

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DAVID A. ZUBIK, ET AL., :

4 Petitioners : No. 14-1418

5 v. :

6 SYLVIA BURWELL, SECRETARY OF :

7 HEALTH AND HUMAN SERVICES, :

8 ET AL., :

9 Respondents; :

10 - - - - - x

11 and

12 - - - - - x

13 PRIESTS FOR LIFE, ET AL., :

14 Petitioners : No. 14-1453

15 v. :

16 DEPARTMENT OF HEALTH AND HUMAN :

17 SERVICES, ET AL., :

18 Respondents; :

19 - - - - - x

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21

22

23

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25

1 and

2 - - - - - x

3 ROMAN CATHOLIC ARCHBISHOP OF :

4 WASHINGTON, ET AL., :

5 Petitioners : No. 14-1505

6 v. :

7 SYLVIA BURWELL, SECRETARY OF :

8 HEALTH AND HUMAN SERVICES, :

9 ET AL., :

10 Respondents; :

11 - - - - - x

12 and

13 - - - - - x

14 EAST TEXAS BAPTIST UNIVERSITY, :

15 ET AL., :

16 Petitioners : No. 15-35

17 v. :

18 SYLVIA BURWELL, SECRETARY OF :

19 HEALTH AND HUMAN SERVICES, :

20 ET AL., :

21 Respondents; :

22 - - - - - x

23

24

25

1 and

2 - - - - - x

3 LITTLE SISTERS OF THE POOR HOME :

4 FOR THE AGED, DENVER, COLORADO, :

5 ET AL., :

6 Petitioners : No. 15-105

7 v. :

8 SYLVIA BURWELL, SECRETARY OF :

9 HEALTH AND HUMAN SERVICES, :

10 ET AL., :

11 Respondents; :

12 - - - - - x

13 and

14 - - - - - x

15 SOUTHERN NAZARENE UNIVERSITY, :

16 ET AL., :

17 Petitioners : No. 15-119

18 v. :

19 SYLVIA BURWELL, SECRETARY OF :

20 HEALTH AND HUMAN SERVICES, :

21 ET AL., :

22 Respondents; :

23 - - - - - x

24

25

1 and

2 - - - - - x

3 GENEVA COLLEGE, :

4 Petitioner : No. 15-191

5 v. :

6 SYLVIA BURWELL, SECRETARY OF :

7 HEALTH AND HUMAN SERVICES, :

8 ET AL., :

9 Respondents. :

10 - - - - - x

11 Washington, D.C.

12 Wednesday, March 23, 2016

13

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:03 a.m.

17 APPEARANCES:

18 PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of

19 Petitioners in Nos. 15-35, 15-05, 15-119 & 15-191.

20 NOEL FRANCISCO, ESQ., Washington, D.C.; on behalf of

21 Petitioners in Nos. 14-1418, 14-1453 & 14-1505.

22 GEN. DONALD B. VERRILLI, JR., ESQ., Solicitor General,

23 Department of Justice, Washington, D.C.; on behalf of

24 Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 14-1418, *Zubik v. Burwell*, and the consolidated cases.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONERS IN
NOS. 15-35, 15-05, 15-119 & 15-191

MR. CLEMENT: Thank you, Mr. Chief Justice, and may it please the Court:

The Little Sisters of the Poor and their co-petitioners face a dilemma that the Religious Freedom Restoration Act does not allow. They can adhere to their religious beliefs and pay millions of dollars in penalties, or they can take steps that they believe to be religiously and morally objectionable, and that the government deems necessary, for them to provide contraception coverage through their health care plans.

Now, the government concedes the sincerity of these religious beliefs, but it attempts to recast them as an objection to the very act of opting out or objecting. And with all due respect, that is simply and demonstrably not true.

The Little --

1 JUSTICE SOTOMAYOR: Could you explain to me
2 the analogy with military objectors during the war?
3 Many of them felt that -- genuine belief; they were
4 pacifists -- that if they registered as pacifists, that
5 that would mean other people would have to serve in
6 their lieu. They were going to jail, and many of them
7 did go to jail, because of this belief.

8 Why is going to jail less burdensome or less
9 important than paying a financial penalty?

10 MR. CLEMENT: Oh, I -- I don't think it is,
11 Justice Sotomayor. But let me stick with the
12 conscientious objector example in the draft context,
13 because I think the way to analyze a conscientious
14 objector case is to say that because they face jail
15 time, there's clearly a substantial burden. Of course,
16 you get to the second part of the analysis, and you
17 probably would insist on a conscientious objector
18 actually objecting.

19 But I think it's important to distinguish
20 between --

21 JUSTICE SOTOMAYOR: Let's stop there.

22 MR. CLEMENT: Okay.

23 JUSTICE SOTOMAYOR: To the extent that a
24 conscientious objector's good faith belief is that if I
25 register, someone will serve in my lieu, what burden is

1 it on the government? Meaning, if -- if you're looking
2 at it in terms of strict scrutiny, the government sends
3 out how many notices to people to come and serve?
4 Ten -- you know, 1,000, 1,200. Do you really think it
5 makes a difference if it knows whether or not one person
6 is not going to show up? And if we're going down that
7 road of what's the difference, why would that law
8 survive?

9 MR. CLEMENT: I think it would, because I
10 think it would be very difficult to administer that kind
11 of system if either you couldn't even know about the
12 objection or you couldn't take any steps on the
13 government's part to fill the spot.

14 But I think what's critical --

15 JUSTICE SOTOMAYOR: Well, then, isn't that
16 the same thing here? If you don't know who can pay, or
17 who -- who's not eligible, or who's eligible to pay, how
18 does this system work?

19 MR. CLEMENT: Well, two things, Your Honor.
20 One, this is perhaps the unique government program where
21 the government can provide an exemption without actually
22 requiring somebody to opt out, because that's exactly
23 what they do for the churches, for the integrated
24 auxiliaries, and the religious orders --

25 JUSTICE SOTOMAYOR: The churches have to

1 tell us that their church plans -- have to tell the
2 government their church plans. Somebody has to tell the
3 government who's eligible or not eligible.

4 MR. CLEMENT: That --

5 JUSTICE SOTOMAYOR: How is that different
6 from military service?

7 MR. CLEMENT: Well, first of all, Your
8 Honor, that's just not true with respect to the
9 churches, their integrated auxiliaries, and the
10 religious orders that stick to their knitting and only
11 engage in religious activity. So factually, there's
12 that distinction.

13 But I think the more important thing, Your
14 Honor, is I would distinguish between the situation
15 where somebody has an objection to opting out because
16 the government's going to take wholly independent steps
17 to find somebody to fill their spot, and a conscientious
18 objector who objects to objecting on a form where the
19 only way they can object is if they list the name of
20 somebody else who's draft-eligible who will then be
21 obligated to serve in their stead. I would --

22 JUSTICE SOTOMAYOR: Well, but the client,
23 then --

24 JUSTICE KENNEDY: You -- you -- you began,
25 Mr. Clement, by saying that the government

1 mischaracterizes your position, and I was just not quite
2 sure where that argument was taking us. You're getting
3 more into the specifics of it now, but could you just
4 begin again there, and --

5 MR. CLEMENT: I --

6 JUSTICE KENNEDY: -- again, what we are
7 talking about?

8 (Laughter.)

