NOS. 14-1418, 14-1453, 14-1505,
15-35, 15-105, 15-119, & 15-191

In the Supreme Court of the United States

DAVID A. ZUBIK, *et al.*
v.
SYLVIA BURWELL, *et al.*

PRIESTS FOR LIFE, *et al.*
v.
DEPARTMENT OF HEALTH & HUMAN SERVICES, *et al.*

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*
v.
SYLVIA BURWELL, *et al.*

EAST TEXAS BAPTIST UNIVERSITY, *et al.*
v.
SYLVIA BURWELL, *et al.*

LITTLE SISTERS OF THE POOR HOME FOR THE AGED,
DENVER, COLORADO, *et al.*
v.
SYLVIA BURWELL, *et al.*

SOUTHERN NAZARENE UNIVERSITY, *et al.*
v.
SYLVIA BURWELL, *et al.*

GENEVA COLLEGE
v.
SYLVIA BURWELL, *et al.*

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

In its supplemental briefing order, this Court has asked the parties to address whether "contraceptive coverage may be obtained by petitioners' employees through petitioners' insurance companies, but in a way that does not require any involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees." The answer to that question is clear and simple: Yes. There are many ways in which the employees of a petitioner with an insured plan could receive cost-free contraceptive coverage through the same insurance company that would not require further involvement by the petitioner, including the way described in the Court's order. And each one of those ways is a less restrictive alternative that dooms the government's ongoing effort to use the threat of massive penalties to compel petitioners to forsake their sincerely held religious beliefs. Moreover, so long as the coverage provided through these alternatives is *truly* independent of petitioners and their plans—*i.e.,* provided through a separate policy, with a separate enrollment process, a separate insurance card, and a separate payment source, and offered to individuals through a separate communication—petitioners' RFRA objections would be fully addressed.

This Court's supplemental briefing order focused on "[p]etitioners with insured plans." Of course, not every petitioner purchases insurance from a commercial insurance company, as many petitioners self-insure or use a self-insured church plan. But less restrictive alternatives involving commercial

insurance companies are available for those petitioners as well. If commercial insurance companies were to offer truly separate contraceptive-only policies along the lines envisioned in this Court's order, then the employees of petitioners who self-insure or use self-insured church plans could enroll in those separate contraceptive-only insurance policies as well. Those policies would obviously be separate from the coverage provided by the self-insured employers or the church plans, and petitioners' employees would be free to enroll in those policies if they choose. Accordingly, among the many less restrictive alternatives available to the government is to require or incentivize commercial insurance companies to make separate contraceptive coverage plans (of the kind contemplated by the Court's order for petitioners with insured plans) available to the employees of petitioners that self-insure or use self-insured church plans, without requiring petitioners to facilitate that process or threatening them with ruinous fines unless they do so.

All of these less restrictive alternatives—in addition to those outlined in petitioners' earlier briefing—underscore that the government's current scheme violates RFRA. There is no reason for the government to insist, on pain of massive penalties, that petitioners abandon their sincerely held religious beliefs when the government can achieve its ends through other means. The substantial burden that the government's current arrangement undoubtedly places on petitioners' religious exercise thus is simply not the "least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. §2000bb-1(b)(2).

ARGUMENT

I. The Employees Of A Petitioner With An Insured Plan Can Receive Contraceptive Coverage From The Same Insurance Company Without Involving The Petitioner Or Threatening The Petitioner With Massive Fines.

Under the current regulatory scheme, the insurance company with which a petitioner contracts to provide benefits under an insured plan will provide contraceptive coverage to the petitioner's employees only if the petitioner complies with the contraceptive mandate via the regulatory mechanism of executing and delivering EBSA Form 700 or the equivalent notice. If the petitioner complies via that regulatory mechanism, its insurance company will provide payments for the contraceptives in connection with the petitioner's plan. The current regulatory scheme, therefore, requires petitioners to take affirmative steps that enable their health plans to be "hijacked" for the delivery of contraceptive coverage. But there is no reason that the government needs to demand those affirmative acts from petitioners—let alone demand them on pain of massive penalties—to effectuate a scheme in which the same insurance company makes contraceptive coverage available to any of petitioners' employees who may want it. There are several ways in which contraceptive coverage could "be obtained by petitioners' employees through petitioners' insurance companies" that "do[] not require any involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees."

