No. 16-1275

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REAL ALTERNATIVES, INC., KEVIN I. BAGATTA, ESQ., THOMAS A. LANG, ESQ., CLIFFORD W. MCKEOWN, ESQ.,

Plaintiffs-Appellants,

v.

SYLVIA M. BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Pennsylvania

BRIEF FOR APPELLEES

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STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1361, 2201, 2202, 42 U.S.C. § 2000bb-1, and 5 U.S.C. § 702. JA 90. The district court issued an order granting the government's motion for summary judgment on December 10, 2015. JA 3. Plaintiffs filed a timely notice of appeal on February 5, 2016. JA 1-2. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Under federal law, health insurers and employer-sponsored group health plans generally must cover (among other preventive services) contraceptive services prescribed for women by their doctors. Implementing regulations create an automatic exemption for a "religious employer," defined as an organization that is organized and operates as a nonprofit entity and that is referred to in an 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 (collectively, "houses of worship"). 45 C.F.R. § 147.131(a) (cross-referencing 26 U.S.C. § 6033(a)(3)(A)(i) and (iii)). The questions presented are:

1. Whether the plaintiff organization's equal protection and Administrative Procedure Act (APA) claims fail because it was not arbitrary or irrational for the government to limit this exemption to houses of worship.

2. Whether the plaintiff employees' Religious Freedom Restoration Act (RFRA) claims fail because they do not have a right under RFRA to demand that the

group health plan provided to them by their employer be tailored to reflect their religious beliefs.

3. Whether the remaining claims fail because the contraceptive coverage requirement does not conflict with abortion-related funding restrictions in the Weldon Amendment and the Patient Protection and Affordable Care Act (ACA or Affordable Care Act) or with the Church Amendment.

STATEMENT OF RELATED CASES

This case has not previously been before this Court or any other court.

An analogous case is pending before the D.C. Circuit in *March for Life v. Burwell*, No. 15-5301 (D.C. Cir.). The D.C. Circuit is holding the *March for Life* appeal in abeyance pending its disposition of *Priests For Life v. HHS*, Nos. 13-5368, 13-5371, 14-5021 (D.C. Cir.), on remand from the Supreme Court. *Priests For Life* presents the same question that this Court addressed in *Geneva College v. Secretary U.S. Dep't of Health & Human Services*, 778 F.3d 422 (3d Cir. 2015), which also was vacated and remanded by the Supreme Court. *See Zubik v. Burwell*, 136 S. Ct. 1557, 1560-61 (2016).

In another similar case, the district court for the Eastern District of Missouri recently issued an opinion. *See Wieland v. U.S. Dep't of Health & Human Servs.*, 13-cv-1577, Doc. 86 (E.D. Mo.) (July 21, 2016).

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. Congress has long regulated employer-sponsored group health plans. In 2010, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119,[1] established certain additional minimum standards for group health plans as well as for 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 preventive-health services without cost sharing, that is, without requiring plan participants and beneficiaries 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 & Human Services (HHS). *Id.* § 300gg-13(a)(4); *see Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014).

HHS requested the assistance of the Institute of Medicine (IOM) in developing such comprehensive guidelines for preventive services for women. 77 Fed. Reg. 8,725, 8,726 (Feb. 15, 2012). Experts, "including specialists in disease prevention,

[1] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

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." IOM, *Clinical Preventive Services for Women: Closing the Gaps* 2-3 (2011) (IOM Report). These services included the "full range" of "contraceptive methods" approved by the Food and Drug Administration, *id.* at 10; *see id.* at 102-10, which the Institute of Medicine 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 102-09.

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 (brackets in original); *see Hobby Lobby*, 134 S. Ct. at 2762. The relevant regulations promulgated by the three Departments implementing this portion of the Act (HHS, Labor, and Treasury) require coverage of, among other things, preventive services, including the contraceptive methods 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]

2. In 2011, the Departments authorized HRSA "to exempt certain religious employers from the [HRSA] Guidelines where contraceptive services are concerned." 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). The Departments explained that their intent was "to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions." *Id.* The Departments noted that "[s]uch an accommodation would be consistent with the policies of States that require contraceptive services coverage, the majority of which simultaneously provide for a religious accommodation." *Id.*

The Departments originally defined a "religious employer" eligible for this automatic exemption as an employer that "1) [h]as the inculcation of religious values as its purpose; 2) primarily employs persons who share its religious tenets; 3) primarily serves persons who share its religious tenets;" and 4) is a non-profit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. 76 Fed. Reg. at 46,623; *see also* 77 Fed. Reg. at 8,729. Section 6033 of the Internal Revenue Code refers in relevant parts to "churches, their integrated auxiliaries, and conventions or associations of churches," and "the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A)(i), (iii).

