Nos. 13-3536, 14-1374, 14-1376 & 14-1377

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GENEVA COLLEGE; MOST REVERAND DAVID A. ZUBIK, et al.; MOST REVERAND LAWRENCE T. PERSICO, et al.,

Plaintiffs-Appellees,

v.

KATHLEEN SEBELIUS, in her official capacity as SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Defendants-Appellants.

On Appeals from the United States District Court for the Western District of Pennsylvania ((No. 12-0207) (Conti, J.) and (Nos. 13-cv-1459 & 13-cv-0303) (Schwab, J.))

BRIEF FOR THE APPELLANTS

STUART F. DELERY
Assistant Attorney General

DAVID J. HICKTON
United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
ADAM C. JED
PATRICK G. NEMEROFF
(202) 514-5089
Attorneys, Appellate Staff
Civil Division, Room 7531
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

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INTRODUCTION

Plaintiffs challenge regulations that establish minimum health coverage requirements under the Affordable Care Act insofar as they include contraceptive coverage as part of required women's preventive health coverage. Plaintiffs acknowledge, however, that either they are automatically exempt from this requirement because they are houses of worship, or they may opt out of the coverage requirement by informing their insurance issuer or third-party administrator that they are eligible for a religious accommodation set out in the regulations and therefore are not required "to contract, arrange, pay, or refer for contraceptive coverage," 78 Fed. Reg. 39,870-01, 39,874 (July 2, 2013). And they do not object to informing insurance issuers or third party administrators of their decision not to provide contraceptive coverage.

Plaintiffs object, instead, to requirements imposed not on themselves, but on insurance issuers and third party administrators. When an eligible organization with an insured plan elects not to provide coverage for religious reasons, the insurance company that issues the policy for that organization's employees (or students) is required to provide or arrange separate payments for contraceptive services for the employees (or students). *See* 45 C.F.R. § 147.131(c)(2)(i)(B) and (ii). In the case of a self-insured plan, these requirements generally must be met by the third party administrator that operates the plan. *See* 29 C.F.R. § 2590.715-2713A(b)(2). In all cases, the organization eligible for a religious accommodation does not administer this

coverage and does not bear any direct or indirect costs of this coverage, which is provided separately from its own health coverage.

Although plaintiffs are thus free to opt out of providing contraceptive coverage, they nevertheless claim that the challenged regulations impermissibly burden their exercise of religion in violation of the Religious Freedom Restoration Act ("RFRA"). In *University of Notre Dame* v. *Sebelius*, 743 F.3d 547 (7th Cir. 2014), the Seventh Circuit considered the same claim and held that the claim is not a basis for a preliminary injunction.[1]

As the *Notre Dame* decision illustrates, plaintiffs cannot transform their right, as eligible organizations, *not* to provide coverage into a substantial burden by characterizing their decision to opt out as "facilitating" the provision of contraceptive coverage by third parties. Eligible organizations that opt out do not "facilitate" the provision of contraceptive coverage by third parties, just as they do not "facilitate" the federal government's reimbursement of third party administrators for the cost of providing such coverage. *Notre Dame*, 743 F.3d at 554 ("Federal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services."). Third parties provide coverage as a result of legal obligations imposed by the government. Plaintiffs are "free to opt out of providing the coverage

[1] The Seventh Circuit denied Notre Dame's petition for rehearing en banc. *See* No. 13-3853, ECF No. 64 (May 7, 2014).

[themselves], but [they] can't stop anyone else from providing it." *University of Notre Dame* v. *Sebelius*, _ F. Supp. 2d. _, 2013 WL 6804773, at *1 (N.D. Ind. Dec. 20, 2013), *aff'd*, 743 F.3d 547 (7th Cir. 2014).

STATEMENT OF JURISDICTION

Plaintiffs in these appeals invoked the district courts' jurisdiction under 28 U.S.C. § 1331. The district court in *Geneva* issued a preliminary injunction with respect to Geneva College's student plan on June 18, 2013 (JA 35), and the government filed a timely notice of appeal on August 17, 2013 (JA 1). The district court issued a preliminary injunction with respect to Geneva College's employee plan on December 23, 2013 (JA 67), and the government filed a timely notice of appeal on February 1, 2014 (JA 4). This Court has appellate jurisdiction over these appeals under 28 U.S.C. § 1292(a)(1).

The district court in *Zubik/Persico* issued a preliminary injunction on November 21, 2013 (JA 134), and, on December 20, 2013, granted plaintiffs' unopposed motion to convert that preliminary injunction into a permanent injunction (JA 136). The government filed timely notices of appeal from the final judgments in *Zubik* and *Persico* on February 11, 2014 (JA 7, 10). This Court has appellate jurisdiction under 28 U.S.C. §§ 1291, 1292(a)(1).

STATEMENT OF THE ISSUE

Whether regulations that allow plaintiffs to opt out of providing contraceptive coverage violate their rights under the Religious Freedom Restoration Act. [Ruled upon in *Geneva* at JA 13-34 (student plan) and JA 37-66 (employee plan). Ruled upon in *Zubik/Persico* at JA 69-133.]

STATEMENT OF RELATED CASES

The issues presented in these appeals are also presented in the following appeals pending before other Circuits (as well as many district court cases):

Priests for Life v. *Sebelius*, Nos. 13-5368, 13-5371 & 14-5021 (D.C. Cir.)

Roman Catholic Archdiocese of New York v. *Sebelius*, No. 14-427 (2d Cir.)

University of Dallas v. *Sebelius*, Nos. 14-10241, 14-20112, & 14-40212 (5th Cir.)

Michigan Catholic Conference v. *Sebelius*, Nos. 13-2723 & 13-6640 (6th Cir.)

Legatus v. *Sebelius*, Nos. 14-1183 & 14-1310 (6th Cir.)

Grace Schools v. *Sebelius*, Nos. 14-1430 & 14-1431 (7th Cir.)

Sharpe Holdings, Inc. v. *HHS*, No. 14-1507 (8th Cir.)

Little Sisters of the Poor v. *Sebelius*, No. 13-1540 (10th Cir.)

S. Nazarene Univ. v. *Sebelius*, No. 14-6026 (10th Cir.)

Reaching Souls Int'l v. *Sebelius*, No. 14-6028 (10th Cir.)

Diocese of Cheyenne v. *Sebelius*, No. 14-8040 (10th Cir.)

