NO. 15-191

# In the Supreme Court of the United States

GENEVA COLLEGE,

*Petitioner*,

v.

SYLVIA MATHEWS BURWELL, et al.,

*Respondents*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## REPLY BRIEF FOR PETITIONER


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## CORPORATE DISCLOSURE STATEMENT

Petitioner Geneva College is a Pennsylvania nonprofit religious corporation. It does not have parent companies and is not publicly held.

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## INTRODUCTION

To oppose review of this nationwide controversy, the Government insists it is delivering abortifacient coverage without involving Geneva College. But the statute and regulations say otherwise.

The Government has declared that the paperwork it forces Geneva to submit "is an instrument under which [Geneva's health] plan is operated." Pet. App. 182a. The regulations insist that the abortifacients will be available in "seamless coverage" with Geneva's own plan. 80 Fed. Reg. 41,318, 41,328 (July 14, 2015). The Government's rules explain that the accommodation is not an exemption from the Mandate, but is a way that "a group health plan . . . complies" with it. *Id.* at 41,343. All of these descriptions are reinforced by the underlying statute, which imposes coverage in a "group health plan." 42 U.S.C. § 300gg-13(a).

The Government fashioned a Mandate scheme by which it delivers abortifacient coverage through objecting religious entities and their health plans, not apart from them. The Government could instead comply with RFRA by creating a system that does not involve Geneva College, but it chooses not to.

That is an issue of immense national importance. Geneva presents insured and student health plan arrangements that are very common and, therefore, essential to the Court's resolution of the issue. And the lower courts ruled on the gamut of issues implicated in this petition. This Court should grant review.

## ARGUMENT

### I. The Mandate's accommodation delivers abortifacient coverage through Geneva College and its own health plan.

The Government claims that it is only trying to provide "separate coverage" of abortifacients to Geneva College's employees and students. Opp. 13. If that were true, why would the Government insist that Geneva and its plan be involved in the process? No exempt church is required to submit a self-certification, much less one that involves them in the coverage the way this accommodation does. 45 C.F.R. § 147.131(a). If the Government really wishes to remove Geneva entirely from the process, why is Geneva not simply exempt, with no obligations, plan amendments, or connection to abortifacient coverage?

The answer is that the accommodation is designed to involve Geneva, not to distance it. Geneva does not object to separate coverage. It objects to the accommodation's mandatory involvement of Geneva and its health plan in the process. The only one stopping the Government from providing abortifacient coverage "separate" from Geneva's involvement is the Government itself.

The importance of the Government's disregard of *Hobby Lobby* in this case is demonstrated by the Government's regulations, which show that Geneva College's health plan is not separate from the abortifacient coverage to which it objects. Contrary to Respondents' assertions in their Opposition and to

those of the court below, the Mandate's accommodation does not remove Geneva, "totally" or otherwise, Pet. App. 43a, from the provision of coverage to which Geneva has a deep religious objection. Instead, the Government's rules explain that the coverage is coming through Geneva.

The Government often repeats that under the accommodation Geneva does not have to "contract, arrange, pay, or refer for" abortifacient coverage. *See, e.g.,* 80 Fed. Reg. at 41,319; Opp. 7–8. But this is a mantra rather than a reality. The legal reality is reflected in four mechanisms by which the accommodation makes objectionable coverage flow through Geneva and its health plan.

First, the form the Government forces Geneva to submit, the EBSA form 700, declares in no uncertain terms that "this form or a notice to the Secretary is an instrument under which the plan is operated." Pet. App. 182a. Necessarily then, Geneva must "contract" or "arrange" for abortifacient coverage. It must submit a self-certification amending its health plan contract (and, because Geneva is a large employer, it must enter that contract in the first place). The self-certification operates as an instrument of Geneva's health plan to guarantee abortifacient coverage. This is the reason the self-certification requires Geneva to identify its health insurer. *Id.*

The Government contradicts its own form when it claims that Geneva's "contracts with [its insurer] will continue to be 'solely for services to which [they] do not object.'" Opp. 18 (quoting *E. Texas Baptist*

*Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015)). Instead, the self-certification says it makes delivery of the objectionable services part of Geneva's plan contract.