1. To take the hypothetical set forth in the Court's order, the government could simply impose a regulatory requirement directly on insurance companies that, to the extent they contract with an eligible organization that does not include some or all contraceptive coverage in its plan, the insurance company must make available to plan beneficiaries a separate plan providing the excluded contraceptive coverage, and must separately contact beneficiaries to inform them of the availability of that plan and how to enroll. These separate plans could take the form of individual insurance policies or of group health plans sponsored by the government. Under this regime, the government would not need to require the petitioner to supply the identity of its insurer; nor would the government or the insurer need any form or authorization from the petitioner to make that separate coverage available. Petitioners with insured plans thus would need to do nothing more than contract for a plan that does not include coverage for some or all forms of contraception, free from the threat of massive penalties for failure to comply with the contraceptive mandate.

Of course, under RFRA, any such scheme would have to truly require no "involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees." Thus, it could not be enforced by a requirement, backed by draconian penalties, that the employer take steps to "comply" with the contraceptive mandate. *See* 45 C.F.R. §147.131(c)(1). To the contrary, under a truly independent scheme, such employers would not be complying with that mandate at all. They would be exempt from that mandate, and the commercial

insurer would be complying with a separate mandate imposed by the federal government.

Indeed, if petitioners were to "have no legal obligation to provide … contraceptive coverage" "to which they object on religious grounds," then there would be no rational reason to threaten them with massive penalties (for violating such a legal obligation) or require them to take steps or furnish information or authorization (to comply with such a legal obligation). Accordingly, as petitioners understand the scenario that the Court's order contemplates, it is not a scenario in which petitioners would be offered yet another way to comply with the contraceptive mandate, and continue to face massive penalties should they fail to do so. It is a scenario in which petitioners would have no obligation to comply with that mandate at all, and would not need to take any affirmative step to avoid the threat of penalties under 26 U.S.C. §4980D or any other form of liability as a consequence of their decision not to include some or all contraceptive coverage from their plans.

This is not just a matter of semantics. Under the current regulatory scheme, the government is correct to treat the provision of an EBSA Form 700 or its equivalent as a mode of "complying" with the contraceptive mandate because the employer itself is forced to take steps that the government deems necessary to make contraceptive coverage available to the employer's employees. Petitioners have never raised RFRA objections to truly independent efforts to provide contraceptive coverage to their employees, whether that coverage is provided via the Exchanges, Title X, or an omnibus agreement with a single

insurer. *See, e.g.*, Oral Argument Tr.13. In a similar fashion, the independent provision of contraceptive coverage by the same insurance company that provides the employer's conscience-compliant plan would not run afoul of RFRA if it were genuinely independent of petitioners and their plans. But if the coverage that is provided is truly separate, no one should be able to conclude that *petitioners* are, in fact, complying with the mandate. To the contrary, they would be excused from the mandate under RFRA, by virtue of their sincerely held religious beliefs.

Not only can the government effectuate such a scheme without involving petitioners; it can—and under RFRA must—do so without involving petitioners' plans. Under the current regulatory scheme, there is just a single plan that automatically comes with payments for contraceptive services. Petitioners' employees, therefore, automatically receive free contraceptive coverage solely by virtue of their enrollment in petitioners' plans. There is no reason why this must be so. Instead, to truly separate petitioners from the contraceptive coverage, there should, at a minimum, be "two separate health insurance policies (that is, the group health insurance policy and the individual contraceptive coverage policy)," 78 Fed. Reg. 39,870, 39,876 (July 2, 2013), with separate enrollment processes, insurance cards, payment sources, and communication streams. Again, these separate plans could take the form of individual insurance policies or group health plans sponsored by the government. But either way, the insurance companies could separately contact petitioners' employees and give them the option of enrolling in the separate, contraceptive-only policy.

