

43. While the *Zubik* petitioners contend that the Court's proposal would work even for self-insured ROs, the government appears doubtful. See Brief for Respondents at 2, 16, *Zubik v. Burwell*, 2135 S. Ct. 1544 (2016) (No. 14-1418).

44. See *supra* note 10.

the *Wheaton College* case,<sup>45</sup> which requires the religious objector (RO) to do no more than inform the government that it objects to the contraceptive mandate on religious grounds. The RO need not provide contact info for its insurance company, or update the government about changes to its plan.<sup>46</sup> Because “Wheaton College” notice does not help the contraceptive mandate along,<sup>47</sup> it might reasonably be seen as nothing other than a statement of protest—a kind of “J’accuse!” that signals only that the RO wants nothing at all to do with contraceptive coverage. Having been notified about the RO’s objection, the government could then take steps to ensure free and easy access to contraception for the RO’s employees and their dependents, leaving the RO out of the matter completely.

#### VI. RISKING THE UNDOING OF UNDUE BURDENS

The foregoing has sought to portray the RO’s complicity claims in a sympathetic light. As it happens, however, I strongly support the contraceptive mandate. Thus, I end by offering some thoughts about why and how other supporters of the contraceptive mandate should respond to the arguments herein.

First, it is notable that just a few weeks prior to the *Zubik* arguments, the Court heard *Whole Woman’s Health v. Hellerstedt*,<sup>48</sup> which challenges Texas’s restrictions on abortion access.<sup>49</sup> Both that case and *Zubik* turn on whether the challenged burdens are substantial.<sup>50</sup> So proponents of reproductive freedom should recognize that they could make common cause with proponents of religious liberty by embracing a generous construal of “substantiality” in both contexts.

Second, supporters of the contraceptive mandate are right to insist on seamless contraceptive coverage, but not for the demeaning reasons they all too often invoke, which portray women as incapable of figuring out how to obtain alternative coverage on the exchanges,<sup>51</sup> or point to their “inertia” when it comes to procuring contraception.<sup>52</sup> Seamless coverage is women’s due, not because some women will not take on additional burdens for obtaining contraception, but because no woman should have to. Men who want to protect themselves from fathering a child need do no more than walk over to their corner drugstore where, without a

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45. *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014).

46. *See Sharpe Holdings, Inc. v. U.S. Dept. of Health & Human Servs.*, 801 F.3d 927, 934 (8th Cir. 2015).

47. *Wheaton College*, 134 S. Ct. 2806.

48. 136 S. Ct. 994 (2016).

49. *See, e.g.*, Ariane de Vogue, *Liberal Supreme Court Justices Critical of Texas Abortion Law* (Mar. 3, 2016, 9:51 AM), <http://www.cnn.com/2016/03/02/politics/supreme-court-abortion-texas/>.

50. *Whole Woman’s Health*, 136 S. Ct. 994; *Zubik v. Burwell*, 135 S. Ct. 1544 (2016) (No. 14-1418). *Whole Woman’s Health* invokes the substantial burden principle from *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 876–77 (1992).

51. *See, e.g.*, Transcript of Oral Argument at 51–52, *Zubik v. Burwell*, 578 U.S. \_\_\_\_ (2016) (No. 14-1418) (quoting General Verrilli); *id.* at 72 lines 8–21.

52. *Id.* at 76 (quoting Breyer, J.).

prescription and for little cost, they can purchase a pack of condoms.<sup>53</sup> Women who seek to take charge of their own reproductive lives, however, already need (at least) a doctor to write and a pharmacist to fill a prescription. This is so notwithstanding the fact that at least some methods of female contraception—"the pill" chief among them—carry risks and side effects so minimal that medical authorities have recommended that they be available over the counter.<sup>54</sup> If there is a "less restrictive" accommodation method, then, it should not heighten women's burden further.<sup>55</sup>

In sum, the Court should recognize that the accommodation process threatens to compel ratification and so imposes a substantial burden. But it should protect petitioners from this burden only if doing so is compatible with robust solicitude for women's right to easy access to free contraception too.

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53. See *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 263 (D.C. Cir. 2014).

54. See American College of Obstetrics and Gynecologists, *Committee Opinion: Over-the-Counter Access to Oral Contraceptives*, ACOG (Dec. 2012), <http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Gynecologic-Practice/Over-the-Counter-Access-to-Oral-Contraceptives>.

55. See generally Sepinwall, *supra* note 8, (making clear that RFRA accommodations should be weighed against third-party costs); Tebbe, Schwartzman & Schragger, *supra* note 4. And even when third parties would not incur material burdens as a result of an exemption, the government must dissociate itself from the expressive content of the religious adherent's complicity claim—the message that the third-party's conduct in which it would be implicated is "sinful." See Nejaime & Siegel, *supra* note 5, at 2576. Otherwise, the government itself risks ratifying the religious adherent's expression. Cf. Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, YALE L.J. FORUM, (Mar. 16, 2016), text accompanying note 37; Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539, 583 (2015) (arguing that RFRA should entail a genuine balancing between the interests of the religious adherent and the parties whom the challenged law is intended to serve). *But cf.* Kent Greenawalt, *Should the Religion Clauses of the Constitution Be Amended?*, 32 LOY. L.A. L. REV. 9, 15 n.25 (1998) (contending that courts should proceed with something less than strict scrutiny under RFRA, given the gravity of exempting someone from a legal requirement).