Second, the regulations go on to clarify that there is no cognizable separation between the abortifacient coverage and Geneva's health plan. The Government received comments suggesting that it should create an accommodation where objectionable coverage is truly separate. 80 Fed. Reg. at 41,328. The Government explained, however, that it was rejecting all such alternatives. Instead, it adopted the present accommodation because truly separate "alternatives raise obstacles to access to seamless coverage." *Id.* Thus the Government finalized an accommodation to deliver abortifacient coverage "in accommodated health plans," which are "better places to provide seamless coverage of the contraceptive services." *Id.* at 41,328–29.

The Government therefore created the particular structure precisely because the accommodation delivers objectionable coverage in a manner connected to the health plan for which Geneva contracts, arranges, and pays. It is impossible for the Government to claim simultaneously that Geneva is removed from providing abortifacient coverage, while insisting that coverage is "seamless" with Geneva's health plan.

The Government tries to rationalize its "separation" theory by protesting that "the 'seamless' nature of the coverage does not reflect any involvement by the objecting employers," because

they do not pay for it. Opp. 19. But Geneva's objection is not just about paying. The Government has declared the abortifacient coverage is incorporated through Geneva's plan. It cannot simply declare by fiat that such coverage is really separate. The Government says there is no daylight between Geneva's plan and delivery of abortifacients to women. Therefore the accommodation must also be a substantial burden on Geneva's religious beliefs. The Government's parsing of connectedness from separateness is the same kind of argument this Court rejected in *Burwell v. Hobby Lobby Stores, Inc.*: "[a]rrogating the authority to provide a binding national answer to [a] religious and philosophical question" of attenuation. 134 S. Ct. 2751, 2778 (2014).

Third, the interconnectedness between abortifacient coverage and Geneva's plan is shown by the sharp difference within the Government's rules between an exemption and the accommodation. Religious exemptions are limited to church-related groups. 45 C.F.R. § 147.131(a). Only they are exempt "religious employers." *Id.* Nothing is required of them or their health plan: no notice, no abortifacient coverage through their plan, and no mechanism to provide such coverage to their employees. It is truly an exemption.

The accommodation is not an exemption. The Government explicitly rejected the suggestion to expand the exemption to other "religiously affiliated ministries" like Geneva. 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). Instead of being an exemption, the accommodation is a *method of compliance*. The

Government's rules explain that through the accommodation process, "a group health plan . . . complies" with the Mandate. 80 Fed. Reg. at 41,343. That process requires Geneva to submit a form that amends its plan instrument to ensure abortifacient coverage. In this respect, the Government misconstrues its regulations when it states that "[t]he accommodation exempts religious objectors." Opp. 13. The Mandate creates only one exemption—for "religious employers" under 45 CFR § 147.131(a)—and the accommodation is not it.

Fourth, the underlying reason the accommodation makes Geneva comply in its plan, instead of being exempt, is because the Mandate's statutory source requires compliance. That ACA provision, 42 U.S.C. § 300gg-13(a), mandates coverage by a "group health plan and a health insurance issuer offering group or individual health insurance coverage." *Id.* Because Respondents did not exempt Geneva, they painted themselves into a corner where their accommodation forces Geneva to "compl[y]." 80 Fed. Reg. at 41,343. And because Geneva complies, it is forced to provide abortifacient coverage through its "group health plan," per the statutory mandate.

By employing an accommodation where Geneva "complies" instead of being exempt, the Government chooses to involve Geneva in the delivery of abortifacients. This is why the accommodation forces Geneva to amend its plan to guarantee the coverage. As such, the Government is incorrect to claim that Geneva seeks "to require the Government to conduct its own internal affairs in ways that comport with

the religious beliefs of particular citizens." Opp. 17 (quoting *Bowen v. Roy*, 476 U.S. 693, 699 (1986)). Geneva's health plans and contracts are not "internal affairs" of the Government. They are internal affairs of Geneva. Nor is Geneva's plan "the government's arrangements with third parties." *Id.* It is the Government's arrangements with Geneva's own behavior. Paradoxically, the Government has redefined Geneva's private affairs as purely government affairs, and then chided Geneva for objecting to government activity.