9 MR. CLEMENT: I would be delighted --
10 delighted to do that, Justice Kennedy.

11 My point was simply that my clients do not
12 object to objecting. And part of the reason you know
13 that is they have not been shy about objecting. They
14 told the government in the regulatory process that they
15 were making a mistake when they eliminated the true
16 exemption to religious orders to only those orders that
17 stuck to purely religious things. And my client the
18 Little Sisters could not go out because they serve the
19 elderly poor on a nondenominational basis. That's why
20 they don't qualify for the exemption. So they objected
21 then. They objected when they filed this lawsuit. They
22 reaffirmed their objection when they filed the notice
23 that was necessary to comply with this Court's interim
24 objection.

25 JUSTICE KAGAN: Well, Mr. Clement, that

1 might be so. But what happens if somebody did just
2 object to objecting? It seems all your arguments would
3 apply the same way. In other words, somebody comes in
4 and says, I do object to objecting because objecting
5 will make it easier for the government to fill my slot.
6 That's a perfectly understandable thing to say. And
7 that's part of my sincere religious belief. And you say
8 the sincere religious belief is what controls. And
9 there too it would seem under your very theory you would
10 have to say that that's a substantial burden, even if
11 it's objecting to objecting.

12 MR. CLEMENT: Two things, Justice Kagan.
13 First, it would only qualify as a substantial burden if
14 the objection requirement was enforced with massive
15 penalties. And that's a relatively rare situation, but
16 it's -- but --

17 JUSTICE KAGAN: Yes. Yes. I mean, we have
18 the same penalties that we have here, and the person is
19 just objecting to objecting. And that's part of the
20 religious belief because that will make it more likely
21 that the government will be able to fill the slot and to
22 take efforts to, you know, to -- to provide
23 contraceptives.

24 MR. CLEMENT: I understand, Justice Kagan.
25 That brings me to the second part of my answer, which is

1 I think the right way to understand that hypothetical --
2 and I was explaining to Justice Kennedy, it's just a
3 hypothetical.

4 JUSTICE KAGAN: Well, it's a hypothetical
5 that's directly implicated by your very theory of the
6 case, because your theory of the case says that
7 everything depends on a person coming in saying this is
8 against my religion, and that being the end-all and the
9 be-all.

10 MR. CLEMENT: Well, I don't think that's our
11 position. Our position is that -- the sincerity of the
12 religious beliefs. The government can question them.
13 They've conceded to them here. There is a legal
14 analysis about the substantial burden, but the
15 substantial burden analysis in this case is very clear
16 because of these millions of dollars in penalties, the
17 exact same penalties that were issued in Hobby Lobby.
18 And the Court said it was an easy case on substantial
19 burden --

20 JUSTICE KAGAN: You're just not answering
21 the question.

22 MR. CLEMENT: Well, I'm trying -- I'm trying
23 to, with all due respect, which is that brings to -- if
24 you have everything else the same, that brings you to
25 the second part of the RFRA analysis. And I would think

1 if our objection, contrary to fact, were we absolutely
2 object to objecting, if you come in and the
3 government -- based on our objection, the government
4 provides the service through the Exchanges, through
5 Title X, through an Aetna uber-policy where everybody
6 gets their contraceptives, some overall government
7 policy, we, in fact, object to none of those things.
8 But if we did, I think we would lose under the second
9 half of the RFRA analysis, because I think that's the
10 right analysis.

11 JUSTICE KAGAN: So if I understand that
12 answer, it's that if a person had a sincere religious
13 belief that objecting to objecting was a form of
14 complicity, then that would control, and you would have
15 to go to the second part of the analysis, which is to
16 say, is there a compelling interest test? Has the
17 government's response been narrowly tailored? But
18 essentially, the objecting -- the difference between
19 objecting to objecting and your clients' position is not
20 a difference at all with respect to the burden analysis.

21 MR. CLEMENT: Well, I do think my clients'
22 objection is distinguishable from the hypothetical,
23 because this is not an objecting to objecting. I mean,
24 maybe one way to understand this is, if there were, in
25 fact, two forms, one was an opt-out form, one was an

1 authorization form, my clients would have no objection
2 to signing the opt-out form. They would very much have
3 an objection to the authorization form. And the
4 government --

5 JUSTICE KAGAN: I guess what I'm saying, Mr.
6 Clement, is I understand the factual distinction that
7 you're making, but the factual distinction doesn't
8 matter given your own legal analysis.

9 MR. CLEMENT: I don't think it does based on
10 this Court's precedents either, but even if I'm wrong
11 about that, you could certainly write an opinion that
12 says there are three legs to the stool in this case.
13 There is the fact that the government demands more than
14 an objection, the fact that it enforces it with massive
15 penalties, and the reality that if that happens, then
16 they are going to hijack our health plans and provide
17 the coverage against our will.

18 JUSTICE SOTOMAYOR: What I don't understand,
19 Mr. Clement, is when will any government law that
20 someone claims burdens their practice ever be
21 insubstantial? Because every believer that's ever come
22 before us, including the people in the military, are
23 saying that my soul will be damned in some way. I'm not
24 naysaying that that is a very substantial perceived
25 personal burden by them. But if that's always going to

1 be substantial, how will we ever have a government that
2 functions? How will we ever have anything that the
3 government can demand people to do in objecting --

4 MR. CLEMENT: Two things --

5 JUSTICE SOTOMAYOR: -- that won't be a
6 problem?

7 MR. CLEMENT: Two things, Justice Sotomayor.
8 The first is that I do think that what you're saying
9 about the government not being able to function under
10 the substantial burden and then the least restrictive
11 alternative analysis, that's exactly what Justice Scalia
12 said for the Court in the Smith decision. And Justice
13 O'Connor took a different view. And they had a healthy
14 debate. And you can question who had the better of the
15 debate, but there is no question which side of the
16 debate settled things.

17 JUSTICE SOTOMAYOR: Well, it's the side of
18 the debate that settles, which is if we are not asking
19 you to do anything except identify yourself, and if who
20 is going to do the action is either the government or a
21 third party, that that's the balance that we have
22 struck, that it's not a substantial burden if someone
23 else is going to do the act that you're objecting to.

24 MR. CLEMENT: Justice Sotomayor, if the only
25 action involved is a third-party action like in part of

1 the Bowen against Roy case or in the Lyng case, you're
2 right, that's not a substantial burden. But when the
3 government says -- and it needs more. I want to be as
4 clear as I can about this. The government admits at
5 pages 87 through 89 of their brief that they need more,
6 just then, to know that we raise our hand and opt out.
7 They also need additional information about our insurer
8 or our TPA. So they require more. So -- and -- if we
9 don't --

10 JUSTICE GINSBURG: But they -- what other
11 than -- who is the TPA? Who is the insurer? That's
12 all.

13 MR. CLEMENT: That's what they say they
14 need.

15 JUSTICE GINSBURG: And then they have an
16 independent contract. The insurer or the TPA is then
17 not dealing with the employer at all. It has an
18 independent obligation that is imposed by the government
19 on it, and not the -- not the company.