The agencies have already taken the position that federal law poses no obstacle to having an insurance company provide a contraceptive-only plan that is distinct from the employer's plan. *See* 78 Fed. Reg. 8,456, 8,467-68 (Feb. 6, 2013). During the rulemaking process, they concluded that they have statutory authority to treat a contraceptive-only plan as an "excepted benefit" that need not comply with all the requirements of the Affordable Care Act, such as the minimum essential coverage and guaranteed issue requirements. *See id.* And they identified no other aspects of the ACA that might pose an obstacle to allowing insurance companies to offer contraceptive-only plans to beneficiaries of any of the plans they provide that do not cover some or all forms of contraception.

Nor do federal privacy laws pose an obstacle to allowing an insurance company to contact beneficiaries of an employer-sponsored plan with information about the availability of and how to enroll in a separate contraceptive-only plan that the insurance company offers. Although HIPAA restricts an insurance company's use of plan beneficiary information for marketing purposes, *see* 45 C.F.R. §164.508(a)(3), HHS has defined "marketing" to exclude "a communication" regarding "health-related products or services available only to a health plan enrollee that add value to, but are not part of, a plan of benefits," *id.* §164.501. HHS has advised that this exception "permits communications by a covered entity about its own products or services," such as "a mailing to subscribers approaching Medicare eligible age with materials describing its Medicare supplemental plan and an application form." "Health

Information Privacy: Marketing," HHS.gov, http://1.usa.gov/1MmPvCk. That exception thus would readily encompass providing plan beneficiaries with information about separate contraceptive-only plans that the insurance company offers.

2. Although the agencies previously identified various state law questions that such an arrangement might raise, *see* 78 Fed. Reg. at 39,876, those are easily addressed. At the outset, there is certainly no insurmountable state law barrier to contraceptive-only policies, as some states already *require* insurance companies to make such policies available to individuals whose employers object to providing that coverage for religious reasons. Before the federal contraceptive mandate came into being, Missouri had its own law requiring contraceptive coverage, subject to an exception "if the use or provision of such contraceptives is contrary to the moral, ethical or religious beliefs or tenets" of the "person or entity purchasing" the plan. Mo. Rev. Stat. §376.1199.4(1) (2001) (amended 2012) (2001 Mo. Legis. Serv. H.B. 762). To ensure that individuals whose plans excluded contraceptive coverage due to religious objections had access to such coverage should they want it, Missouri law also provided that "a health carrier shall allow enrollees in a health benefit plan that excludes coverage for contraceptives ... to purchase a health benefit plan that includes coverage for contraceptives." *Id.* §376.1199.5. Until the federal mandate came along, this system had existed for more than a decade without challenge on religious freedom grounds.

Other states also have devised means of allowing individuals to contract directly with their insurance companies to obtain contraceptive coverage should their employer-sponsored plan exclude it for religious reasons. *See, e.g.*, Haw. Rev. Stat. §431:10A-116.7(b)-(e) (1999); N.Y. Ins. Law §3221(*l*)(16)(B)(i) (2015); W. Va. Code §33-16E-7(c) (2005). And still more states allow insurance companies to market separate abortion coverage to individuals whose health plans do not provide it. *See* Alina Salganicoff et al., Henry J. Kaiser Family Foundation, "Coverage for Abortion Services in Medicaid, Marketplace Plans and Private Plans" (Jan. 20, 2016), http://kaiserf.am/1nAYh4v. While some of these arrangements do not involve the precise modes of separation discussed above, they (along with separate plans for vision and dental) demonstrate the workability of scenarios in which individuals separately contract with insurance companies to obtain forms of coverage that are excluded from their principal health plans.