[2] All citations to the implementing regulations are to those regulations as amended by the August 2014 interim final regulations.

In 2013, the Departments adopted a "simplified and clarified" definition of religious employer that eliminated the first three prongs of the definition quoted above. 78 Fed. Reg. 39,870, 39,871 (July 2, 2013). As amended, the regulations automatically exempt from the contraceptive coverage requirement any employer that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. *Id* at 39,874. The Departments explained that the amended exemption "continues to respect the religious interests of houses of worship and their integrated auxiliaries in a way that does not undermine the governmental interests furthered by the contraceptive coverage requirement." *Id.* In responding to comments that the exemption would "undermine the governmental interests furthered by the contraceptive coverage requirement," the Departments noted 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 who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." *Id.* But, as the Departments later explained, "[h]iring coreligionists is not itself a determinative factor as to whether an organization should be accommodated or exempted from the contraceptive requirements." 80 Fed. Reg. 41,318, 41,325 (July 14, 2015). Rather, the exemption "was provided against the backdrop of the longstanding governmental recognition of

a particular sphere of autonomy for houses of worship" and was not "a mere product of the likelihood that these institutions hire coreligionists." *Id.*

3. In addition to this automatic exemption for houses of worship, the Departments established an accommodation for group health plans maintained by eligible organizations that have religious objections to providing contraceptive coverage. 45 C.F.R. § 147.131(b); *see* 78 Fed. Reg. at 39,874-82; 79 Fed. Reg. 51,092 (Aug. 27, 2014); 80 Fed. Reg. at 41,323-28. Under the accommodation, eligible organizations are not required to contract, arrange, pay, or refer for contraceptive coverage, but plan participants and beneficiaries of their plans "still benefit from separate payments for contraceptive services without cost sharing or other charge." 78 Fed. Reg. at 39,874; *see also Geneva Coll. v. Secretary U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 427-30 (3d Cir. 2015), *vacated by Zubik v. Burwell*, 136 S. Ct. 1557, 1560-61 (2016). Plaintiff Real Alternatives is not eligible for this accommodation and does not seek the accommodation. JA 126 (praying only that Real Alternatives be given the "religious employer" exemption and making no request for the accommodation). The accommodation regulations thus are not at issue in this suit.

B. Factual and Procedural Background

Plaintiff Real Alternatives is "a non-profit, non-religious, pro-life" organization that objects to purchasing a group health plan that covers certain contraceptives. Appellants' Br. 5, 7. Because Real Alternatives is not a house of worship, it is not

eligible for the automatic exemption from the contraceptive coverage requirement that is available to houses of worship.

In this suit, Real Alternatives contends that the Departments acted arbitrarily and in violation of the equal protection component of the Fifth Amendment by limiting the automatic exemption to houses of worship rather than extending it to organizations like Real Alternatives. JA 118-21. Its three employees, who are also plaintiffs in this suit, object for religious reasons to participating in a group health plan that includes coverage of certain contraceptives and contend that the requirement that their employer's plan include contraceptives violates their rights under RFRA. JA 123-25. Plaintiffs also contend that this requirement conflicts with abortion-related funding limitations in the Weldon Amendment and the ACA, and with the Church Amendment. JA 121-22.

The district court denied plaintiffs' motion for summary judgment and granted summary judgment to the Departments. JA 79. The court rejected the equal protection and APA challenges to the automatic exemption for houses of worship, noting that "[t]he long history of precedent supporting respect for and deference to religious freedom as a legitimate government interest supports the Departments' classification." JA 45-46. For "the same reasons," the court held that the exemption is not arbitrary and capricious in violation of the APA. JA 49.

With respect to the plaintiff employees' RFRA claims, the court concluded that the contraceptive coverage requirement does not impose a substantial burden on their

religious exercise. JA 57-67. The court reasoned that the contraceptive coverage requirement "simply does not cause Plaintiffs to modify their behavior in violation of their beliefs . . . . Rather, it is the behavior of a third party, the insurer, that the government modifies by requiring the insurer to provide additional services to Plaintiffs." JA 64. The court also held that the contraceptive coverage requirement would survive RFRA's compelling interest test, because it is the least restrictive means of furthering compelling government interests. JA 68-79. The court also rejected plaintiffs' remaining APA claims. JA 49-55.