20 MR. CLEMENT: Justice Ginsburg, that's true
21 if and only if we provide the form, because it's not
22 just the information on the form. The government treats
23 that form as an authorization. In the case of
24 self-insured plans with TPA --

25 JUSTICE GINSBURG: It's not an

1 authorization. The government -- the law -- the
2 regulation requires it, but it doesn't matter whether
3 you say yes or no. And you could say, I fill out the
4 form. I do not authorize. I do not permit. It won't
5 make any difference.

6 MR. CLEMENT: It makes all the difference,
7 Justice Ginsburg. If we don't provide the form, then
8 the coverage doesn't flow. We haven't provided the form
9 in these cases, and as a result, the coverage hasn't
10 flowed. The government thinks -- and I think it's most
11 obvious with respect to the self-insured plans, but it's
12 true of all of them. The government thinks it needs
13 something from us so it can take that something and make
14 it a plan document.

15 JUSTICE GINSBURG: Because the government
16 has another interest at stake in -- one thing you said
17 and I want it clear that this is not involved at all.
18 No one doubts for a moment the sincerity of the belief
19 of your client and all the others. And since sincerity
20 of their belief is accepted, it's off the table, any
21 more than the sincerity of belief of the parents in the
22 Roy case was questioned. In none of these cases is that
23 an issue. That's accepted.

24 But the government has acted in this case,
25 as you know, the -- the original health care plan didn't

1 provide these covered services for women, and it saw a
2 compelling interest there, a need that was marginally
3 ignored up until then. So as in all things, it can't be
4 all my way. There has to be an accomodation, and that's
5 what the government tried to do.

6 MR. CLEMENT: I agree, Justice Ginsburg, but
7 just because they call it an accomodation doesn't mean
8 it's immune from RFRA analysis. And if what they gave
9 my clients is what they gave the 345,000 churches, their
10 integrated auxiliaries and the purely religious
11 activities of religious orders, if they gave that
12 accomodation to my client, we'd fill out any form they
13 wanted to. But the problem is we have to fill out a
14 form, and the consequence of us filling out that form is
15 we will be treated very differently from those other
16 religious employers.

17 JUSTICE GINSBURG: It doesn't --

18 JUSTICE ALITO: You started to talk about --
19 you started to talk about self-insured plans. Is it the
20 case that the form or the notice to HHS in that instance
21 becomes a plan instrument?

22 MR. CLEMENT: In both cases, Your Honor, it
23 becomes a plan instrument, and I think -- you know, the
24 government thinks that our notification in this case is
25 the functional equivalent of the EBSA 700 Form, and the

1 reason they required a form -- and this shows you it's
2 not really an opt out, because the way the regulations
3 were originally designed, you didn't raise your hand and
4 tell the government, I object. You sent a form directly
5 to the insurer or directly to the TPA that they then
6 treated as the permission slip to provide the coverage.

7 JUSTICE GINSBURG: And that's out now.

8 MR. CLEMENT: Well, no, it's not out.
9 That's actually still one of the ways that you can
10 apply --

11 JUSTICE GINSBURG: Yes, but you don't have
12 to do that. You can notify the government.

13 MR. CLEMENT: Well, the alternative, thanks
14 to this Court in its interim relief, is that we now can
15 file an objection that the government treats exactly the
16 same way. All they do that's different is they
17 essentially -- it's a mailing rule. They take our
18 objection and then they provide that objection to the
19 third-party administrator, and at least with the
20 self-insured plans, that becomes every bit as much a
21 plan document as the EBSA Form 700.

22 And with all due respect, it's a little rich
23 for the government to say, This isn't your plan, don't
24 worry about this, when their whole interest is put in
25 terms of seamless coverage. If it's seamless to the

1 enduser, then I don't think the Little Sisters
2 perception that it's seamless to them, and they are, in
3 fact, complicit is an irrational belief by any stretch.

4 JUSTICE KENNEDY: Is the -- is the essence
5 of your argument that -- and your objection is that the
6 contraceptive coverage is -- is being done through the
7 health insurance that you contract with?

8 MR. CLEMENT: That's -- I think that's a
9 fair description of it, Justice Kennedy. And I think
10 the only problem the government is having understanding
11 our position is that that health plan is somewhat
12 intangible. And I think if you put this in more
13 tangible terms, if the -- if the consequence of us
14 filing the form was that they would come in to one of
15 the Little Sisters homes and set up shop in a room, they
16 could pay us rent, it wouldn't cost us a thing. And
17 then they operated a Title X clinic out of our homes? I
18 think everyone would understand that, of course, we are
19 complicit in the coverage that's provided on our
20 premises. And just because this is more intangible, I
21 don't think the principle is any different, and
22 certainly from the perspective --

23 JUSTICE KENNEDY: Do we accept the -- your
24 clients' view on complicity, or do we have a Palsgraf
25 analysis and see how far the causation go -- I'm -- do

1 we just accept your view on complicity and then just see
2 whether or not the accomodation is possible on this and
3 that's the least restrictive?

4 MR. CLEMENT: I think that's the role that
5 your courts have had for the Court, because I think they
6 don't want to get in the role of having the truth
7 detector test, and that -- and that's not just the Hobby
8 Lobby decision. That goes back to the Thomas decision.
9 If you remember that decision, you had a religious
10 adherent who had an objection to formulating cylindrical
11 tanks -- cylindrical things that would go into tanks.

12 Now, there was another Jehovah's Witness
13 that was in the record that said, You don't need to
14 object to that. That's not that big a deal. It's too
15 attenuated. And this Court specifically said, We're not
16 going to get in the business of refereeing those
17 disputes, and we're not going to get in the business of
18 trying to figure out and second-guessing whether Mr.
19 Thomas is really correctly misunderstanding his faith.

20 Now, here you have a ton of amicus briefs
21 that reinforce that the religious beliefs that are at
22 issue here for the Little Sisters and for my other
23 clients are not at all idiosyncratic, are not at all,
24 you know, wrong as a matter of faith. But that's not an
25 area that you should get into. I think --

1 JUSTICE BREYER: Are you finished?

2 MR. CLEMENT: Yeah, I am.

3 JUSTICE BREYER: All right. I have -- You
4 must have thought about this question, I suspect. I'll
5 assume, I want to assume for purposes of the question,
6 that this isn't just a matter of signing a form with an
7 objection. Your -- your clients are involved in the
8 health care plan in major ways. They probably figure --
9 sign papers every five months or every day, and they
10 choose insurers. They do all kinds of things. And it's
11 the topping, the icing on the cake, that pushes it over
12 the edge, which is that you have to fill out the form
13 saying, I object, this is my insurer, you then can
14 contact my employees, da, da, da, da, da. It's a whole
15 bunch of things.