To the extent the agencies identified aspects of the particular contraceptive-only policy approach that they previously considered that might pose state law questions, those aspects can readily be addressed. For example, the agencies noted comments questioning whether a contraceptive-only policy would be considered an enforceable contract under state law if the individual neither enrolls in that policy nor has the ability to opt out. *See* 78 Fed. Reg. at 39,876. But that concern can be eliminated through the simple expedient of giving individuals a say in whether to enroll, which they have as to all other forms of coverage and under all the state law schemes that provide separate contraceptive coverage. Indeed, as

noted, if the contraceptive coverage is to be truly separate, not just an automatic and unavoidable component of the petitioner's plan, then it *must* have an enrollment process that is distinct from (and not an automatic consequence of) enrolling in the employer's plan. Otherwise, it is *not* independent of the employer's plan. That process certainly need not be complex. Like activating a credit card, it could be as simple as having the insurance company send each eligible employee a contraceptive coverage card with a sticker attached providing a telephone number to call or website portal to use should she wish to activate the coverage. That would be much less burdensome than the process through which individuals enroll in separate dental or vision care plans—or in the employer-sponsored plan itself, as that, too, typically requires some affirmative act on the employee's part.

Nor should using a separate insurance card for the contraceptive coverage plan raise any material concerns from the government's perspective, as the government has already conceded that supplying employees with "two insurance cards, one for contraceptive benefits, and one for other benefits … would [not] constitute a barrier to accessing … contraceptive services." 80 Fed. Reg. 41,318, 41,328 (July 14, 2015). That concession reflects the reality that individuals routinely use separate insurance cards to access dental, vision, or prescription drug plans, and the government has never suggested that this arrangement discourages individuals from using those benefits. Accordingly, to the extent there are state law concerns about arrangements in which the contraceptive-only plan is an automatic and undifferentiated component of the employer's plan,

those concerns are easy to avoid—and are in all events essential to avoid moral complicity and ensure true separation between the contraceptive coverage and the petitioner's religiously compliant health plan.

Finally, a truly separate scheme would also need to incorporate certain features of the current scheme that are designed to provide some degree of separation. *See* 26 C.F.R. §54.9815-2713A(c)(2)(ii). The insurance company must, for example, continue to separate any communications relating to the contraceptive coverage from communications relating to the employer coverage. Those communications must, moreover, make clear that the contraceptive-only plan is separate and distinct from petitioners' plans. The insurance company also must continue to pay separately for the contraceptive coverage without any cost to the employer or the plan. *Id.* To the extent there are any concerns about the financial stability of a contraceptive-only plan that charges no premiums and cannot pass on any of its costs, that too is a concern that the government has the ability to address. The agencies have already concluded that they have statutory authority to use adjustments to user fees on the federal Exchanges to reimburse insurance companies for providing contraceptive coverage. *See, e.g.*, 78 Fed. Reg. at 39,882-83. Indeed, they are already doing so in the self-insured context. 26 C.F.R. §54.9815-2713AT(b)(3). Thus, if there is any need to financially incentivize insurance companies to offer separate, contraceptive-only plans in the insured context, the government can use the same financial mechanism to subsidize them there as well.

In this regard, it bears emphasis that the financial and practical burdens of offering truly separate contraceptive coverage to petitioners' employees are likely to be minimal, as there are good reasons to suspect that relatively few of those employees will opt for contraceptive coverage. As noted in the principal briefing, *see, e.g.*, *ETBU* Opening Br.66-67; *Zubik* Reply Br.19, petitioners all qualify for the exemption Congress provided in Title VII that allows religious nonprofits to hire co-religionists. And as petitioners have explained, *Zubik* Opening Br.63-65; *Zubik* Reply Br.32-33; *ETBU* Opening Br.66-67; *ETBU* Reply Br.19-20, employers entitled to that exemption are more likely to hire individuals who share their religious beliefs and are thus less likely to opt for coverage that violates those shared religious beliefs. Of course, if the government actually offered the kind of truly separate contraceptive coverage envisioned by the Court's order, it could develop data to test whether employers entitled to the Title VII exemption are less likely to have employees that opt for that coverage even if offered. In all events, the salient point for present purposes is that the Court should discount any asserted concerns about financial or practical difficulties that might ensue should large numbers of petitioners' employees opt for separate coverage.[1]