Appeal No. 13-2814 (3d Cir.) arises out of the *Geneva* litigation but presents distinct issues and has been stayed pending the Supreme Court's decision in *Conestoga Wood Specialties Corporation* v. *Sebelius*, No. 13-356 (S. Ct.).

STATEMENT OF THE CASE

A. Regulatory Background

1. Congress has long regulated employer-sponsored group health plans and health insurance coverage. In 2010, the Patient Protection and Affordable Care Act established certain additional minimum standards for group health plans as well as health insurance issuers that offer coverage in the group and the individual health insurance markets. The Act requires non-grandfathered group health plans and health insurance issuers offering non-grandfathered health insurance coverage to cover four categories of recommended preventive-health services without cost sharing, that is, without requiring plan participants to make copayments or pay deductibles or coinsurance. 42 U.S.C. § 300gg-13. As relevant here, these services include preventive care and screenings for women as provided for in comprehensive guidelines supported by the Health Resources and Services Administration ("HRSA") (a component of the Department of Health and Human Services ("HHS")). *Id.* § 300gg-13(a)(4).

HHS requested the assistance of the Institute of Medicine in developing such comprehensive guidelines for preventive services for women. 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012). Experts, "including specialists in disease prevention, women's

health issues, adolescent health issues, and evidence-based guidelines," developed a list of services "shown to improve well-being, and/or decrease the likelihood or delay the onset of a targeted disease or condition." Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 2-3 (2011) (IOM Report). These included the "full range" of "contraceptive methods" approved by the Food and Drug Administration ("FDA"), *id.* at 10; *see id.* at 102-110, which the Institute found can greatly decrease the risk of unwanted pregnancies, adverse pregnancy outcomes, and other adverse health consequences, and vastly reduce medical expenses for women. *See id.* at 102-07.

Consistent with those recommendations, the HRSA guidelines include "'[a]ll Food and Drug Administration [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,' as prescribed" by a health care provider. 77 Fed. Reg. at 8725 (quoting the guidelines). The relevant regulations adopted by the three Departments implementing this portion of the Act (HHS, Labor, and Treasury) require coverage of, among other preventive services, the contraceptive services recommended in the HRSA guidelines. 45 C.F.R. § 147.130(a)(1)(iv) (HHS); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. § 54.9815-2713(a)(1)(iv) (Treasury).

2. The implementing regulations authorize an exemption from the contraceptive-coverage provision for the group health plan of a "religious employer." 45 C.F.R. § 147.131(a). A religious employer is defined as a non-profit organization described in the Internal Revenue Code provision that refers to churches, their

integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order. *Ibid.* (cross-referencing 26 U.S.C. § 6033(a)(3)(A)(i) and (iii)).

When the initial final regulations were issued, the Departments announced, in response to religious objections raised by some commenters, that they would develop "'changes to these final regulations that would meet two goals'—providing contraceptive coverage without cost-sharing to covered individuals and accommodating the religious objections of [additional] non-profit organizations[.]" *Wheaton College* v. *Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012) (per curiam) (quoting 77 Fed. Reg. at 8727).

After notice and comment rulemaking, the Departments published the current final regulations, challenged here, in July 2013. *See* 78 Fed. Reg. 39,874-39,886; 45 C.F.R. § 147.131(b) (HHS); 29 C.F.R. § 2590.715-2713A(a) (Labor); 26 C.F.R. § 54.9815-2713A(a) (Treasury). The regulations provide additional religion-related accommodations for group health plans established or maintained by "eligible organizations" (and group health insurance coverage provided in connection with such plans). An "eligible organization" is an organization that satisfies the following criteria:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

> (3) The organization holds itself out as a religious organization.
>
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies.

E.g., 45 C.F.R. § 147.131(b); *see also* 78 Fed. Reg. at 39,874-75.

Under these regulations, an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874. To be relieved of these obligations, it need only complete a form stating that it is an eligible organization and provide a copy to its insurance issuer or third party administrator. *See id.* at 39,874-75; *see, e.g.*, 29 C.F.R. § 2590.715-2713A(a)(4), (b)(1), (c)(1).

If an eligible organization chooses not to provide contraceptive coverage, the plan's participants and beneficiaries will generally have access to contraceptive coverage without cost sharing through alternative mechanisms established by the regulations.

When an eligible organization that chooses not to provide contraceptive coverage has an "insured" plan, the health insurance company that issues the policy for that organization is required by regulation to provide separate payments for

contraceptive services to plan participants. *See* 45 C.F.R. § 147.131(c)(2).[2] The insurance issuer may not impose any premium, fee, or other charge, directly or indirectly, on the eligible organization or the group health plan with respect to the issuer's payments for contraceptive services. *See id.* § 147.131(c)(2)(ii), (f). The insurance issuer must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the . . . plan," *id.* § 147.131(c)(2)(i)(A), and "segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services," *id.* § 147.131(c)(2)(ii).

When an eligible organization that chooses not to provide contraceptive coverage has a "self-insured" plan, the regulations generally require the third party administrator to provide or arrange separate payments for contraceptive services to plan participants. 29 C.F.R. § 2590.715- 2713A(b)(2). "The eligible organization will not act as the plan administrator or claims administrator with respect to claims for

[2] An employer is said to have an "insured" plan if it contracts with an insurance company that bears the financial risk of paying health insurance claims. An employer is said to have a "self-insured" plan if it bears the financial risk of paying claims. Self-insured employers often use insurance companies to administer their plans, performing functions such as developing networks of providers, negotiating payment rates, and processing claims. In that context, the insurance company is called a third party administrator or TPA. Employers may be regarded as self-insured even if they purchase a separate insurance policy (known as reinsurance or "stop loss" coverage), which is not a form of health insurance, to protect themselves against unusually high claims costs. *See generally* Congressional Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 6 (2008). Student plans are comparable to insured employee plans.

contraceptive services, or contribute to the funding of contraceptive services." *Id.* § 2590.715- 2713A(b)(1)(ii)(A). The regulations bar the third party administrator from imposing any premium, fee, or other charge, directly or indirectly, on the eligible organization or the group health plan with respect to payments for contraceptive services. *Id.* § 2590.715-2713A(b)(2). The third party administrator may seek reimbursement for payments for contraceptive services from the federal government through an adjustment to Federally-facilitated Exchange user fees. *Id.* § 2590.715-2713A(b)(3); *see* 45 C.F.R. § 156.50(d).