SUMMARY OF ARGUMENT

In implementing the contraceptive coverage requirement, the Departments created an automatic exemption for non-profit organizations that are referred to 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 (collectively, "houses of worship"). 45 C.F.R. § 147.131(a) (cross-referencing 26 U.S.C. § 6033(a)(3)(A)(i), (iii)). Plaintiffs incorrectly contend that it was arbitrary and irrational for the Departments to limit this exemption to houses of worship, rather than extending it to all organizations that object to contraceptive coverage. The automatic exemption for houses of worship is consistent with—and was predicated upon—our Nation's long tradition of recognizing a special sphere of autonomy for houses of worship. Plaintiffs'

contention that the government cannot furnish such special solicitude without extending the same treatment to all objectors is profoundly at odds with that tradition. And their claims are premised on their mistaken view of the reason that the Departments provided this automatic exemption. As the Departments have explained, the exemption "was provided against the backdrop of the longstanding governmental recognition of a particular sphere of autonomy for houses of worship," and was not, as plaintiffs contend, "a mere product of the likelihood that these institutions hire coreligionists." 80 Fed. Reg. 41,318, 41,325 (July 14, 2015).

The plaintiff employees' RFRA claims are likewise meritless. The employees cannot establish that their religious exercise is substantially burdened by regulations that impose no obligations on them, but instead require their employer and insurer to include contraceptive coverage in a group health plan. The responsibilities that the regulations place on employers and insurance issuers require no action by employees, and the employee plaintiffs are not obligated to use the covered services to which they object. Moreover, even if the employee plaintiffs could demonstrate a substantial burden on their religious exercise, their RFRA claim would fail because the challenged regulations are the least restrictive means of achieving a compelling government interest. Allowing individuals to demand that the group health plan in which they participate be personally tailored to their religious beliefs would undermine the government's compelling interest in ensuring a sustainable and comprehensive system of health insurance.

Plaintiffs' remaining APA claims also lack merit. The contraceptive coverage requirement is consistent with the Weldon Amendment and Title I of the ACA because, as a matter of federal law, none of the FDA-approved contraceptives causes abortions. And the requirement is consistent with the Church Amendment because an employee's receipt of health care benefits from an employer does not amount to "perform[ing] or assist[ing] in the performance of any part of a health service program or research activity funded . . . by the Secretary of [HHS]." 42 U.S.C. § 300a-7(d).

STANDARD OF REVIEW

The district court's summary judgment decision is subject to de novo review in this Court. *See*, *e.g.*, *Shuman ex rel. Shertzer v. Penn Manor Sch. Dist.*, 422 F.3d 141, 146 (3d Cir. 2005).

ARGUMENT

I. The Departments Did Not Act Arbitrarily Or Irrationally By Limiting The Automatic Exemption To Houses Of Worship.

The Departments created an automatic exemption from the contraceptive coverage requirement for a narrow category of religious employers. 45 C.F.R. § 147.131(a). A "religious employer" is defined as a non-profit organization that is referred to 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. *Id.* (cross-referencing 26 U.S.C. § 6033(a)(3)(A)(i), (iii)). This automatic exemption does not apply to other non-profit

religious organizations or to organizations, like Real Alternatives, which object to contraceptive coverage for non-religious reasons.

Plaintiffs' APA and equal protection challenges to the scope of this automatic exemption fail because the Departments reasonably confined the exemption to houses of worship. The standard of review for the APA and equal protection claims is similar. Under the APA, the decision not to extend the automatic exemption to employers like Real Alternatives is subject to a "narrow standard of review" and must be upheld as long as the Departments have "articulate[d] a satisfactory explanation for [their] action." *Nazareth Hosp. v. Secretary U.S. Dep't of Health & Human Servs.*, 747 F.3d 172, 179 (3d Cir. 2014). Likewise, because Real Alternatives does not fall within a suspect class and no fundamental right is implicated in this case, its equal protection claim fails if the Departments "can show a 'rational basis' for [their] decision." *Id.* at 180 (citation omitted); *see also* Appellants' Br. 27-28 (conceding that rational basis is the appropriate standard of review).

These deferential standards are easily met here. Special solicitude for houses of worship has deep historical roots. *See Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 676 (1970) (upholding a property tax exemption for houses of worship); *cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (finding a "special rule for ministers grounded in the Religion Clauses themselves"). It would be profoundly at odds with our Nation's traditions to hold that the government cannot provide an exemption for houses of worship without extending the same exemption

to other objectors. Such a rule would powerfully discourage the government from creating exemptions for houses of worship and undermine the special solicitude that houses of worship have long enjoyed.