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[1] Although the law is clear that the government has the burden of proving that the substantial burden it has placed on religion is the "least restrictive means" of furthering a "compelling governmental interest," 42 U.S.C. §2000bb-1(b)(2); *see also Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015), the records in these cases confirm that the government has never seriously attempted to

3. In sum, there is no need to demand any separate certification or notice from the petitioner in order to effectuate a scheme in which any of the petitioner's employees who want contraceptive coverage can get it from the same insurance company with which the petitioner contracts. The government can obligate, incentivize, or contract with the insurance company to offer separate contraceptive coverage to employees who do not receive any coverage from their employer without any involvement by the petitioner "beyond [its] own decision to provide health insurance without contraceptive coverage to [its] employees." That coverage would become available to the petitioner's employees because of the obligation imposed on the insurance company, and not because the petitioner provided any form surrendering information, authorization, its plan, or its plan infrastructure on pain of massive penalties. And unlike under the current regulatory scheme, that coverage would be truly separate from the petitioner's plan.

Because the government can operate such an arrangement without requiring petitioners to take steps to put themselves in compliance with the contraceptive mandate, the government's current regulatory scheme necessarily runs afoul of RFRA, as it substantially burdens religious exercise and is not the "least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. §2000bb-1(b)(2). Even accepting the dubious premise that the government not only has a compelling

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substantiate any of the suppositions on which its claim that there are no less restrictive means available rests.

interest in ensuring that petitioners' employees can receive contraceptive coverage, but has a compelling interest in furnishing the coverage through the same insurance company that provides their employer-sponsored plans,[2] the government can achieve that end without involving the petitioner or its plan. And if the government *can* achieve that end through means in which that coverage is truly separate from the petitioner and its plan—*i.e.*, provided through a separate plan, with a separate enrollment process, a separate insurance card, and a separate payment source, and offered to eligible individuals through a separate communication—then the government *must* do so to avoid running afoul of RFRA. It cannot insist on imposing massive penalties on petitioners unless they take steps that are not actually necessary for the government to achieve its interests.

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[2] The government's contention that it has a compelling interest in providing coverage "seamlessly"—an argument that emerged late in this litigation—essentially collapses the separate compelling interest and least restrictive means analyses. To keep those analytical steps distinct, and to protect the coherence of the test Congress fashioned in RFRA, the government cannot insist that it has a compelling interest in utilizing specific means. And, of course, the government cannot simultaneously insist that employers must provide coverage seamlessly and that petitioners are mistaken to perceive that their plans are being used to provide the service. If the seams are absent for their employees, then they are absent for the employer. That said, as the Court's order and this brief indicate, it is possible to utilize the same insurer but provide truly separate policies, and such policies are a less restrictive alternative even assuming there is a compelling interest in providing contraceptive coverage through the same insurance company.

To be clear, that is not to say that petitioners endorse such an approach as a policy matter. Many of them most emphatically do not, as they sincerely believe that the use of some or all forms of contraception is immoral, and they are hardly indifferent to efforts to encourage or facilitate that use. For that reason, petitioners may disagree as a policy matter with government programs, such as Title X, that make contraceptives or abortifacients more widely available to their own employees or anyone else. And petitioners certainly have the right, protected by the First Amendment, to make that disagreement known. At the same time, however, petitioners do not object under RFRA to every regulatory scheme in which the employees of a petitioner with an insured plan can obtain contraceptive coverage from the same insurance company with which the employer has contracted to provide a health plan. Petitioners simply object to having to play a morally impermissible role in the process through which those insurance companies (or anyone else) might provide contraceptive coverage to their employees. If the coverage can be provided in a way that eliminates that role, then it can be provided in a way that satisfies RFRA.