Regardless of the type of plan, an eligible organization that opts out of providing contraceptive coverage has no obligation to inform plan participants of the availability of these separate payments made by third parties. Instead, the health insurance issuer or third party administrator itself provides this notice, and does so "separate from" materials that are distributed in connection with the eligible organization's group health coverage. 45 C.F.R. § 147.131(d); 29 C.F.R. § 2590.715-2713A(d). That notice must make clear that the eligible organization is neither administering nor funding the contraceptive benefits. *Ibid.*

B. Factual Background and Prior Proceedings

The plaintiff in *Geneva* is Geneva College, which is eligible for a religious accommodation described above. Geneva College provides health coverage to its

employees and students through insured plans.[3] The plaintiffs in *Zubik/Persico* include entities (such as the Diocese of Pittsburgh and the Diocese of Erie) that are exempt from the contraceptive coverage requirement under 45 C.F.R. § 147.131(a), as well as other employers (Catholic Charities, St. Martin Center, Prince of Peace Center, and Erie Catholic Preparatory School) that are eligible to opt out under an accommodation. These plaintiffs provide health coverage under self-insured plans that are administered by third party administrators.

Plaintiffs claim that the regulations violate the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, which provides that the government "shall not substantially burden a person's exercise of religion" unless the application of that burden is the least restrictive means to advance a compelling governmental interest. They argue that opting out of the contraceptive-coverage requirement substantially burdens their religious exercise because doing so "facilitat[es] free access to the objected to services." JA 55; *see also* JA 116 (similar).

Accepting this RFRA claim, the district court in *Geneva College* issued preliminary injunctions with respect to Geneva College's student plan (JA 35) and employee plan (JA 67).[4] The district court in *Zubik/Persico* issued a preliminary

[3] There are additional plaintiffs in *Geneva* but their claims are not at issue here.

[4] The *Geneva* court's preliminary injunction with respect to Geneva's student plan was premature because the final regulations establishing the accommodations had not yet been issued. However, the preliminary injunction with respect to

Continued on next page.

injunction with respect to the plans at issue in those cases (JA 134) and subsequently granted plaintiffs' unopposed motion to convert that preliminary injunction into a permanent injunction (JA 136).

SUMMARY OF ARGUMENT

Plaintiffs are either already exempt from the requirement to provide contraceptive coverage or can opt out of that requirement by completing a form and providing a copy to their health insurance issuer or third party administrator. Plaintiffs object to opting out on the ground that, once they have opted out, third parties will separately provide payments for contraceptive services without cost to or involvement by plaintiffs.

Plaintiffs cannot convert their opt-out right into a substantial burden by characterizing the opt-out as "facilitating" the provision of contraceptive coverage by other parties. Eligible organizations that opt out do not "facilitate" the provision of contraceptive coverage by third parties, just as they do not "facilitate" the federal government's reimbursement of third party administrators for the cost of providing such coverage. If third parties step in and provide coverage, they do so as a result of legal obligations imposed upon them or the availability of reimbursements from the government.

Geneva's employee plan was issued after those regulations were finalized, and the district court incorporated the reasoning of its prior decision.

Even if the accommodations were subject to RFRA's compelling-interest test, plaintiffs' claims would fail because the accommodations further compelling interests. First, the government has a compelling interest in being able to accommodate religious concerns in this and other programs by asking religious objectors to identify themselves and by then filling the gaps created by the accommodations. Second, the contraceptive-coverage requirement and the broader framework of which it is part advance the government's compelling interests in providing uniform insurance benefits, protecting the public health, and providing equal access for women to health-care services. It is difficult if not impossible to conceive of a regulation that would achieve these compelling interests that is less restrictive than an opt-out option.

STANDARD OF REVIEW

These appeals present issues of law that are subject to *de novo* review. *See*, *e.g.*, *New Jersey Primary Care Ass'n, Inc.* v. *New Jersey Dep't of Human Services*, 722 F.3d 527, 535 (3d Cir. 2013) (conclusions of law that underlie a preliminary injunction are subject to plenary review).

ARGUMENT

THE CHALLENGED REGULATIONS DO NOT IMPERMISSIBLY BURDEN PLAINTIFFS' EXERCISE OF RELIGION UNDER RFRA.

A. The Challenged Accommodations, Which Allow Plaintiffs to Opt Out of Providing Contraceptive Coverage, Do Not Substantially Burden Plaintiffs' Religious Exercise Under RFRA.

1. Plaintiffs are permitted to opt out of providing such coverage.

Congress enacted RFRA to restore the state of Free Exercise law that prevailed prior to *Employment Division* v. *Smith*, 494 U.S. 872 (1990). *See* 42 U.S.C. § 2000bb(a)(4), (5), and (b)(1). In *Smith*, the Supreme Court held that the Free Exercise Clause does not require religion-based exemptions from neutral laws of general applicability. *See* 494 U.S. at 876-90. RFRA later "adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006).

The initial version of RFRA prohibited the government from imposing any "burden" on free exercise. Congress added the word "substantially" "to make it clear that the compelling interest standards set forth in the act" apply "only to Government actions [that] place a substantial burden on the exercise of" religion, as contemplated by pre-*Smith* case law. 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); *see ibid.*(statement of Sen. Hatch). Consistent with RFRA's restorative purpose, Congress expected courts considering RFRA claims to "look to free exercise cases decided prior to *Smith* for guidance." S. Rep. No. 111,

103d Cong., 1st Sess. 8-9 (1993) (Senate Report); *see* H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993) (same); *see also* 146 Cong. Rec. S7774, 7776 (July 27, 2000) (joint statement of Sens. Hatch and Kennedy) (explaining that, for purposes of the Religious Land Use and Institutionalized Persons Act of 2000, which was modeled on RFRA, "[t]he term 'substantial burden' . . . is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise"). Whether a burden is "substantial" under RFRA is a question of law, not a "question[] of fact, proven by the credibility of the claimant." *Mahoney* v. *Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011); *see, e.g.*, *Bowen* v. *Roy*, 476 U.S. 693, 701 n.6 (1986) ("Roy's religious views may not accept this distinction between individual and governmental conduct," but the law "recognize[s] such a distinction").

None of the plaintiffs here is required to provide contraceptive coverage. Some plaintiffs are exempt from the contraceptive coverage requirement because they fall into the long-established category in the Internal Revenue Code for churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order. *See* 45 C.F.R. § 147.131(a) (cross-referencing 26 U.S.C. § 6033(a)(3)(A)(i) and (iii)).