16 All right. So the question is, putting that
17 all together now, are they protected by RFRA? I think
18 the reason that the Court went from Sherbert and Verner
19 over to Smith was they couldn't figure out how to apply
20 Sherbert and Verner. And it's Sherbert and Verner that
21 RFRA picks up. And this is at least one difficulty with
22 it, which is where I'm going. And I've even read St.
23 Benedict. You know, not -- not for religious purposes,
24 I'm trying to find out something about being a member of
25 society.

1 Sometimes when a religious person who's not
2 a hermit or a monk is a member of society, he does have
3 to accept all kinds of things that are just terrible for
4 him. Think of the Quakers, the Quakers who object to
5 Vietnam. Think of the people who object to laws
6 protecting blasphemy. Think of the people who object to
7 shoveling the snow in front of the walk that will lead
8 to the abortion clinic. Think of the Christian
9 Scientists who know when they report the accident, the
10 child will go to the hospital or the adult and receive
11 medical care that is against their religion.

12 So there are loads of things. I've just
13 given you four. Think of the taxes. Well, there's no
14 question that doesn't violate the religious clause. But
15 plenty of other things do. So what's the line? Why do
16 the Quakers have to pay the taxes for Vietnam, but you
17 don't find the religious Jew or Muslim getting an extra
18 day off during the week when the law says nobody can
19 work on Sunday because their sabbath is on Saturday?
20 What is the line?

21 And I've been reading and reading to try to
22 find a fairly clear simple statement of what that line
23 is and how it works. And to repeat the difficulty of
24 Sherbert and Verner, which is what RFRA does, quite
25 honestly, doesn't help me. But you might.

1 MR. CLEMENT: I'm going to try, Justice
2 Breyer, and then I'm going to try to reserve my time for
3 rebuttal.

4 So what I would say to you is you're exactly
5 right, that Smith was a much more administrable world,
6 but Congress --

7 JUSTICE BREYER: Did -- did they tell me
8 that it worked?

9 MR. CLEMENT: Absolutely. So here's the way
10 that you work it and draw the line. You first ask, is
11 there a substantial burden on religious exercise? That
12 is going to weed out some claims. If I was trying to
13 claim that a tax on wine, for example --

14 JUSTICE BREYER: No, the Quaker, the Quaker.
15 You think that wasn't a substantial burden?

16 MR. CLEMENT: No, no, no. I'm just trying
17 to tell you that that's one step. It will weed out some
18 claims. I do think then there's going to be work to be
19 done on the second half of the test, and I think there
20 are some fairly obvious differences between a regime
21 where essentially the government itself by its own
22 actions has showed that people can't opt out. It's too
23 important. It's too universal.

24 And then you come at a case like this, or
25 like Sherbert itself. The thing that made Sherbert an

1 easy case was the government of South Carolina had
2 already taken care of the Sunday objectors. So at that
3 point, their argument that the whole system would
4 collapse if we take care of the Sabattarians, it was not
5 a particularly persuasive argument.

6 Here, they've taken care of the churches.
7 They've taken care of a religious order just like the
8 Little Sisters, if only the Little Sisters wouldn't go
9 out and care for the elderly and poor. They've
10 demonstrated that this is an easy case.

11 I reserve my time.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Mr. Francisco.

14 ORAL ARGUMENT OF NOEL FRANCISCO

15 ON BEHALF OF THE PETITIONERS IN

16 NOS. 14-1418, 14-1453 & 14-1505

17 MR. FRANCISCO: Mr. Chief Justice, and may
18 it please the Court:

19 The government here has the same interest
20 that it has with respect to every other employee in this
21 country who doesn't get contraceptive coverage from an
22 employer-based plan. Yet for all of these other
23 employees, the government tells us that it furthers its
24 interest in other ways. The government, therefore,
25 needs to prove that those other ways are somehow

1 insufficient when it comes to Petitioners' employees,
2 but the sum total of their showing in this case is
3 limited to less than one column of one page of the
4 Federal Register. That is simply insufficient before
5 the government can demand that organizations like
6 Catholic Charities and the Little Sisters of the Poor
7 engage in conduct that all agree here they regard as
8 sinful.

9 Instead, what we have here is a religious
10 employer definition, that is, those organizations that
11 get the full-blown exemption as opposed to organizations
12 like the Petitioners here that gives a full-blown
13 exemption to organizations even if they don't object to
14 providing contraceptive coverage that treats identical
15 organizations differently where you've got a Catholic
16 school on the west side of town that has to comply.

17 JUSTICE GINSBURG: Are you suggesting that
18 once you have this category, the church, then any other
19 organization, religiously-oriented organization, has to
20 come within that same category as the church itself?
21 The government can't treat the church as special and
22 give it an exemption that it doesn't give to
23 religious-oriented organizations?

24 MR. FRANCISCO: No, Your Honor, I'm not
25 necessarily suggesting that. But in this case, when you

1 look at what the government has, in fact, done in
2 particular, when you look at what Congress has, in fact,
3 done, that is, in fact, the line that Congress has
4 drawn. Both in the Title VII exemption where churches,
5 like the houses of worship and religious organizations
6 like our clients get treated the same. Like in the tax
7 exemption regime. Here the government's entire line is
8 drawn from the tax world where the line -- where they --
9 they define those who have to file informational tax
10 returns --

11 JUSTICE GINSBURG: Yes, the government could
12 do that, but does it have to? That is, can the
13 government say we are going to treat the church itself
14 ultra protected? Religious-oriented organizations are
15 protected, but not at that same level.

16 MR. FRANCISCO: Your Honor, no, I don't
17 think they can do that in the context of this regime. I
18 don't think the government can take the position that
19 the Little Sisters of the Poor are any less at the core
20 of a, quote-unquote, "church" than a house of worship,
21 where we have time --

22 JUSTICE KENNEDY: The same with a
23 university?

24 MR. FRANCISCO: Excuse me, Your Honor?

25 JUSTICE KENNEDY: The same with a

1 university?

2 MR. FRANCISCO: I think with a university,
3 yes, Your Honor, because, again, when you look at how
4 Congress has drawn the lines, universities get the Title
5 VII exemption from -- for religious hiring. Churches
6 do. The Little Sisters --

7 JUSTICE KENNEDY: Well, but then you're
8 answering really to the affirmative in -- to Justice
9 Ginsburg's question. Once you give it to a -- a church,
10 you have to give it to any other religious organization.
11 That's -- that's your position.

12 MR. FRANCISCO: Not quite, Your Honor. I
13 think that the problem is that the government has to
14 draw a definition that is coherent and that is rational.
15 And I think the problem here is they've drawn a
16 definition from the tax regime that doesn't comply when
17 you carry it over to this regime.

18 In the tax world, when the churches, when
19 the universities, when the Little Sisters of the Poor
20 file that informational tax return, they actually get
21 the exact same exemption --

22 JUSTICE KENNEDY: It's going to be very
23 difficult for this Court to write an opinion which says
24 that once you have a church organization, you have to
25 treat a religious university the same. I just find that

1 very difficult to write.