Geneva's integral involvement under the accommodation belies the Government's assertion that Geneva's insurer must "expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan." Opp. 23 (quoting 45 C.F.R. § 147.131(c)(2)(1)). This toothless disclaimer is an insufficient summary of what is happening. The accommodation also forces Geneva to amend its contract to include objectionable coverage, attaches that coverage in an undifferentiated manner to Geneva's plan, and imposes compliance with the intra-plan Mandate rather than an exemption.

If the Government truly wanted to remove Geneva from the process of providing abortifacient coverage, it would not continue to involve Geneva or its health plan in any of these ways. Out of one side of its mouth the Government claims to exclude abortifacients from Geneva's plan, while out of the other side it ensures that the coverage is inseparable from the plan. This brings to mind the lament of Michael Corleone: "Just when I thought I was out

. . . they pull me back in!"[1] The Court should not ignore the levers that the accommodation creates to pull Geneva and its plan back into providing abortifacient coverage even while the Government feigns Geneva's removal.

The Government sought, and still seeks, to define "substantial burden" under RFRA by means of causal "attenuat[ion]" instead of by the "very different question" of pressure that the Government places on Geneva to violate its beliefs. *Hobby Lobby*, 134 S. Ct. at 2777–78. The reason the Government's accommodation is so different from how the Government describes it is that the ACA and ERISA create legal barriers to letting Respondents achieve both separation and coverage through a plan. The Government could amend those statutes to remove Geneva from the process, but instead Respondents prioritized contraception access to respecting Geneva's separation from abortifacient coverage. So they created a regulatory scheme whose mechanics explicitly require the involvement and ongoing use of Geneva and its health plan. The Government has chosen to call the scheme separate instead of making it so.

Given that the actual operation of the accommodation bolsters Geneva's case, it is not surprising that the Government would argue that "Petitioners' RFRA claims do not depend on the details of the accommodation." Opp. 21. The Government similarly maintained in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546

[1] *The Godfather: Part III* (Paramount Pictures 1990).

U.S. 418, 430 (2006), that there was "no need to assess the particulars" of its statutory scheme. But this Court held that RFRA requires "an inquiry more focused than the government's categorical approach." *Id.* What the accommodation does—as distinct from what the Government says it does—is essential to the Court's inquiry. The accommodation makes abortifacient coverage flow necessarily with, through, and by amending Geneva's own health plan, forcing it to comply rather than be exempt from the group plan Mandate.

The Government is incorrect in characterizing Geneva's objection as focusing on what happens "after" it sends a mere notification off. *See* Opp. 15 (citing Pet. App. 37a). The notification itself amends Geneva's plan, which is a plan it continues to provide in an ongoing manner. The objectionable coverage is not occurring "after," but during, as a result of, and inseparable from the actions of Geneva and its health plan.

The Government could provide this coverage in other separate ways, but it chooses not to do so. For example, Congress could amend the ACA and ERISA to allow the Government to ensure coverage without involving Geneva. Or, in light of the Government's history of implementing provisions of the ACA, it could make contraceptive coverage available through sources separate from Geneva, such as the ACA's state exchanges for health plans.

But Geneva does not maintain that "employers may prevent their employees from receiving contraceptive coverage," or that the Government

may not "arrang[e] for third parties to provide those women with separate coverage." Opp. 13. Geneva's claim by no means stops the Government from arranging separate coverage. The accommodation does not create separation between Geneva and the abortifacient coverage to which it objects. It effectively forces Geneva to arrange and contract for that coverage, and merely labels the scheme "separate" so as to advance a new version of the attenuation argument that the Government lost in *Hobby Lobby*.