The remaining plaintiffs concede that they satisfy the criteria for the additional religious accommodations under which they do not have to provide contraceptive coverage. *See* 45 C.F.R. § 147.131(b) and (c)(1); 29 C.F.R. § 2590.715-2713A(a), (b)(1). To opt out of this coverage requirement, these plaintiffs need only complete a form

stating that they are eligible and provide a copy to their insurance issuer or third party administrator. *See* 78 Fed. Reg. 39,870-01, 39,874-75 (July 2, 2013); *see, e.g.*, 29 C.F.R. § 2590.715-2713A(a)(4), (b)(1), (c)(1); *see also Michigan Catholic Conference* v. *Sebelius*, _ F. Supp. 2d _, 2013 WL 6838707, *7 (W.D. Mich. Dec. 27, 2013), *appeal pending*, No. 13-2723 (6th Cir.) (eligible organizations need only "attest to [their] religious beliefs and step aside"). Indeed, plaintiffs presumably would need to inform their insurer or third party administrator of their objection even if they were automatically exempt from the coverage requirement, to ensure that they would not be contracting, arranging, paying, or referring for such coverage. *Univ. of Notre Dame* v. *Sebelius*, _ F. Supp. 2d _, 2013 WL 6804773, *8, *aff'd*, 743 F.3d 547 (7th Cir. 2014).

2. Plaintiffs object to requirements imposed on third parties, not on themselves.

The responsibilities that the regulations place on insurance issuers and third party administrators require no action by plaintiffs. Plaintiffs will not "contract, arrange, pay, or refer" for such coverage, 78 Fed. Reg. at 39,874, and the regulations bar insurance issuers and third party administrators from passing along any costs, directly or indirectly, with respect to payments for contraceptive services. *See* 45 C.F.R. § 147.131(c)(2)(ii) (insured plans) ("With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the

group health plan, or plan participants or beneficiaries."); 29 C.F.R. § 2590.715-2713A(b)(2)(i) and (ii) (same for self-insured plans); *see also* 45 C.F.R. § 147.131(c)(2)(i)(A) (separate coverage must be "[e]xpressly exclude[d] . . . from the group health insurance coverage provided in connection with [plaintiffs'] group health plan[s]"); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(A) ("Obligations of the third party administrator" are imposed by regulation, and the employer does "not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services.").

Insurance issuers and third party administrators—rather than the eligible organizations—must notify plan participants of the availability of separate payments for contraceptive services, and "[t]he notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services[.]" 45 C.F.R. § 147.131(d) (insured plans); 29 C.F.R. § 2590.715-2713A(d) (same for self-insured plans).

Plaintiffs do not contend that their religious exercise is burdened by completing a form that states that they are religious non-profit organizations with religious objections to providing contraceptive coverage. Their objection is instead that federal law requires insurers and third party administrators to provide coverage after plaintiffs declare that they will not provide coverage themselves. *See* JA 77 (objecting that "provid[ing] a self-certification to their third-party administrator ("TPA"), [is] thus facilitating/initiating the process by which the TPA will obtain coverage for the

contraceptive products, services, and counseling for the organizations' employees"); JA 55 (objecting that the "self-certification requirement substantially burdens its religious exercise by requiring it to act as the 'sole trigger' of access to the objected to services").

Plaintiffs cannot transform their right, as eligible organizations, *not* to provide coverage into a substantial burden by characterizing their decision to opt out as "facilitating" the provision of contraceptive coverage by third parties. Eligible organizations that opt out do not "facilitate" the provision of contraceptive coverage by third parties, just as they do not "facilitate" the federal government's reimbursement of third party administrators for the cost of providing such coverage. *Notre Dame*, 743 F.3d at 554 ("Federal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services."). Third parties provide coverage as a result of legal obligations imposed by the government. Plaintiffs are "free to opt out of providing the coverage [themselves], but [they] can't stop anyone else from providing it." *Notre Dame*, _ F. Supp. 2d. _, 2013 WL 6804773, at *1. If, after an eligible employer opts out, an insurance issuer or third party administrator makes separate payments due to an obligation imposed by the government or the availability of reimbursement by the government, employees and students will receive coverage for contraceptive services *despite* plaintiffs' religious objections, not *because* of them.

In plaintiffs' view, it is immaterial whether they are required to offer and pay for contraceptive coverage or whether they may decline to do so. On this reasoning, a conscientious objector could object not only to his own military service, but also to opting out, on the theory that his opt-out would "'trigger' the drafting of a replacement who was not a conscientious objector." *Notre Dame*, 743 F.3d at 556. "That seems a fantastic suggestion," yet, "confronted with this hypothetical at the oral argument" in *Notre Dame*, the plaintiff's counsel "acknowledged its applicability and said that drafting a replacement indeed would substantially burden the [conscientious objector's] religion." *Ibid.* Similarly, on plaintiffs' reasoning here, the plaintiff in *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), could have demanded not only that he not make weapons but also that he not *opt out* of doing so, because someone else would then take his place on the assembly line.[5]

[5] Instead of opting out of contraceptive coverage, plaintiffs also could choose to discontinue offering health coverage. In that scenario, plaintiffs' employees and students could purchase health insurance, which covers all essential health benefits including contraceptive benefits, on exchanges where many may qualify for subsidies. *See* 26 U.S.C. § 36B. It is not clear whether plaintiffs believe that this too would constitute "facilitating" contraceptive coverage; but it also would not constitute the kind of burden that is "substantial" under RFRA. This is yet another means by which plaintiffs could avoid providing the coverage to which they object. *See Tony & Susan Alamo Found.* v. *Sec'y of Labor*, 471 U.S. 290, 303-305 (1985) (option to compensate employees by furnishing room and board obviates religious objection to paying cash wages). In that scenario, plaintiffs would save the cost of providing health coverage and instead may be subject to a tax of $2,000 per full-time employee. *See* 26 U.S.C. § 4980H(a) and (c)(1). Even were the expense greater, a burden is not substantial when it merely "operates so as to make the practice of their religious beliefs more expensive" or inconvenient. *See Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961).