2 MR. FRANCISCO: And, Your Honor, we're not
3 suggesting that. What we are suggesting is that when
4 the government has the same interest here that it has
5 for all of the other employees in this country that
6 don't get coverage from a -- from an employer-based
7 plan -- and it's not just the religious employers. It's
8 not just the grandfathered plans. In addition, you have
9 the self-employed, the unemployed, and the employees of
10 small businesses. The government has the same interest
11 with respect to all of those organizations.

12 JUSTICE KAGAN: I thought there was a -- a
13 very strong tradition in this country, which is that
14 when it comes to religious exercises, churches are
15 special, and that -- you know, we have said this most
16 recently in Hosanna-Tabor, but it's a long line of cases
17 which says that there's something very special about
18 churches themselves.

19 And -- and if you're saying that every time
20 Congress gives an exemption to churches and synagogues
21 and mosques, that they have to open that up to all
22 religious people, then the effect of that is that
23 Congress just decides not to give an exemption at all.
24 And that's why there are some people who are extremely
25 strong RFRA supporters who have deserted this cause

1 right here, Professor Laycock among them, because of the
2 mortal danger that it poses to churches.

3 MR. FRANCISCO: And, Your Honor, just to be
4 clear, I am not suggesting that whenever you give an
5 exemption to churches, that exemption has to apply to
6 all other religious organizations. What I am suggesting
7 is that when the government has the same interest with
8 respect to both religious and secular employees, the
9 churches, the religious employers, the employees of
10 small businesses, the employees of grandfathered plans,
11 and the government furthers that interest with respect
12 to all of those employees in many other ways -- whether
13 it's the Affordable Care Act Exchanges, whether Title X,
14 whether it's Medicare and Medicaid -- at a minimum, the
15 government needs to explain why all of those other ways
16 are sufficient for all of those other employees, but
17 yet --

18 JUSTICE GINSBURG: But the grandfather is
19 traditional. There are many statutes that have
20 grandfather provisions that -- they're transitional.
21 And there are many statutes that -- that treat small
22 enterprises differently.

23 Are -- are you saying that once the
24 government makes -- recognizes, exempts from the law the
25 small business, the very small business, once it has a

1 number, like in Title VII, 15 employees, that's it? The
2 floodgates open, and it has to -- has to open what is an
3 exemption for the very small business to everyone?

4 MR. FRANCISCO: Not at all, Your Honor. But
5 what I am saying is if Title VII had an exemption that
6 said you can't discriminate on the basis of race unless
7 you've a pre-existing policy of race discrimination, in
8 which case you can maintain that case in perpetuity as
9 long as you don't change it, that's fine, then I think
10 that would undermine the -- the purpose of Title VII.
11 And that's precisely the type of exemption that you have
12 in the contraceptive mandate.

13 JUSTICE ALITO: Couldn't Congress, or
14 perhaps the Executive, survey the employees of churches
15 and of other -- of religious nonprofits and categories
16 of religious nonprofits, the Little Sisters, a big
17 university, and determine the percentage of employees in
18 each of those groups who are members of the religion and
19 draw a distinction among those groups based on -- on
20 that survey? Couldn't Congress do that?

21 MR. FRANCISCO: Justice Alito, they could do
22 that, and they could do many other things, as well.

23 JUSTICE SOTOMAYOR: Well, we could also
24 just -- why don't we assume that if they are part of the
25 -- if the majority are part of the religion, that they

1 are not going to buy contraceptives? That's their
2 religious tenet. And so why are we worried about this
3 case at all?

4 MR. FRANCISCO: Well, Your Honor, because I
5 think --

6 JUSTICE SOTOMAYOR: We are worried because
7 there are some women who don't adhere to that particular
8 religious tenant, and who have -- we perceive the
9 government has determined, have a real need for
10 contraceptives.

11 MR. FRANCISCO: And, Justice Sotomayor, I
12 think that goes to the larger problem with the
13 government's case here, which is the utter absence of
14 evidence. Let's assume, for the sake of argument --

15 JUSTICE SOTOMAYOR: What is the utter
16 absence? there is plenty of evidence that was relied
17 upon to show that when contraceptives are provided to
18 women in a seamless way, that the number of unintended
19 pregnancies dramatically falls, as does the number of
20 abortions. And so that health risk to women who want
21 contraceptives who can't get it is proven,
22 scientifically and otherwise.

23 MR. FRANCISCO: But, Justice Sotomayor, that
24 problem, the problem with seamlessness or whether you
25 call it the problem of burdensomeness, that's the

1 problem that exists not just with respect to the
2 employers of Petitioner's employees, but with respect to
3 every other employee who, like Petitioner's employees,
4 also --

5 JUSTICE SOTOMAYOR: But you know that we
6 exempt certain employers of certain size from Title VII,
7 and it's not because we don't believe that racial
8 discrimination is a bad thing, and it's not that we're
9 not committed to eradicating that problem, but because
10 at a certain point, we have assumed as a society, or as
11 a government, that you can't do everything.

12 So you can't take care of the health needs
13 of a hundred percent of women, but you can of a
14 significant number. Why is that a judgment that is not
15 entitled to some respect?

16 MR. FRANCISCO: Because I think it means one
17 of two things: Either the government is willing to
18 tolerate all of the problems it identifies for
19 Petitioner's employees with respect to the employees of
20 grandfathered plans -- and we understand that there are
21 about 44 million of those -- with respect to -- respect
22 to the employees of small businesses, with respect to
23 the employees of religious employers, the unemployed and
24 the self-employed.

25 Either they're willing -- if they're willing

1 to tolerate the problems with all of those people, then
2 it really does question whether they have a compelling
3 interest in forcing these particular Petitioners to
4 comply. But on the flip side, if, as they suggest in
5 their briefs, they are not actually willing to tolerate
6 the problem with respect to all of those other people,
7 but instead, think they can further their interest in
8 other ways, the question becomes: Why are all of those
9 other ways that are sufficient for all of those other
10 people suddenly insufficient when it comes to
11 Petitioner's employees?

12 And that's the fundamental breakdown in the
13 government's side of the case. More generally, I think
14 we see an absence of evidence on many of the critical
15 issues here.

16 Let's assume for the sake of argument we
17 knew what the size of the problem was, how many women
18 out there actually lack access to contraceptive
19 coverage. And we don't know the answer to that. And
20 let's further assume that we knew how much of that
21 problem would be reduced by forcing organizations like
22 Petitioner's to comply. Would we reduce it by 1
23 percent? 15 percent? 50 percent? And we don't know
24 that.

25 We still don't know whether the government

1 could achieve a comparable reduction through less
2 burdensome means, and the very less burdensome means
3 that it says are sufficient to further its interests
4 with respect to all of the other employees who, like
5 Petitioner's employees, don't get contraceptive coverage
6 from an employer-based plan.