Plaintiffs' argument also cannot be squared with *United States v. Lee*, 455 U.S. 252 (1982), where the Court rejected a claim to extend a limited exemption from statutory requirements to a broader category of religious objectors. The Court explained that "[c]onfining the . . . exemption to the self-employed provided for a narrow category which was readily identifiable." *Id.* at 260-61. Here, too, the limited exemption for houses of worship is defined by reference to a long-established and administrable statute, and it provides no basis to exempt other organizations outside that special and narrow context. *Cf. Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987) ("Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion," the Supreme Court has "see[n] no reason to require that the exemption comes packaged with benefits to secular entities."); *id.* at 339 (rejecting equal protection claim because the exemption "is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions"); *Wilkins v. Penns Grove-Carneys Point Reg'l Sch. Dist.*, 123 F. App'x 493, 495 (3d Cir. 2005) (rejecting an equal protection challenge because "the 'narrow' religious exemption . . . is

rationally drawn to further the legitimate [state] interest in accommodating students' free exercise of religion").

Plaintiffs' argument, and the district court's decision in *March for Life* on which they rely, rest on a basic misunderstanding of the reason that the Departments provided the automatic exemption for houses of worship. As the Departments have explained, the exemption was *not* "a mere product of the likelihood that these institutions hire coreligionists." 80 Fed. Reg. at 41,325. Indeed, the Departments eliminated the original regulatory requirement that, in order to qualify for the exemption, an employer must primarily employ persons who share its religious tenets. *See* p. 6, *supra*. Although the Departments suggested that employees of houses of worship might be less likely to use contraceptives, they did so only to explain why the exemption was not expected to "undermine the overall benefits" of the contraceptive coverage requirement—not as an independent reason for exempting those organizations. 77 Fed. Reg. at 8,728. Thus, the Departments have explained, "[h]iring coreligionists is not itself a determinative factor as to whether an organization should be accommodated or exempted from the contraceptive requirements." 80 Fed. Reg. at 41,325. Rather, the exemption "was provided against the backdrop of the longstanding governmental recognition of a particular sphere of autonomy for houses of worship." *Id.*; *see also* 78 Fed. Reg. at 39,874 (stating that intent of the exemption was "to respect the religious interests of houses of worship and their integrated auxiliaries in a way that does not undermine the governmental

interests furthered by the contraceptive coverage requirement"); 76 Fed. Reg. at 46,623 (stating that intent of the exemption was "to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions").

The Departments had good reason not to create an exemption for any employer that purports to hire only employees who would not utilize cost-free contraceptive coverage. While the government has a well-recognized interest in respecting the sphere of autonomy for houses of worship, it has no such interest in permitting employers to eliminate particular preventive services from their health plans based on the perceived lack of need for such services. Implementing plaintiffs' proposed exemption would require corroborating whether any plan beneficiary might ever wish to use contraceptives, which in turn would require intrusive inquiries into employees' gender, age, medical needs, religious views, and sexual activities to determine how many will benefit from the availability of FDA-approved, doctor-prescribed contraceptives. The government therefore had a legitimate interest in adopting a comprehensive contraceptive coverage requirement, with only a narrow automatic exemption for houses of worship. *See Lee*, 455 U.S. at 260-61 (recognizing government interest in implementing an administrable "comprehensive national

program" and in confining exemption to a "narrow category" that is "readily identifiable").[3]

For similar reasons, plaintiffs are mistaken to rely on *Center for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 872 (7th Cir. 2014), which declared that "[a]n accommodation cannot treat religions favorably when secular groups are identical with respect to the attribute selected for that accommodation." Even assuming that this pronouncement was a correct statement of the law, it has no relevance here because houses of worship have never been regarded as identically situated to other organizations.

II. Employees Do Not Have A Right Under RFRA To Demand That The Group Health Plan In Which They Participate Be Tailored To Their Religious Beliefs.

A. Imposition of the Contraceptive Coverage Requirement on an Employer and Its Insurer Does Not Substantially Burden the Employees' Religious Exercise.

1. 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), (b)(1). In *Smith*, the Supreme Court held that the Free Exercise

[3] Plaintiffs incorrectly assert that the Departments acted arbitrarily and capriciously by not responding directly to two public comments that "ask[ed] for an exemption for non-religious pro-life groups that exist to oppose abortifacient items." Appellants' Br. 25-26. The Departments made clear the exemption was focused on houses of worship, and they were not required to "consider every alternative proposed nor respond to every comment made," no matter how tangential to that concern. *National Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013).