## II. The courts below fully considered the RFRA elements raised against the Mandate.

The Government is incorrect in suggesting that this case is a poor vehicle due to an alleged inadequacy in the scope of the proceedings below. The district court thoroughly considered all elements of Geneva's RFRA claim, twice: first for Geneva's student health plan, and again for its employee plan. Pet. App. 50a–124a. This involved consideration of Geneva's religious exercise, the substantial burden that the Mandate and its accommodation impose, whether the Government has established a compelling interest, and whether the accommodation is the least restrictive means of serving such an interest. *See, e.g.,* Pet. App. 71a–75a. This provides an ample and thoughtful record analyzing the issues raised in Geneva's RFRA claim.

The Third Circuit below zeroed in on the substantial burden argument, wrote on that issue extensively, and thus established a broad foundation for review of the predominant issue in the current

controversy that involves religious non-profits. Pet. App. 29a–48a. A similar scope characterized the decisions this Court reviewed in the for-profit context, including the Third Circuit's decision in *Conestoga Wood Specialties Corporation*. *See* 134 S. Ct. 678 (2013) (granting certiorari petition). In *Conestoga* the Third Circuit, as here, did not reach the compelling interest and least restrictive means issues simply because it found no substantial burden. *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 389 (3d Cir. 2013). This Court granted certiorari anyway.

It should do so again. The substantial burden issue is the heart of the present dispute. Indeed, the court of appeals ruled below not only that Geneva's free exercise rights are not substantially burdened, but that they are not burdened at all. Pet. App. 46a. That extreme ruling deserves this Court's review. The extensive judicial discussion of all of RFRA's elements, including in the district court below, demonstrates that the Third Circuit's focus on the substantial burden still allows this Court to adequately explore strict scrutiny or any of the issues Geneva has raised.

## III. Geneva College sponsors health plans that are essential to the resolution of this controversy.

The Government is also incorrect in suggesting that this case presents an inadequate vehicle because of the nature of Geneva College's health insurance arrangements. To the contrary, this case

presents questions at the core of religious organizations' quandary under the Mandate.

Geneva sponsors both a fully insured plan and a student health plan. Fully insured health plans are common among religious groups due to the economic difficulty of a small or mid-sized non-profit organization self-funding its health insurance. Moreover, many religious institutions are engaged in the ministry of education, so the Mandate's impact on student health insurance is an important concern. Thus this case presents key insurance arrangements that are essential for this Court's resolution of the national controversy over the accommodation.

In addition to Geneva's own insurance arrangements, the decision below analyzed self-insured health plans, and health plans sponsored by exempt churches but in which non-exempt entities participate, because those issues were raised in a consolidated case. Pet. App. 24a–28a; *see also Zubik v. Burwell,* Pet. for Writ of Cert. (No. 14-1418) (May 29, 2015). Reviewing the Third Circuit's decision *in toto* would provide the Court with fully insured, self-insured, student, and church-sponsored health plan arrangements to consider.

The simplicity of Geneva's facts is also a virtue that makes this case an ideal vehicle for review. This case does not present complicated issues concerning whether its health plan is exempt from ERISA, and how that might affect the Government's authority, or how administrators of Geneva's plan might respond to directives under the accommodation. Geneva's fully insured and student plans present a clean and

essential vehicle for resolving the nationwide controversy over the relationship between RFRA and the Mandate's accommodation.

Geneva also comes to this Court as a religious organization whose community members solidly align with its organizational views on the sanctity of preborn human life. *See* Pet. App. 54a. This is an important fact in light of the Government's refusal to exempt Geneva based on its unsourced speculation that employees of churches "are more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. at 39,874. A district court recently ruled that the Government's refusal to exempt an organization whose employees specifically oppose abortifacient items is irrational in light of the Government's decision to fully exempt churches with "likely" anti-contraception employees. *See March for Life v. Burwell*, No. 1:14-cv-01149-RJL, slip op. at 12–17 (D.D.C. Aug. 31, 2015). Geneva thus represents the ideal kind of organization to advocate the importance of the national controversy between religious objections and the Mandate's accommodation.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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