Nothing in the cases on which plaintiffs rely, or in the pre-*Smith* case law that RFRA restored, supports the contention that opting out of an obligation may itself be deemed a substantial burden if someone else will take the objector's place. *See, e.g.*, *Notre Dame*, 743 F.3d at 557 (noting the "novelty of [the] claim—not for the exemption . . . but for the right to have it without having to ask for it"); *Korte* v. *Sebelius*, 735 F.3d 654, 687 (7th Cir. 2013) (emphasizing that the plaintiff corporations "are asking for relief from a regulatory mandate that coerces *them* to pay for something—insurance coverage for contraception") (court's emphasis); *Thomas*, 450 U.S. at 710-712 (explaining that the plaintiff was substantially burdened because he was not able to opt out of the job in which he was "engaged directly in the production of weapons"); *see also Tilton* v. *Richardson*, 403 U.S. 672, 689 (1971) (plurality opinion) (rejecting the plaintiffs' claim that "the Free Exercise Clause is violated because they are compelled to pay taxes, the proceeds of which in part finance grants" to religiously-affiliated colleges to which they objected, on the ground that the plaintiffs were "unable to identify any coercion directed at the practice or exercise of their religious beliefs"); Senate Report 12 (expressly stating that RFRA was not intended to "change the law" as articulated in *Tilton*); *Kaemmerling* v. *Lappin*, 553 F.3d 669, 673-674, 678-679 (D.C. Cir. 2008) (rejecting RFRA challenge to requirement that prisoner give tissue sample on which DNA analysis would later be carried out because

the prisoner did not object in and of itself to bodily violation of giving sample but only to the government's later extracting DNA information).[6]

Unlike the for-profit corporations in cases like *Korte* v. *Sebelius*, 735 F.3d 654, 687 (7th Cir. 2013), plaintiffs here need not "contract, arrange, pay, or refer for contraceptive coverage" to which they have religious objections. 78 Fed. Reg. at 39,874. They "need not place contraceptive coverage into 'the basket of goods and services that constitute [their] healthcare plan[s].'" *Priests for Life* v. *U.S. Dep't of Health & Human Servs.* __ F. Supp. 2d __, No. 13-cv-1261, 2013 WL 6672400, at *10 (D.D.C. Dec. 19. 2013) (quoting *Gilardi* v. *U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), *cert. petn. pending*, No. 13-567). Indeed, the district court in *Notre Dame* observed that the Seventh Circuit emphasized this distinction in *Korte*, "when it stated that the lack of an exemption or accommodation for the for-profit plaintiffs was 'notabl[e],' suggesting that the case might well have come out differently had the *Korte* plaintiffs had access to the accommodation now available to [eligible organizations]." *Notre Dame*, _ F. Supp. 2d _, 2013 WL 6804773, *9 (quoting *Korte*,

[6] Likewise, in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), the plaintiffs challenging a state program providing textbooks to religious schools contended that the program violated the Free Exercise Clause because, "[t]o the extent books are furnished for use in a sectarian school operated by members of one faith, members of other faiths and non-believers are thereby forced to contribute to the propagation of opinions which they disbelieve" and that this was "no less an interference with religious liberty than forcing a man to attend a church." Br. of Appellants 35, *Allen*, *supra* (No. 660). The Court rejected that contention, holding that such a claim of indirect financial support did not constitute coercion of the plaintiffs "as individuals in the practice of their religion." *Allen*, 392 U.S. at 249.

735 F.3d at 662). The Seventh Circuit directly addressed this issue in *Notre Dame*, where the court of appeals concluded that nothing in *Korte* supported the plaintiff's challenge to the accommodations. *Notre Dame*, 743 F.3d at 558 ("Notre Dame can derive no support from our decision in *Korte* v. *Sebelius*, 735 F.3d 654 (7th Cir. 2013), heavily cited in the university's briefs.").

The district court in *Zubik/Persico* mistakenly opined that the regulations require plaintiffs to "supply a third party with the names of the Plaintiffs' respective employees so that the third-party may provide (and/or pay for) contraceptive products, services, and counseling." JA 115; *see also* JA 55 ("Geneva asserts that it would play a central role in facilitating access to the objected to services by coordinating notices with and providing employee information to its insurer."). There is no such requirement. Insurance issuers and third party administrators already have the information they need to make separate payments for contraceptive services. The regulations impose no additional requirement on eligible organizations.

Moreover, it is the obligation of the health insurance issuer or third party administrator to provide notice of the availability of separate payments for contraceptive services. This notice must be "separate from" materials that are distributed in connection with the eligible organization's group health coverage, and the notice must make clear that the eligible organization is neither administering nor funding the contraceptive benefits. 45 C.F.R. § 147.131(d); 29 C.F.R. § 2590.715-2713A(d).

The district court in *Zubik/Persico* also took issue with the fact that churches (and other houses of worship) are automatically exempt from the contraceptive-coverage provision, whereas other religiously affiliated organizations (such as certain universities and social service organizations) may opt out of providing contraceptive coverage by availing themselves of the accommodations. Contrary to the district court's understanding, the regulations do not require that the affiliated organizations be "expelled from the Dioceses' health insurance plans" (JA 76) or otherwise "divid[e] the Catholic Church" (JA 121). Instead, as discussed above, the affiliated organizations can opt out of providing contraceptive coverage and thus continue to provide health coverage under the Dioceses' group health plans.

The *Zubik/Persico* court opined that it is impermissible for the government to distinguish between houses of worship and other religiously affiliated organizations, JA 121, but the Seventh Circuit correctly rejected the same argument. The definition of a "religious employer" in the regulations is based on longstanding Internal Revenue Code provisions. 45 C.F.R. § 147.131(a) (cross-referencing section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended). As the Seventh Circuit explained, "religious employers, defined as in the cited regulation, have long enjoyed advantages (notably tax advantages) over other entities, 26 U.S.C. §§ 6033(a)(3)(A)(i), (iii), without these advantages being thought to violate the establishment clause." *Notre Dame*, 743 F.3d at 560 (citing *Walz* v. *Tax Comm'n of the*

City of New York, 397 U.S. 664, 666 (1970) (upholding property tax exemptions for real property owned by religious organizations and used exclusively for religious worship)).

3. Plaintiffs' analysis disregards the burdens placed on plan participants if plaintiffs' position were accepted.

In urging that an opt out is itself a substantial burden, plaintiffs assert that, for purposes of RFRA, their exercise of religion is burdened by the provision of health coverage to students and employees, and their families, by insurance issuers' and third party administrators' compliance with federal regulations. Plaintiffs (and the district courts) erroneously assume that the RFRA inquiry should evaluate the nature of the asserted burden placed on plaintiffs' exercise of religion without regard to the burden on third parties that would result from accepting their position. In their view, it is immaterial whether an employer's or university's assertion of a right under RFRA would deprive its employees or students of health care coverage.