7 JUSTICE KAGAN: Mr. Francisco, I have to
8 admit to not quite understanding this argument, that --
9 it seems as though the most important laws, the laws
10 that serve the most compelling interests, are -- often
11 have exceptions in them. There are often small business
12 exceptions. There are often transition rules, like the
13 grandfathering provision here. And if, every time that
14 existed, somebody could come in and say, well, the
15 government must not really believe in this law because
16 there is an exception to it, state -- allows some
17 people -- then, I mean, we might as well pack it all in.
18 There's not a law in town that doesn't have exceptions
19 like that.

20 MR. FRANCISCO: I don't think that's right,
21 Your Honor. First of all, the grandfather plan is not a
22 transition rule. It contains no sunset provision. It
23 allows --

24 JUSTICE KAGAN: It's lower and lower every
25 single year.

1 MR. FRANCISCO: It's got lower for the first
2 couple of years, and it's leveled off in the last two
3 years at about --

4 JUSTICE GINSBURG: If you make any change --

5 MR. FRANCISCO: -- 25 percent.

6 JUSTICE GINSBURG: If you make any change in
7 your health plan, then you're out from under the
8 grandfather, and every employer is going to make changes
9 in the health plan. So it's a diminishing -- it's a
10 transitional period. Once you make a change in your
11 plan, you're out from under the grandfather.

12 MR. FRANCISCO: Yes, Your Honor, except that
13 they allow -- they allow employees to raise copayments
14 at the rate of medical inflation without losing status,
15 and they allow you to continue adding employees to the
16 plan without losing grandfathered status, which I think
17 partly explains why it's leveled off at about 25 percent
18 over the last couple of years. But even putting that
19 aside, I think that once you've drawn a massive
20 exemption for secular and religious reasons, it tends to
21 undermine -- it tends to do one of two things. Either
22 it shows your interest really isn't that compelling,
23 because you're allowing -- you're willing to tolerate a
24 whole bunch of bad stuff for a whole bunch of other
25 people, or -- and I don't think that's really what it

1 means here. I think what it means here is the
2 government is telling us that it's got the same interest
3 with respect to grandfathered employees --

4 JUSTICE KAGAN: Here is the deal you would
5 put in place, Mr. Francisco. You would be saying to
6 Congress, Congress, next time you pass a law, don't put
7 in an exemption for churches; you're going to get in
8 real trouble doing that. Don't write transition rules
9 that will help people adjust to a new legal regime;
10 you're going to get in real trouble doing that. Don't
11 write exemptions for small businesses, even though there
12 are very particular concerns that small businesses face;
13 you're going to get in trouble for that. Now, those are
14 terrible incentives to give to a legislature, are they
15 not?

16 MR. FRANCISCO: No -- Your Honor, I think
17 what it means is that when the government claims an
18 interest, the overwhelming interest to force
19 Petitioners -- organizations like Petitioners to violate
20 their sincerely held religious beliefs, then yes, when
21 it says we're going to exempt some organizations for
22 purely secular reasons, some organizations for political
23 reasons, and other organizations for religious reasons,
24 then it does have to --

25 JUSTICE BREYER: I see your point is that --

1 let's imagine a widespread government program filled
2 with exemptions. There are a smaller group of people
3 who need an exemption for religious reasons. We look at
4 those other exemptions. Some seem to have good reasons;
5 some seem to have terrible reasons. We -- really, under
6 the RFRA or the First Amendment should exempt the
7 religious too, right?

8 MR. FRANCISCO: Sure, Your Honor.

9 JUSTICE BREYER: Okay. I've just described
10 to you the United States Tax Code where we know that you
11 do not have to have an exemption for those who are
12 religiously objecting, for example, to paying taxes
13 because it would support a war.

14 MR. FRANCISCO: Sure, Your Honor. But I
15 think that the --

16 JUSTICE BREYER: Okay. So what -- that's
17 what I'm looking for. Same question. And I'm not
18 asking it to refute you; I'm asking it because I'm
19 looking for what the distinction actually is. And for
20 the reason I just said, I don't think the distinction
21 can be, well, you've exempted some people, so you have
22 to exempt the religious people too. But that would run
23 throughout the government of the United States.

24 So what -- we know there is a distinction,
25 or at least you -- I believe you when you tell me

1 there's a -- I want to know what you think it is.

2 MR. FRANCISCO: And Justice Breyer, these
3 are finely-grained factual -- factual issues --

4 JUSTICE BREYER: No, they're not. All
5 right, well, go ahead. You want to say that.

6 MR. FRANCISCO: But -- but I think that when
7 you're looking at a regime like this one that has both
8 religious exemptions, that has large exemptions for
9 totally nonreligious reasons, and that has the exact
10 same problem that the government claims Petitioners
11 present, with respect to all the other employees in this
12 country, who just like Petitioners' employees, don't --

13 JUSTICE BREYER: I got where you're going
14 with your exemptions, but that's not the thrust of my
15 question. The thrust is I haven't found it yet. I want
16 to find what the real distinction is, whether you call
17 it RFRA or call it Smith, I don't care what you call it.
18 I'm trying to find the basis for the distinction between
19 those things that we do require people to do despite
20 their religious objection and those things that we
21 don't.

22 And if you want to think there's no such
23 difference, just read -- as you've read, Neuborne's
24 brief. Lists them all in two pages. Some go one way;
25 some go the other way. He says it's because of other

1 people being involved. That might be the answer, but
2 what's your answer?

3 MR. FRANCISCO: And I'd agree that's a tough
4 line, but I think the --

5 JUSTICE BREYER: What -- what is the right
6 line?

7 MR. FRANCISCO: I don't think there's a
8 clear line for what things do we -- we require and what
9 things we don't require --

10 JUSTICE BREYER: Give me a hint what the
11 direction is.

12 (Laughter.)

13 MR. FRANCISCO: I think the way the law
14 works -- I think the way the law works is it says are
15 you allowed to require them to do this particular thing
16 that violates their beliefs? And in making that
17 decision, you look at what the -- how the government is
18 treating other similar situations.

19 And if here the government is in fact
20 saying, with respect to all of these other people who
21 also don't get the coverage from their employers, we're
22 willing to tolerate it or else willing to address the
23 issue in other ways, then under RFRA the answer is you
24 have to look to those other ways to see whether they're
25 sufficient for these employees or whether they're

1 uniquely insufficient for these employees.

2 JUSTICE KAGAN: Mr. Francisco, may -- may I
3 ask a question? Is there any accomodation that the
4 government would offer that would in fact result in
5 women employees of your clients, or students of your
6 clients, getting health care as part of an
7 employer-based plan or a student-based plan, getting
8 contraceptive coverage? Is there any accomodation that
9 would be acceptable?

10 MR. FRANCISCO: Your Honor, the
11 accommodations that we've listed in our briefs would all
12 be acceptable --

13 JUSTICE KAGAN: No, no, no. Through -- in
14 other words, is there -- is there any -- you object to
15 this notification. Is there any kind of notification
16 that would be acceptable?

17 MR. FRANCISCO: Your Honor, if by submitting
18 this notification or any other notification we got the
19 same treatment as the religious employers, then this
20 notification would be acceptable.