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. S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); *see id.* (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. 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). The Supreme Court's pre-*Smith* decisions establish objective limits on the burdens the law deems cognizable. One of those limits is the principle that a sincere religious objection to the government's conduct of its own affairs cannot establish a substantial burden that subjects the government's actions to strict scrutiny. *See 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."); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448 (1988) (same). By the same token, a substantial burden cannot be established by a sincere religious objection to the government's imposition of an independent obligation on third parties. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (recognizing as "a fundamental principle of the Religions Clauses" that "[t]he First Amendment gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities") (quotation marks and alteration omitted); *see also Geneva College v. Secretary U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 440 (3d Cir. 2015) ("The Supreme Court has consistently rejected the argument that an independent obligation on a third party can impose a substantial burden on the exercise of religion in violation of RFRA, as we discuss below."), *vacated by Zubik v. Burwell*, 136 S. Ct. 1557, 1560-61 (2016).[4]

[4] *Zubik* and *Geneva College* involved challenges to the accommodation for group

Continued on next page.

2. The plaintiff employees in this case cannot establish that their religious exercise is substantially burdened by regulations that impose no obligations on them. The employees object to regulations that require the Real Alternatives group health plan to include coverage of contraceptives. *See* Appellants' Br. 36; JA 123-24. But the provisions requiring that plans include preventive services apply only to "group health plan[s]" and "health insurance issuer[s]," not to plan beneficiaries. *See* 42 U.S.C. § 300gg-13; 45 C.F.R. § 147.130(a)(1). And because Real Alternatives does not object to that requirement on religious grounds, the only plaintiffs asserting a RFRA claim here are the individual employees who are plan beneficiaries. *See* Appellants' Br. 34 n.4.

The responsibilities that the regulations place on employers and insurance issuers require no action by the employees. Employees are not required to use services simply because they are among the wide array of services covered by a group health plan. Indeed, health plans routinely cover services that a particular beneficiary will never use. For example, most health plans cover prostate cancer screening, even though women do not have a prostate. And most plans cover children's

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health plans maintained by eligible organizations that have religious objections to providing contraceptive coverage. 45 C.F.R. § 147.131(b). That accommodation is not at issue in this case. In its order vacating this Court's decision in *Geneva College*, the Supreme Court emphasized that it "expresse[d] no view on the merits of the cases" and, in particular, that it did not "decide whether [the employers'] religious exercise has been substantially burdened, whether the Government has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest." *Zubik*, 136 S. Ct. at 1560.

immunizations, even though some beneficiaries do not have children and others may object to immunizing their children on religious grounds.

The plaintiff employees cannot establish a substantial burden based on a government requirement that third parties make contraceptive coverage available to them. Plaintiffs do not claim to have incurred any additional cost as a result of the inclusion of those services in their health plan, *see* JA 114-15, which is consistent with the Departments' determination that the contraceptive coverage obligation "will not impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from the services." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2763 (2014) (citing 78 Fed. Reg. at 39,877). And the challenged regulations no more impose a burden on plaintiffs' religious exercise than would any other government program that makes contraceptives available to plaintiffs. Plaintiffs appear to recognize that they would not have a cognizable RFRA claim if the government made contraceptives available to them through Title X (Appellants' Br. 54-55), a program through which the government pays private contractors to provide family planning services to low income individuals. And for purposes of RFRA, it makes no difference that the government has instead chosen to provide optional coverage by regulating a private insurer rather than by paying a private contractor. RFRA does not require the government "to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Roy*, 476 U.S. at 699-700.

3. Plaintiffs nonetheless assert that their religious exercise is substantially burdened because the effect of the challenged regulations is to "t[ake] away something the Real Alternatives employees valued: a morally acceptable health plan." Appellants' Br. 38. The Supreme Court rejected an analogous argument in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, which involved a Free Exercise challenge to the construction of a road through a national forest that would have prevented members of several Native American tribes from continuing to use sacred sites for religious rites. 485 U.S. at 447-58. The Court acknowledged that the challenged project would have "devastating effects on traditional Indian religious practices." *Id.* at 451. But the Court emphasized that "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Id.* at 452.