That said, there are certainly additional and even more separate (and thus even more preferable) ways for the government to achieve its ends. For instance, instead of having the offer of separate contraceptive coverage come directly from the insurance company, the government itself could inform petitioners' employees about the availability of that coverage, or ask healthcare providers to provide that information to any individual who lacks contraceptive

coverage. *See infra* pp.21-23. That would more clearly avoid the appearance that the coverage is available only as a result of the employment relationship with the employer. The contraceptive-only plans also could be offered not just directly from the insurer, but on the Exchanges as well, which once again would help underscore that they are a distinct product, obtained through a distinct contractual relationship. The government also could contract with one or more commercial insurance companies to provide coverage to all of petitioners' employees and not insist on a one-to-one correspondence between the employee's contraceptive insurer and the employer's insurer. The government also could use means that do not involve the insurance companies with which petitioners contract, such as using Title X to make free contraceptives available to any women whose plans do not include them.

None of these options would necessitate any involvement by petitioners "beyond their own decision to provide health insurance without contraceptive coverage to their employees." Accordingly, the availability of these manifold less restrictive means dooms the government's effort to defend its current scheme under RFRA.

II. Employees Of Petitioners With Self-Insured Plans Can Receive Contraceptive Coverage Through The Insurance Companies Providing Contraceptive-Only Coverage To Petitioners With Insured Plans.

This Court's order focused on "[p]etitioners with insured plans." That focus presumably recognizes that the dynamic is quite different for employers that

self-insure or utilize self-insured church plans. In those contexts, it is the *insurer itself* that holds the concededly sincere religious objection to providing contraceptive coverage, so there is no scenario in which such coverage could be obtained by the petitioner's employees through the petitioner's own insurer without directly involving a religious objector. When an employer self-insures, the employer itself is the insurer; the only third parties involved are whatever third party administrator(s) the employer may use to process claims and perform other administrative tasks. While those TPAs are sometimes affiliated with commercial insurers, their contract with the self-insured employer is solely as a claims administrator, not as an insurer. They bear no risk and have no fiduciary duties—those are left to the self-insured employer—and they can act only in accordance with the directions that they are given by the self-insurer. Accordingly, in the self-insured context, to require the "petitioner's insurer" to provide the coverage would be to require the petitioner itself to do so, which presumably even the government would concede (at least after *Hobby Lobby*) violates RFRA.

The situation is slightly, but not meaningfully, different as to employers that utilize multiple-employer self-insured church plans. In that context, the "insurer" is either the employer—*i.e.*, a church or a convention or association of churches, 26 U.S.C. §414(e)(1)—or an entity that shares the religious beliefs of the church with which the employer is affiliated and has crafted a plan specifically designed to be consistent with those beliefs. The Christian Brothers Employee Benefit Trust, for example,

sponsors a church plan that is open only to nonprofits that are in good standing with the Roman Catholic Church and listed or approved for listing in *The Official Catholic Directory*. JA993-94. The Little Sisters and the hundreds of other Catholic employers in the class that they represent use that plan to provide health benefits to their employees. JA979. Consistent with the teachings of the Catholic Church, the Trust does not include contraceptive coverage in its plan, and it holds sincere religious objections to doing so. JA998-99.[3] Accordingly, any requirement that the employees of a petitioner that uses the Trust's plan receive contraceptive coverage through the petitioner's "insurer" would substantially burden the religious exercise of one of the petitioners here—*viz.*, the Trust.

The situation is the same for petitioners who use the church plan provided by petitioner GuideStone Financial Resources. GuideStone is an agency of the Southern Baptist Convention and provides a church plan that is available to organizations controlled by or associated with the Southern Baptist Convention. JA1173. Consistent with its religious beliefs, GuideStone excludes from its church plan coverage the four forms of contraception that violate its religious beliefs about abortion, while providing the other FDA-approved contraceptives addressed by the mandate. And it is not just the employers who use GuideStone, but GuideStone itself, that sincerely

[3] The Trust's plan and other plans used by Catholic petitioners do, however, provide coverage for contraceptives when they are prescribed for a non-contraceptive purpose. *See Zubik* Opening Br.17 n.6; JA86, 122-23, 362, 403, 409, 999.

objects to providing coverage for those four forms of contraception. JA1175-77. Accordingly, once again, there is no way for the employees of petitioners that use GuideStone's plan to receive contraceptive coverage through the petitioners' "insurer" without demanding something from petitioners beyond the decision to provide a health plan that does not include some forms of contraceptive coverage.