21 JUSTICE KAGAN: No. The religious
22 employers, their employees do not get contraceptive
23 coverage through the employer-based plan. I'm
24 suggesting -- I'm asking whether there's any
25 accommodation that would result in the women employees

1 getting contraceptive coverage seamlessly through an
2 employer-based plan that you would find acceptable.

3 MR. FRANCISCO: Your Honor, possibly so,
4 possibly not, and if I could explain. We've not been
5 offered that kind of alternative to consider. I think
6 the more distance you put between the Petitioners on the
7 one hand and the provision of the objectionable coverage
8 to their employees on the other, the less problematic it
9 is from their particular perspective.

10 JUSTICE KAGAN: Well, what might be
11 acceptable if it puts enough distance?

12 MR. FRANCISCO: Sure. Easily. Enough
13 distance is we file the notice of objection, and the
14 government furthers its interest in the same way it
15 furthers its interest with respect to all of the other
16 employees who don't get coverage from an employer-based
17 plan. The employees -- Association --

18 JUSTICE SOTOMAYOR: So your answer to
19 Justice Kagan is wrong. Basically you're saying, even
20 if all you do is an opt-out, I raise my hand, I tell you
21 that I'm a religious objector, and they somehow, from
22 this suit, they know who your third-party administrator
23 is, they have a general law that requires now all ERISA
24 plans and insurance companies to tell them who their
25 clients are; that if your insurer is involved in any

1 way, you object?

2 MR. FRANCISCO: Not necessarily, Your Honor.
3 Again, as Mr. Clement was saying, if there was an
4 uber-insurance policy where Aetna was the company that
5 the government picked to provide contraceptive coverage
6 to all women in this country, and we happened to use
7 Aetna, I think we'd probably be fine.

8 JUSTICE KENNEDY: Paid for by the
9 government?

10 MR. FRANCISCO: Yes, Your Honor. But the
11 problem is when they seize control --

12 JUSTICE GINSBURG: But Justice Kagan's
13 question was these college students, they want to get
14 the same coverage that -- that is available for all
15 other conditions.

16 You -- you -- as far as I understand, you're
17 saying no. It has to be some other plan. Government
18 buys -- government provides its own plan, but as long as
19 you connect the insurer --

20 MR. FRANCISCO: Uh-huh.

21 JUSTICE GINSBURG: -- it is insuring the
22 religious organization. As long as that insurer is
23 linked, it's how these students will have to get
24 something else. It can't get what all the other
25 students get for all other health protection.

1 MR. FRANCISCO: And Justice Ginsburg, I'm
2 trying to be careful because we have many clients that
3 have many different views. But I think as a general
4 matter, I could certainly see the case that if they're
5 seizing control of our plans, the plans that we are
6 required to provide under threat of penalty, and using
7 those plans as the vehicle to delivering the
8 objectionable coverage to our employees solely as long
9 as they're enrolled on those plans, which is what this
10 does, then I could certainly see why many clients would
11 view that as a substantial burden on their religious
12 beliefs.

13 We then turn to less restrictive
14 alternatives. And Your Honor, I'll just conclude here,
15 it's quite clear that the government has alternatives
16 because it's the same alternatives that it uses for
17 everybody else. And if all of those alternatives are
18 fine with them, they at least need evidence explaining
19 why they're not fine for us as well.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 General Verrilli.

22 ORAL ARGUMENT OF GEN. DONALD B. VERRILLI, JR.

23 ON BEHALF OF THE RESPONDENTS

24 GENERAL VERRILLI: Mr. Chief Justice, and
25 may it please the Court:

1 The accommodation that Petitioners challenge
2 in this case strikes precisely the sensible balance
3 between religious liberty and compelling governmental
4 interests that Congress sought when it enacted RFRA.

5 As this Court recognized in *Hobby Lobby*, the
6 accommodation seeks to respect the religious liberty of
7 Petitioners by exempting them from the contraceptive --
8 contraceptive requirement, and to respect the interest
9 of Petitioners' employees --

10 JUSTICE KENNEDY: And is it fair for me to
11 infer from the way you open your remarks that you
12 concede that there is a substantial burden here? And
13 the question then is what is a permissible
14 accommodation? What's the least restrictive
15 alternative?

16 Do you concede that there's a substantial
17 burden?

18 GENERAL VERRILLI: We do not concede there's
19 a substantial burden, Justice Kennedy. We -- we concede
20 that the religious belief is sincere. We're not
21 questioning sincerity of the belief, but we don't think
22 that in a case in which the -- an -- when a question is
23 this, when a religious objection is made to the
24 independent arrangements of the government makes with
25 third parties to fill a regulatory gap created by

1 granting an exemption from a -- a generally applicable
2 rule, that that qualifies as --

3 JUSTICE KENNEDY: Well, do -- do you
4 question their belief that they're complicit in the
5 moral wrong?

6 GENERAL VERRILLI: No, we do not.

7 JUSTICE KENNEDY: Well, then -- then it
8 seems to me that that's a substantial burden. And then
9 -- and the next question is whether there is an
10 accommodation and whether that's the least restrictive.

11 GENERAL VERRILLI: So, look, I'm -- I'm
12 happy to discuss the substantial burden further, but I
13 do want to go to what I think is the critical point on
14 the question of how RFRA scrutiny applies, if it does
15 apply, and it's this: Mr. Francisco spent a lot of time
16 talking about the various alternatives that the
17 government might be able to use instead of the
18 accommodation, and I think there's a real problem with
19 every single one of them in that every single one of
20 them defeats the very purpose for which Congress imposed
21 the preventive services requirement, not just with
22 respect to contraception, but with respect to all
23 preventive services. And the point here, and I think
24 you can see this, if you look at the relevant statutory
25 provision, which you can find at Page 4(a) of the

1 appendix to our brief, which is the preventive
2 services -- preventive services provision, the point
3 here of this provision is that a group health plan,
4 i.e., the health plan that covers people through their
5 employer, or individual health insurance coverage, i.e.,
6 the kind of coverage that's sold on the Exchanges, shall
7 include cost free all of the preventive services.

8 The whole point of this provision, the whole
9 point of it, was to ensure that people who got health
10 insurance would get the preventive services as part of
11 their regular care from their regular doctor with no
12 barriers.

13 CHIEF JUSTICE ROBERTS: That's -- in other
14 words, your compelling interest is not that women obtain
15 the contraceptive services. Your compelling interest is
16 that women obtain the contraceptive services through the
17 insurance plan or the third-party administrator hired by
18 the Petitioners, hired by the Little Sisters.

19 In other words, it seems to me you can't say
20 that what you're trying to do is make sure everybody has
21 this coverage. You want to make sure they have it
22 through the program set up by the Little Sisters, and
23 that's what they object to.