That approach is at odds with the pre-*Smith* jurisprudence incorporated by RFRA and with both of the free-exercise decisions cited in RFRA itself, *see* 42 U.S.C. § 2000bb(b)(1), which emphasized the importance of third-party interests to the free-exercise analysis. In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the Court accepted the free exercise claim only after stressing that "recognition of the [employee's] right to unemployment benefits under the state statute" did not "serve to abridge any other person's religious liberties." *Id.* at 409. In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), the Court held that the Free Exercise Clause required an exemption from compulsory

education laws for Amish parents only after determining that the parents had "carried" the "difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education," thus establishing that there was only a "minimal difference between what the State would require and what the Amish already accept." *Id.* at 235-236; *see id.* at 222. Moreover, the Court in *Yoder* emphasized that its holding would not extend to a case in which an Amish child affirmatively wanted to attend school over his parents' objection. *See id.* at 231-232. And, in *United States* v. *Lee,* 455 U.S. 252 (1982), the Court's rejection of the employer's free-exercise claim relied on the fact that exempting the employer from the obligation to pay Social Security taxes would "operate[] to impose the employer's religious faith on the employees," who would be denied the benefits to which they were entitled by federal law. *Id.* at 261.

RFRA is not properly interpreted to create tension with the approach of these pre-*Smith* cases.[7] Indeed, the Supreme Court has stressed that, in "[p]roperly

[7] The types of accommodations cited in the debates prior to enactment of RFRA did not impose substantial costs or burdens on third parties. *See, e.g.*, 139 Cong. Rec. E1234-01 (daily ed. May 11, 1993) (statement of Rep. Cardin) (citing as examples of contemplated accommodations ensuring burial of veterans in "veterans' cemeteries on Saturday and Sunday . . . if their religious beliefs required it" and precluding autopsies "on individuals whose religious beliefs prohibit autopsies"); 139 Cong. Rec. S14350-01 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (contemplated accommodations include allowing parents to home school their children, allowing individuals to volunteer at nursing homes, and allowing families to decline autopsies). Such accommodations do not require third parties to forfeit federal protections or benefits to which they are entitled.

applying" the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which was modeled on RFRA, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries[.]" *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005).[8] *Cf. Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 80 (1977) (Title VII's reasonable-accommodation requirement does not entitle employee to a religious accommodation that would come at the expense of other employees).

4. It is the province of this Court to consider whether regulations that allow plaintiffs to decline to provide contraceptive coverage "substantially" burden their exercise of religion under RFRA.

Whether a burden is "substantial" under RFRA is a question of law, not a "question[] of fact, proven by the credibility of the claimant." *Mahoney* v. *Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011); *see, e.g., Bowen*, 476 U.S. at 701 n.6 ("Roy's religious views may not accept this distinction between individual and governmental conduct," but the law "recognize[s] such a distinction"); *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448 (1988) (similar); *Kaemmerling*, 553 F.3d at 679 ("[a]ccepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious

[8] For this reason, *Cutter* rejected an Establishment Clause challenge to RLUIPA. Indeed, the Supreme Court has held that, under certain circumstances, an accommodation that imposes burdens on employees can violate the Establishment Clause. *See Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 708-11 (1985) (holding that a statute requiring an employer to accommodate an employee's Sabbath observance without regard to the burden such an accommodation would impose on the employer or other employees violated the Establishment Clause).

nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened").

Although a court accepts a litigant's sincerely held religious beliefs, it must assess the nature of a claimed burden on religious exercise to determine whether, as a legal matter, that burden is "substantial" under RFRA. Plaintiffs cannot preclude that inquiry by collapsing the question of substantial burden into the sincerity of their beliefs. Were that the case, any person would be able not only to declare a sincerely held religious belief but also to demand absolute deference to its assessment of what constitutes a substantial burden on that belief.

The district courts erred by accepting without inquiry not only that plaintiffs' religious beliefs are sincere but *also* that the challenged right to opt out creates a "substantial" burden on their "exercise of religion" as contemplated by RFRA. This approach does not accord with settled law. *See, e.g., Lyng*, 485 U.S. at 448; *Bowen*, 476 U.S. at 701 n.6; *Tilton*, 403 U.S. at 689; *Allen*, 392 U.S. at 248-249; *Kaemmerling*, 553 F.3d at 679; *Mahoney*, 642 F.3d at 1121; *see also* 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (explaining addition of the "substantial burden" requirement).

In short, while this Court does not scrutinize plaintiffs' religious beliefs, it properly determines whether the challenged regulations impose a substantial burden on those beliefs as provided for by RFRA and pre-*Smith* free-exercise law. Plaintiffs may decline to provide contraceptive coverage without facing any penalties. RFRA

does not give plaintiffs the right to block third parties from making payments for contraceptive services.

B. Plaintiffs' Claims Would Fail Even If the Accommodations Were Subject to RFRA's Compelling-Interest Test.

1. The government has a compelling interest in its ability to operate programs while accommodating religious concerns.

Plaintiffs' claims would fail even if the accommodations were subject to RFRA's compelling-interest test. Plaintiffs challenge a narrow set of regulations that allow them to opt out of providing contraceptive coverage and then require third parties to make or arrange separate payments at government expense. Plaintiffs' extraordinarily broad argument is that religious objectors may object not only to *their own* compliance with legal obligations but also to the fact that, if they decline to comply, the government will pursue its policy objectives in another way.

The government's ability to accommodate religious concerns in this and other areas depends on its ability to ask that religious objectors who do not belong to an identifiable class (such as exempt organizations under the Internal Revenue Code) certify that they are entitled to the religious exception. *See Notre Dame*, 743 F.3d at 557 ("The novelty of [plaintiff's] claim—not for the exemption, which it has, but for the right to have it without having to ask for it—deserves emphasis."). It also depends on the government's ability to fill the gaps created by the accommodations. Plaintiffs' theory, by contrast, asserts that it is insufficient to permit an objector to opt out of an objectionable requirement; the government may not shift plaintiffs' obligations to a

third party but must, in their view, fundamentally restructure its operations or even be unable to fulfill its mission. Under that view, any effort by the government to fill a gap created by an accommodation would, itself, be subject to RFRA's compelling interest test. As the Supreme Court admonished in its pre-*Smith* decisions, "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen*, 476 U.S. at 699. Plaintiffs' reasoning would fundamentally undermine the means by which the government accommodates religious concerns and would impair the government's operations and mission.