Indeed, the government itself seems to recognize these problems, as even the current regulatory scheme does not require the *insurer* to provide contraceptive coverage when the employer utilizes a self-insured plan. Instead, the government seeks to use a *TPA* to either provide that coverage or make arrangements with an insurance company to do so. But, as the current scheme reflects, that too cannot be done without involving the petitioner. *Zubik* Reply Br.5-6. Because the government seeks to make the TPA a "plan administrator" of the petitioner's own plan for the limited purpose of ensuring the provision of contraceptive coverage, it needs some sort of written document from the petitioner that it can deem sufficient to empower the TPA to provide or arrange for the provision of contraceptive coverage to beneficiaries of the petitioner's plan. *See* Resp.Br.16 n.4. Moreover, a TPA does not have the same authority as an insurer to use plan beneficiary information; as a "business associate," not a "covered entity," under HIPAA, a TPA generally is limited to using that information in ways that its contractual relationship with the covered entity permits—*i.e.*, in ways that the objecting self-insured petitioner or the objecting church plan authorizes. *See* 45 C.F.R. §164.504(e). Accordingly, in the context of self-insured

plans, requiring either the "insurer" or the petitioner's TPA to provide or arrange for the contraceptive coverage necessarily would require something above and beyond the petitioner's decision not to include contraceptive coverage in its plan.

That said, the truly separate contraceptive-only policies envisioned by the Court's supplemental order offer a ready, less restrictive alternative to provide contraceptive coverage for individuals who want such coverage and work for petitioners that self-insure or utilize self-insured church plans. If commercial insurance companies begin making truly separate contraceptive coverage available to the employees of petitioners with insured plans as contemplated by this Court's order, then there should be no legal obstacle to allowing additional individuals to enroll in those plans, whether directly through the insurer or through the Exchanges. Indeed, making such contraceptive-only plans available to employees of petitioners with self-insured plans would underscore that such coverage is truly separate from the coverage provided by petitioners that use commercial insurers, as employees of other employers would be receiving essentially the same contraceptive-only policies. And the government could not raise any financial objection to such an arrangement, as it has already agreed under its current regulatory scheme to pay at least 110% of the cost of using a commercial insurer to provide contraceptive coverage to the employees of

objecting religious organizations with self-insured plans. *See* 45 C.F.R. §156.50(d)(1)-(3).[4]

The only question, then, would be how employees of employers with self-insured plans would learn of the availability of those contraceptive-only policies. Asking the objecting employer or the objecting church plan to provide employees with that information would go well beyond what this Court's order contemplates and what RFRA can tolerate. But there are other means through which individuals could learn about the availability of such contraceptive-only policies and how to enroll. For instance, the government itself could provide that information and assist individuals in enrollment. The government already has the identity and contact information of petitioners' employees through mandatory IRS filings, so it could simply provide information about how to enroll in a contraceptive-only plan to petitioners' employees. The government also has the "name, address, and [taxpayer identification number], or date

[4] Of course, if the government is unwilling to accept any scenario in which the contraceptive coverage does not come from the same insurer as the employer coverage, the government still has the option that it proposed in the courts below: allowing any of petitioners' employees who want contraceptive coverage to obtain subsidized health plans on the Exchanges. *See, e.g.*, Gov't.Resp.Br.21 n.4, *Little Sisters v. Burwell* (10th Cir. 2014) (No. 13-1540). Having itself once proposed sending *all* of petitioners' employees to the Exchanges, and having now conceded that the Exchanges suffice for other individuals who cannot get contraceptive coverage through an employer, *see* Resp.Br.65, the government cannot credibly argue that those Exchanges are somehow unacceptable or not a less restrictive means when it comes to petitioners who self-insure or use self-insured church plans.