Similarly, plaintiffs do not advance their argument by asserting that the challenged regulations have the effect of forcing them to choose between accepting a health plan to which they object and forgoing health insurance altogether. In *Bowen v. Roy*, parents brought a Free Exercise challenge to a law that required the government to use a Social Security number to identify their daughter in processing a claim for welfare benefits filed on her behalf. 476 U.S. at 695-97. Like the plaintiff employees in this case, the parents characterized the challenged law as requiring "them to choose between the child's physical sustenance and the dictates of their faith." 476 U.S. at 713 (Blackmun, J., concurring in part). The Court nonetheless held that the parents had not established a substantial burden, because the right to free exercise of religion

"does not afford an individual a right to dictate the conduct of the Government's internal procedures." 476 U.S. at 700 (majority op.). The Court acknowledged that the parents' "religious views may not accept this distinction between individual and governmental conduct." *Id.* at 701 n.6. But the Court explained that "the Free Exercise Clause, and the Constitution generally, recognize such a distinction," and it held that "for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference." *Id.*

In evaluating plaintiffs' RFRA claim, this Court need not accept plaintiffs' characterization of the challenged regulations as forcing them to take an action to which they object. Just as the employees in this case describe their objection as being to "participating in a health plan" that includes contraceptive coverage (Br. 36, 39), the parents in *Roy* could have framed their objection as being to participating in a benefits program that involved the use of their daughter's Social Security number (*see* Appellees' Br. at 47, *Roy, supra* (No. 84-780) (contending that they were "not merely witnesses to the government's unilateral decision" to use their daughter's Social Security number)).

In short, the challenged regulations impose no obligations on employees, and the responsibilities that the regulations place on employers and insurance issuers require no action by the employees. The regulations make certain contraceptive services available to employees through their employer's health plan. But the

employees remain free to decline those services, and they therefore can identify no substantial burden that warrants application of RFRA's compelling interest test.

B. The Challenged Regulations Are the Least Restrictive Means for Achieving Compelling Government Interests

1. Even if the plaintiff employees could demonstrate a substantial burden on their exercise of religion, their RFRA claim would fail because the challenged regulations are the least restrictive means of achieving the government's compelling interest in ensuring a "sustainable" system of insurance "under the ACA to advance public health." *Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 258 (D.C. Cir. 2014), *vacated and remanded Zubik v. Burwell,* 136 S. Ct. 1557 (2016); JA 73 (recognizing "the government's interest in ensuring a sustainable system of insurance is compelling"). As the district court correctly recognized, this interest in a functional health care system "would be harmed should exemptions to particularized religious claimants be required." JA 73. Plaintiffs seek personalized health plans that exclude one of the many preventive services that Congress sought to make more accessible and affordable. *See* 75 Fed. Reg. 41,726, 41,731-36 (July 19, 2010). But group health policies are not amenable to customization based on the preferences of individual beneficiaries, and there is no less restrictive alternative that would allow individual plaintiffs to excise specific coverages from their health plans.

Access to preventive services under the Affordable Care Act (like group health insurance generally) works through "[r]isk pooling in the group market" which

"result[s] in sharing . . . cost[s] . . .across an entire plan or employee group." *See* 75 Fed. Reg. at 41,730. To accomplish this risk pooling, group health plans, by design, cover a wide array of services. No one is required (or expected) to use every service that is covered by a health plan. Insurance simply provides payments for services that individual subscribers, based solely on their own personal choices and the advice of their physicians, elect to receive. The package of services available under a comprehensive plan inevitably includes some services that any given beneficiary would never or could never use. For example, health insurance plans cover both prostate cancer screenings and cervical cancer screenings for all beneficiaries, even though only men can use the former and only women the latter. Though it may seem unnecessary to make cervical cancer screenings available to men or prostate cancer screenings available to women, the use of plans that offer a common set of coverages serves important functions. Such comprehensive coverage allows insurance markets to set rates based on standardized policies and ensures that medical costs are spread across the entire pool of plan beneficiaries.

Plaintiffs contend that RFRA entitles individual plan beneficiaries to opt out of coverage for any particular service they object to on religious grounds.[5] But allowing

[5] "[C]ontraceptive care is by no means the sole form of health care that implicates religious concerns." *Grote v. Sebelius*, 708 F.3d 850, 866 (7th Cir. 2013) (Rovner, J., dissenting). "To cite a few examples: artificial insemination and other reproductive technologies; genetic screening, counseling, and gene therapy; preventative and remedial treatment for sexually-transmitted diseases; sex

Continued on next page.

beneficiaries to unbundle the services offered under group policies in that manner would fundamentally undermine the group health insurance system.

The district court correctly recognized that insurance markets could not function—either administratively or financially—if insurers had to tailor health plans based on the demands of individual beneficiaries. JA 75 ("A ruling that only women, or only individuals without religious objections to certain coverage in their insurance plans, should receive such coverage would cause grave institutional inefficiency" and "would render the system . . . unworkable."). Because the government has a compelling interest in the provision of health care and the functioning of the insurance market, the government has a corresponding "interest in the uniformity of the health care system the ACA put in place, under which all eligible citizens receive the same minimum level of coverage." *Priests For Life*, 772 F.3d at 265; *cf. Cutler v. U.S. Dep't of Health & Human Servs.*, 797 F.3d 1173, 1176 (D.C. Cir. 2015) ("Consistent with the statutory goals of near-universal coverage and protecting the efficient functioning of the health insurance markets . . . Congress allowed only carefully limited exceptions to the general obligation to maintain health insurance."), *cert. denied*, 136 S. Ct. 877 (2016).