2. The contraceptive coverage provision advances compelling governmental interests.

Plaintiffs' claims also fail because the contraceptive-coverage provision, including the religious accommodations at issue here, advance compelling governmental interests and are the least restrictive means to achieve them.

a. The Affordable Care Act and its preventive-services coverage provision advance the compelling interest of ensuring a "comprehensive insurance system with a variety of benefits available to all participants." *Lee*, 455 U.S. at 258. "While [RFRA] adopts a 'compelling governmental interest' standard, '[c]ontext matters' in the application of that standard." *Cutter*, 544 U.S. at 722-23 (citation omitted; brackets in original). That context here includes not only the Affordable Care Act but also ERISA, which the Affordable Care Act amends by (among other things) adding the

preventive health services coverage provision. ERISA is "a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans," *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). In enacting ERISA, Congress found "that the continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit] plans," which "are affected with a national public interest." 29 U.S.C. § 1001(a). Congress "declared" that ERISA's "policy" was in part to "protect . . . the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b).

When evaluating a claim under RFRA, a court must consider the impact of granting relief on third parties, a task that is particularly imperative when the requested relief would deprive third parties of right and benefits secured by federal law. *Compare Sherbert*, 374 U.S. at 409 ("recognition of the [employee's] right to unemployment benefits under the state statute" did not "serve to abridge any other person's religious liberties"), and *Yoder*, 406 U.S. at 222, 231-32, 235-36 (parents had "carried" the "difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education" and emphasizing that the holding would not extend to a case in which an Amish child affirmatively wanted to attend school over his parents' objection), *with Lee,* 455 U.S. at 261 (refusing to exempt employer from paying Social Security taxes because that would "operate[] to impose the employer's religious faith on the employees," who would be denied the benefits to which they were entitled by federal law). *See also Cutter*, 544 U.S. at 720, 722-23

The impact on third parties that would result from plaintiffs' position, moreover, would undermine comprehensive efforts to protect the public health, which is unquestionably a compelling governmental interest. "A woman's ability to control whether and when she will become pregnant has highly significant impacts on her health, her child's health, and the economic well-being of herself and her family." *Korte*, 735 F.3d at 725 (Rovner, J., dissenting). Physician and public health organizations, such as the American Medical Association, the American Academy of Pediatrics, and the March of Dimes accordingly "recommend the use of family planning services as part of preventive care for women." IOM Report 104. This is not a "broadly formulated interest[] justifying the general applicability of government mandates," *O Centro*, 546 U.S. at 431, but rather a concrete and specific one, supported by a wealth of empirical evidence.

Use of contraceptives reduces the incidence of unintended pregnancies. IOM Report 102-03. Unintended pregnancies pose special health risks because a woman with an unintended pregnancy "may not immediately be aware that [she is] pregnant, and thus delay prenatal care." 78 Fed. Reg. at 39,872; *see* IOM Report 103. A woman who does not know she is pregnant is also more likely to engage in "behaviors during pregnancy, such as smoking and consumption of alcohol, that pose pregnancy-related risks." 78 Fed. Reg. at 39,872; *see* IOM Report 103. As a result, "[s]tudies show a greater risk of preterm birth and low birth weight among unintended pregnancies." 78 Fed. Reg. at 39,872; *see* IOM Report 103. And, because contraceptives reduce the

number of unintended pregnancies, they "reduce the number of women seeking abortions." 78 Fed. Reg. at 39,872.

Contraceptive use also "helps women improve birth spacing and therefore avoid the increased risk of adverse pregnancy outcomes that comes with pregnancies that are too closely spaced." 78 Fed. Reg. at 39,872; *see* IOM Report 103. In particular, short intervals between pregnancies "have been associated with low birth weight, prematurity, and small-for-gestational age births." 78 Fed. Reg. at 39,872. "[P]regnancy may be contraindicated for women with serious medical conditions such as pulmonary hypertension . . . and cyanotic heart disease, and for women with the Marfan Syndrome." IOM Report 103-04; *see* 78 Fed. Reg. at 39,872. And "there are demonstrated preventive health benefits from contraceptives relating to conditions other than pregnancy." 78 Fed. Reg. at 39,872. For example, contraceptives can prevent certain cancers, menstrual disorders, and pelvic pain. *Ibid.*; *see* IOM Report 107.

The contraceptive-coverage regulations, including the religious accommodations, also advance the government's related compelling interest in assuring that women have equal access to recommended health-care services. 78 Fed. Reg. at 39,872, 39,887; *see Roberts* v. *United States Jaycees*, 468 U.S. 609, 626 (1984) (discussing the fundamental "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women," and

noting that "[a]ssuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests").

Congress enacted the women's preventive-services coverage provision because "women have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. 29,070 (2009) (statement of Sen. Feinstein); *see* IOM Report 18. Prior to the Affordable Care Act, "[w]omen of childbearing age spen[t] 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. at 29,070 (statement of Sen. Feinstein); *see* Ctrs. for Medicare & Medicaid Servs., *National Health Care Spending By Gender and Age: 2004 Highlights*, ("Females 19-44 years old spent 73 percent more per capita [on health care expenses] than did males of the same age."). These disproportionately high costs had a tangible impact: women often found that copayments and other cost sharing for important preventive services "[were] so high that they avoid[ed] getting [the services] in the first place." 155 Cong. Rec. at 29,302 (statement of Sen. Mikulski); *see* IOM Report 19 ("[W]omen are consistently more likely than men to report a wide range of cost-related barriers to receiving or delaying medical tests and treatments and to filling prescriptions for themselves and their families."). Studies have demonstrated that "even moderate copayments for preventive services" can "deter patients from receiving those services." IOM Report 19.

b. The district courts mistakenly opined that the government's compelling interests are undermined by the religious employer exemption or other features of the Affordable Care Act. JA 63-64 (citing JA 29-31)); JA 123-124.

The regulatory exemption for religious employers extends to "churches and other houses of worship" and their integrated auxiliaries. 78 Fed. Reg. at 39,874; *see* 45 C.F.R. § 147.131(a). There is a long tradition of protecting the autonomy of a church through exemptions of this kind, and the Religion Clauses of the First Amendment give "'special solicitude to the rights of religious organizations' as religious organizations, respecting their autonomy to shape their own missions, conduct their own ministries, and generally govern themselves in accordance with their own doctrines as religious institutions." *Korte*, 735 F.3d at 677 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 706 (2012)). In establishing the religious-employer exemption, the Departments explained that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection" and that those employees "would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874.