of birth" of each primary policy holder on a minimum essential coverage plan, as well as the name and taxpayer identification number or birthdate of each individual covered under the plan. 26 C.F.R. §1.6055-1(c), (e). Accordingly, the government alternatively could target its informational and enrollment efforts at individuals who are *enrolled* in petitioners' plans (thereby bypassing employees who obtain their coverage elsewhere, such as through a spouse's employer that may provide coverage that includes contraceptives, *cf.* Resp.Br.65 (suggesting mandate-compliant spousal coverage would suffice for employees of exempt employers)).

The government also could require doctors and other healthcare providers who have no religious objections to contraception to provide individuals with information about how to enroll in a contraceptive-only plan if their employer's plan does not include such coverage, and to help them complete that process should they choose to do so.[5] Medical professionals are already required to provide HIPAA privacy information to patients, *see* 45 C.F.R. §164.520, so such an arrangement clearly would be feasible as a practical matter. And studies suggest that such an

[5] The fact that petitioners have religious objections to providing contraceptive coverage and may opt to not provide such coverage by no means suggests that healthcare providers in their healthcare networks necessarily have any objection to recommending or prescribing such coverage. Nor is there any merit to the government's suggestions that the exclusion of contraceptive coverage from petitioners' plans would somehow preclude those healthcare providers from informing enrollees in petitioners' plans of their ability to obtain contraceptive coverage through other means. *Cf.* Oral Argument Tr.52-53, 79-80.

arrangement may actually make it *more likely* that the individual will understand and use contraceptive coverage.

For instance, several states have developed programs through which coverage for separate family planning services is made available through Medicaid to individuals who are not eligible for other Medicaid coverage. *See* Adam Sonfield & Rachel Benson Gold, Guttmacher Institute, "Medicaid Family Planning Expansions: Lessons Learned and Implications for the Future" 3-4 (2011), http://bit.ly/22mgO1o. While most of those states initially enrolled eligible individuals in those programs automatically, research revealed that, "[w]hen surveyed, many [auto-enrolled women] do not know or remember that they have been enrolled, or they do not understand what benefits are (and are not) available to them." *Id.* at 9. Some states thus have shifted to a simple "opt-in" process that can be completed at the doctor's office. Accordingly, a system in which individuals whose employers do not provide contraceptive coverage can enroll in separate contraceptive policies with the help of a medical professional may actually more effectively further the government's ultimate policy objectives.

Again, that is not to say that petitioners endorse or agree with those policy objectives. But the relevant question is whether the government can achieve them in a less restrictive manner. It can. Like the options discussed as to petitioners with insured plans, these options would not require any separate certification or notification by the petitioner, or otherwise require the petitioner to do anything to encourage or facilitate access to the contraceptive coverage. Instead, the only

action the petitioner would take is to choose to provide a plan that does not include some or all contraceptive coverage. Once that happened, the petitioner's involvement would be at an end. So, too, would the involvement of the petitioner's plan, as these options would not require the contraceptive coverage to be provided under the auspices of a single plan, with a single insurance card and a single enrollment process, all connected back to the objecting employer. Thus, here too, the government can achieve its objectives through means less restrictive than its current regulatory scheme.

* * *

In sum, both in the insured context and in the self-insured context, the current scheme violates RFRA, as it substantially burdens religion and is not the "least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. §2000bb-1(b)(2). The government can get contraceptive coverage to petitioners' employees—and can even do so through the same insurance companies with which some petitioners contract—without demanding, on pain of massive penalties, that petitioners take steps to comply with the contraceptive mandate. And the government can achieve that end without requiring petitioners to surrender their health plans to serve as vehicles for the provision of contraceptive coverage. There is thus no reason to allow the government to continue to threaten petitioners with financial ruin unless and until they take steps that concededly violate their sincere religious beliefs.

CONCLUSION

The Court should reverse the judgments of the Courts of Appeals.

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