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reassignment; vaccination; organ transplantation from deceased donors; blood transfusions; stem cell therapies; [and] end-of-life care." *Id.* Many of the health care services that may implicate religious concerns are preventive services required by the preventive services coverage provision.

The government's interest in this case is analogous to the "very high" governmental interest identified in *United States v. Lee*, 455 U.S. at 259, in which the Supreme Court rejected a Free Exercise Clause challenge to the Social Security program, holding that the program was "essential to accomplish an overriding governmental interest," 455 U.S. at 257-58; *see id.* at 260. The Court described the challenged program as a "comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees." *Id.* at 258. The Court recognized that the viability of the program depended on "mandatory and continuous participation in and contribution to" the program and that it therefore would be "difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs." *Id.* at 258-60. The Court rejected the exemption sought for Amish employers because it would not be "compatible with a comprehensive national program," which "must be uniformly applicable to all, except as Congress provides explicitly otherwise." *Id.* at 260-61; *see also Goehring v. Brophy*, 94 F.3d 1294, 1301 (9th Cir. 1996) (applying *Lee* in rejecting RFRA challenge to student health fee where "the fiscal vitality of the . . . fee system would be undermined if the plaintiffs . . . were exempted from paying a portion of their student registration fee on free exercise grounds" because "[m]andatory uniform participation by every student is essential to the insurance system's survival").

Like the relief sought in *Lee*, the relief plaintiffs seek here is inherently incompatible with the governmental interest at issue.[6] Because the government's interest is in protecting the uniformity of coverage within group health plans, there can be no less restrictive alternative that would allow individual employees to remove from their plans services to which they object.

2. Plaintiffs argue at length (Br. 41-53) that the government lacks a compelling interest in providing contraceptive coverage. This argument is both irrelevant and wrong. It is irrelevant because, as discussed above, the governmental interest here is in ensuring a sustainable and universal system of insurance to advance public health. That interest is independent of the government's compelling interest in ensuring that women covered by every type of health plan receive full and equal minimum health coverage, including contraceptive coverage.

In any event, the argument is also wrong. In *Hobby Lobby*, five Justices recognized that the government has a "compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee." 134 S. Ct. at 2785-86 (Kennedy, J., concurring); *accord* 134 S. Ct. at 2799-2800 & n.23 (Ginsburg, J., dissenting); *see also Priests For Life v. U.S. Dep't of Health & Human Servs.*, 808 F.3d 1, 22 (D.C. Cir. 2015)

[6] Plaintiffs have not argued otherwise. Plaintiffs' brief has a section devoted to less restrictive alternatives (Br. 53-56), but it exclusively proposes alternative means for providing contraceptive coverage, not alternative means of ensuring uniformity within group health plans.

(Kavanaugh, J., dissenting from denial of rehearing en banc) ("It is not difficult to comprehend why a majority of the Justices in *Hobby Lobby* . . . would suggest that the Government has a compelling interest in facilitating women's access to contraception.").[7] Since *Hobby Lobby*, every court of appeals to consider the question has concluded that this interest is compelling. *See Priests For Life*, 772 F.3d at 257-64; *Eternal Word Television Network, Inc. v. Secretary of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1151-58 (11th Cir. 2016), *vacated by order of May 31, 2016*; *see also University of Notre Dame v. Burwell*, 786 F.3d 606, 607-08 (7th Cir. 2015), *cert. granted, judgment vacated*, 136 S. Ct. 2007 (2016); JA 70 ("[T]he overarching benefits that contraceptive care provides give[] us no pause in concluding that the Contraceptive Mandate furthers the government's compelling interest in promoting public health and gender equality.").[8] Thus, even if the extent of the government's specific interest in contraceptive coverage was relevant—and it is not—that interest is compelling.

The plaintiff employees also challenge the government's interest in a workable insurance system, asserting that the government's position is undermined by the fact that the regulations allow certain categories of employers to exclude such coverage

[7] The remaining Justices assumed without deciding that the government has a compelling interest in contraceptive coverage. *See Hobby Lobby*, 134 S. Ct. at 2780 (majority opinion).