That limited exemption does not undermine the government's interest in ensuring that women generally have access to contraceptive coverage. In *Lee*, the Supreme Court rejected an argument that was analogous to the reasoning of the

district courts here. The Supreme Court rejected a Free Exercise claim on the ground that it would undermine the comprehensive and mandatory nature of Social Security, 455 U.S. at 258, even as the Court emphasized that Congress had provided religion-based exemptions for self-employed individuals, *id.* at 260-61. The Supreme Court concluded that "[c]onfining [the exemption] to the self-employed provided for a narrow category which was readily identifiable," *ibid.*, and held that Congress's inclusion of such a limited exemption did not undermine the government's interest in enforcing the law outside the exemption's confines. Here, too, the limited exemption for houses of worship does not undermine the government's interest in requiring or arranging for contraceptive coverage outside that narrow context.

Nor does the Affordable Care Act's grandfathering provision, 42 U.S.C. § 18011; 45 C.F.R. § 147.140(g), provide any basis to deny women the separate payments for contraceptives that the regulations require. The grandfathering provision has the effect of allowing a transition period for compliance with a number of the Act's requirements (not just the contraceptive-coverage and other preventive-services provisions) until a health plan makes one or more specified changes, such as an increase in cost-sharing requirements above a certain threshold, a decrease in employer contributions beyond a certain threshold, or the elimination of certain benefits. The impact of this grandfathering provision is thus "temporary, intended to be a means for gradually transitioning employers into mandatory coverage." *Gilardi*, 733 F.3d at 1241 (Edwards, J., concurring in part and dissenting in part). And, in fact,

the percentage of employees in grandfathered plans is steadily declining, having dropped from 56% in 2011 to 48% in 2012 to 36% in 2013. Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits 2013 Annual Survey* 7, 196.

The compelling nature of an interest is not diminished because the government phases in a regulation advancing it in order to avoid undue disruption. *Cf. Heckler* v. *Mathews*, 465 U.S. 728, 746-48 (1984) (noting that "protection of reasonable reliance interests is . . . a legitimate governmental objective" that Congress may permissibly advance through phased implementation of regulatory requirements). Congress specified that various crucial Affordable Care Act provisions would not be immediately effective. For example, the minimum coverage provision, 26 U.S.C. § 5000A, as well as the guaranteed-issue and community-rating insurance market reforms at the heart of the Act, did not take effect until 2014, four years after enactment. *Id.* at 2580; *see* 42 U.S.C. §§ 300gg-1, 300gg-3, 300gg-4(a) (guaranteed-issue provision); *see also* 42 U.S.C. §§ 300gg(a)(1), 300gg-4(b) (community-rating provision). These post-2010 effective dates do not in any way call into question the compelling nature of the interests that these key provisions advance. Similarly, in enacting the Americans with Disabilities Act, for example, Congress imposed different requirements on existing grandfathered facilities than on later-constructed facilities, *see* 42 U.S.C. §§ 12183(a)(1), 12182(b)(2)(A)(iv), but that reasonable distinction did not undermine the interests served by the law.

The *Geneva* court was similarly mistaken in positing that, because employers with fewer than 50 full-time-equivalent employees are exempt from a different provision, 26 U.S.C. § 4980H, which subjects certain large employers to a potential tax if they fail to offer full-time employees (and their dependents) adequate health coverage, 26 U.S.C. § 4980H(c)(2)(A), therefore the interests are not compelling. The preventive-services coverage requirements apply without regard to the size of the employer. 42 U.S.C. § 300gg-13. Small employers that provide health coverage to their employees must comply with the preventive-services coverage provision.

By the *Geneva* court's logic, none of the Act's provisions regulating group health plans would be supported by a compelling interest, given that small employers face no potential penalty for failing to offer a plan in the first place. Yet federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by those statutes. For example, when Title VII was first enacted, the statute's prohibitions on employment discrimination did not apply to employers with fewer than 25 employees, and even now, those prohibitions do not apply to employers with fewer than 15 employees. *See Arbaugh* v. *Y&H Corp.*, 546 U.S 500, 504-05 & n.2 (2006). This exception for small employers does not call into question the government's compelling interests in eradicating employment discrimination. Similarly, the Social Security Act originally did not cover agricultural or domestic workers. *See Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 584 (1937); *Lee*, 455 U.S. at 258 n.7 (noting additional ways in which Social Security Act's coverage was

"broadened" over the years). Yet those initial exemptions for large categories of employees did not undermine the compelling interests underlying the statute.

Moreover, the *Geneva* court overlooked the fact that Congress expected the employees of small businesses that choose not to offer group health coverage to receive the required preventive services coverage through other means. Such employees may obtain coverage on a health insurance exchange, and all policies offered on exchanges provide contraceptive coverage without cost sharing. *See* 45 C.F.R. § 147.130; *see also* 26 U.S.C. § 36B (providing tax credits for eligible individuals for insurance purchased on exchanges); 26 U.S.C. § 5000A (minimum coverage provision).

c. It is difficult if not impossible to conceive of a means that is less restrictive than an accommodation that allows objecting organizations to opt out of providing contraceptive coverage. The *Zubik/Persico* court nonetheless opined that the government should expand the exemption for religious employers, in which case the affected women will not receive separate payments for contraceptive services from third parties. JA 128. But the point of the regulations is to require third parties to make separate payments for contraceptive services after entities like plaintiffs opt out, so that the affected women will be able to receive, though other mechanisms, the coverage that entities like plaintiffs elect not to provide. The *Zubik/Persico* court's proposed "alternative" is directly at odds with that basic objective.

CONCLUSION

The orders on review should be reversed.

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

DAVID J. HICKTON
United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK. B. STERN
/s/ALISA B. KLEIN
ADAM C. JED
PATRICK G. NEMEROFF
(202) 514-5089
Attorneys, Appellate Staff
Civil Division, Room 7531
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

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REQUIRED CERTIFICATIONS

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,290 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

I further certify to the following:

As counsel for the federal government, I am not required to be a member of the bar of this Court.

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/s/ Alisa B. Klein
Alisa B. Klein

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein
Alisa B. Klein