[8] The Eighth Circuit assumed the existence of a compelling interest without deciding the question. *See Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 943 (8th Cir. 2015), *cert. granted, judgment vacated sub nom. Dep't of Health & Human Servs. v. CNS Int'l Ministries*, 2016 WL 2842448 (U.S. May 16, 2016).

from their group health plans. Br. 51-53. But as the district court explained, the "exemptions to which Plaintiffs point apply only to employers" and "do not apply to the employees as individuals." JA 76. That the group health system can accommodate circumstances where entire plans omit categories of coverage does not mean that it is workable to allow individual plan participants to customize their plans, which is the relief the plaintiff employees seek under RFRA.

III. Plaintiffs' Other APA Challenges Lack Merit.

The district court correctly rejected plaintiffs' remaining APA claims. JA 49-55. Plaintiffs assert that certain FDA-approved contraceptives may prevent implantation and that this coverage requirement therefore conflicts with the abortion-related provisions of the Weldon Amendment[9] and Title I of the ACA.[10] The claims fail because Congress legislated against the background of longstanding FDA regulations that treat pregnancy as "the period of time from implantation until delivery," 45 C.F.R. § 46.202(f), and categorize drugs that may prevent implantation as contraceptives rather than abortifacients. *See*, *e.g.*, 62 Fed. Reg. 8,610, 8,611 (Feb. 25, 1997) ("Emergency contraceptive pills are not effective if the woman is pregnant; they

[9] The Weldon Amendment requires that no funds provided by the underlying appropriations bill be made available to a federal agency or program that "subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Pub. L. No. 112-74, div. F, § 507(d)(1), 125 Stat. 786, 1111 (2011).

[10] Title I of the ACA states that "nothing in this title . . . shall be construed to require a qualified health plan to provide coverage of [abortion services] as part of its essential health benefits for any plan year." 42 U.S.C. § 18023(b)(1)(A)(i).

act by delaying or inhibiting ovulation, and/or altering tubal transport of sperm and/or ova (thereby inhibiting fertilization), and/or altering the endometrium (thereby inhibiting implantation)."); *see also Michigan Catholic Conference v. Burwell*, 755 F.3d 372, 397 (6th Cir. 2014) (rejecting argument "that the court should defer to [plaintiffs'] independent interpretation of 'abortion'" because "[t]hat is not how statutory interpretation works," and dismissing claim that "'abortion' in the Weldon Amendment includes FDA-approved emergency contraceptives"), *vacated on other grounds*, 135 S. Ct. 1914 (2015), *reinstated,* 807 F.3d 738, 741 (6th Cir. 2015), *vacated on other grounds, Zubik*, 136 S. Ct. 1557.

Indeed, although Title X of the Public Health Service Act generally bars the Secretary from providing funds "used in programs where abortion is a method of family planning," 42 U.S.C. § 300a-6, HHS has long advised Title X grantees that they "should consider the availability of emergency contraception the same as any other [contraceptive] method which has been established as safe and effective." Office of Population Affairs, HHS, Memorandum (OPA 97-2) (Apr. 23, 1997)[11]; *see also*, *e.g.*, 146 Cong. Rec. S6095 (daily ed. June 29, 2000) (statement of Sen. Helms) ("[T]he Congressional Research Service confirmed to me that Federal law does, indeed, permit the distribution of the 'morning-after pill' at school-based health clinics receiving Federal funds designated for family planning services."). Representative

[11] http://www.hhs.gov/opa/pdfs/opa-97-02.pdf.

Weldon himself did not consider the word "abortion" in the statute to include FDA-approved emergency contraceptives. *See* 148 Cong. Rec. H6580 (daily ed. Sept. 25, 2002) (statement of Rep. Weldon) ("The provision of contraceptive services has never been defined as abortion in Federal statute, nor has emergency contraception, what has commonly been interpreted as the morning-after pill. . . . [U]nder the current FDA policy[,] that is considered contraception, and it is not affected at all by this statute.").

The plaintiff employees also contend that the challenged regulations are contrary to the Church Amendment, 42 U.S.C. § 300a-7(d), which prohibits an individual from being required to "perform or assist in the performance of any part of a health service program or research activity funded . . . by the Secretary of [HHS] if his performance or assistance . . . . would be contrary to his religious beliefs or moral convictions." 42 U.S.C. § 300a-7(d). The claim fails because the receipt of health insurance from an employer does not constitute "performance or assistance" in "a health service program or research activity funded" by HHS. The Church Amendment therefore has no application to this case.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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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 7,545 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.

The text of the electronic brief is identical to the text in the paper copies.

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/s/ Patrick G. Nemeroff
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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2016, 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.

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