24 GENERAL VERRILLI: Yes, I understand that,
25 Your Honor. But assuming for the moment -- and I'm

1 happy to discuss substantial burden further -- but
2 assuming for the moment that we are in RFRA scrutiny
3 because there is a substantial burden, the point I'm
4 making here, and I do think this is critical, is that
5 the -- none of these options that the Petitioners have
6 identified going out on the Exchange and buying a
7 separate individual policy, a contraceptive coverage
8 only policy, Title X, Medicare, Medicaid, with respect
9 to every one of them, you'd have to change the law to
10 make them even eligible here. But even if you could
11 change the law, every single one of them creates the
12 very problem that Congress was trying to solve in this
13 provision because it would require setting up a one-off
14 jerry-rigged separate channel to get contraceptive
15 coverage.

16 CHIEF JUSTICE ROBERTS: The point is that
17 it's the form in which the services are provided that
18 you object to, not the fact that they be provided or
19 not, because that's not the question. In other words,
20 the Petitioner has used the phrase "hijacking," and it
21 seems to me that that's an accurate description of what
22 the government wants to do. They want to use the
23 mechanism that the Little Sisters and the other
24 Petitioners have set up to provide services because they
25 want the coverage to be seamless.

1 Now, maybe that's a sufficiently compelling
2 government interest, the form in which the services are
3 provided, but the interest is not whether or not women
4 receive contraceptive services. The Petitioners do not
5 object to the fact that the people who work for them
6 will have these services provided. They object to
7 having them provided through the mechanism that they
8 have set up because they think, you know, whether you or
9 I or anybody else thinks, they think that that
10 complicity is sinful.

11 GENERAL VERRILLI: I understand that, Mr.
12 Chief Justice. I understand that that's their position.

13 Let me engage with you on the question of
14 whether that constitutes a substantial burden. We think
15 that it doesn't constitute a substantial burden because
16 the way that this accommodation is structured, although
17 you're quite right, it seeks from the perspective of the
18 employee to ensure that the employee gets the protection
19 that Congress designed, that from the perspective of the
20 employer, that this is provided through a separate
21 program.

22 JUSTICE KENNEDY: But you're saying, don't
23 worry, religions, you're not complicit. That's what
24 you're saying?

25 GENERAL VERRILLI: No. We're saying that

1 the judgment about complicity is up to you, but that
2 there is an objective limit that RFRA recognizes on the
3 scope of what is a cognizable burden, that that was true
4 in the pre-Smith case law before RFRA, and it was
5 recognized in Lyng and in Bowen, and those are cases in
6 which there was no doubt --

7 JUSTICE KENNEDY: It seems to me then the
8 analysis has to be whether or not there are less
9 restrictive alternatives and if -- is this the least
10 restrictive alternative?

11 GENERAL VERRILLI: Well, as I said, Your
12 Honor, if RFRA scrutiny applies, then this certainly is
13 the least restrictive alternative.

14 JUSTICE ALITO: Well, let me mention one of
15 them. Suppose that it were possible for a woman who
16 does not get contraceptive coverage under a
17 grandfathered plan or under a plan offered by a church
18 or under a plan offered by a religious nonprofit to
19 obtain a contraceptive-only policy free of charge on one
20 of the Exchanges. Why would that not be a least -- a
21 less restrictive alternative?

22 GENERAL VERRILLI: It has precisely the
23 problem. It's not a less restrictive alternative
24 because it has precisely the problem Congress was trying
25 to overcome in the preventive services provision.

1 JUSTICE ALITO: What -- what type of a
2 burden does that impose? Is it because these -- these
3 Exchanges are so unworkable, even with the help of a
4 navigator, that -- that a woman who wants to get free
5 contraceptive coverage simply has to sign up for that on
6 -- on one of the Exchanges?

7 GENERAL VERRILLI: No, Your Honor.

8 JUSTICE ALITO: So she'll have two insurance
9 cards instead of one. She'll have one from the
10 employer, and she'll have one from this plan, just as a
11 lot of people have one insurance card for medical
12 services and one for prescriptions --

13 GENERAL VERRILLI: Yes, of course.

14 JUSTICE ALITO: -- for dental or vision.

15 GENERAL VERRILLI: For the very reason that
16 the employee has to go out and get a separate policy,
17 even in the world that doesn't exist now, because those
18 policies can't be sold on Exchanges now --

19 JUSTICE ALITO: Well, we can talk -- we can
20 talk about that in a minute, but continue with that.

21 GENERAL VERRILLI: But even in that
22 hypothetical world, that is not equally effective at
23 achieving the government's interest, because the whole
24 point of this provision is that you get this care from
25 your regular doctor as part of your regular health care

1 without any barriers, including any co-pay barriers.
2 And I think -- think about -- consider this, please,
3 from the perspective of the woman employee. She has a
4 health plan from her employer. She goes to -- she goes
5 to her doctor, her regular doctor. She may have a
6 medical condition that makes pregnancy a danger for her.
7 She may be one of the women, and this is about 15
8 percent of all prescribed contraception, who needs
9 contraception to treat a medical condition, or maybe she
10 just wants the contraception that's appropriate for her.

11 What happens under this -- under
12 Petitioners' regime is the doctor has to say to her --
13 her regular doctor has to say to her, Sorry, I can't
14 help you. It's not just that you don't get paid -- the
15 prescription paid for, it's not just that he can't write
16 the prescription, he can't counsel or educate the
17 patient.

18 JUSTICE ALITO: But why would that be? He
19 would be -- he would be paid under the -- under the
20 contraceptive plan.

21 GENERAL VERRILLI: Because it wouldn't be
22 her regular doctor. She'd have to go out and buy the
23 separate plan, find a doctor who is willing to take the
24 separate plan, assuming -- assuming, of course, that
25 there are insurance companies willing to sell these

1 separate --

2 JUSTICE ALITO: Well, you don't think that
3 they would be willing to sell them if you subsidize them
4 at 115 percent, which is what you were doing in the case
5 of those who provide services under self-insured plans.

6 GENERAL VERRILLI: But the whole point here,
7 Justice Alito, is that Congress wanted to eliminate --
8 even what were perceived by most of the small barriers,
9 like a 5 or \$10 co-pay, because the medical experts said
10 that even though small barriers -- even when you're
11 getting it as part of your regular coverage, even those
12 small barriers work as a sufficient disincentive that
13 many fewer people use contraception than would
14 otherwise, and that -- and the barrier -- and the system
15 that Your Honor is positing, imposes a significantly
16 greater barrier even in a --

17 JUSTICE ALITO: What about the women -- what
18 about the women in grandfathered plans --

19 GENERAL VERRILLI: Well --

20 JUSTICE ALITO: -- under -- in grandfathered
21 plans that offer no contraceptive coverage? What about
22 them?

23 GENERAL VERRILLI: So grandfathered plans,
24 let's talk about them. As I do -- and I will answer
25 Your Honor's question directly, but I do think the

1 broader context matters here.

2 This is a transitional device. The number
3 of people who are in grandfathered plans has dropped by
4 50 percent. There is no reason to think it's not going
5 to continue to drop, and if it does continue to drop, at
6 the pace of the last four years, we'll be at zero very
7 soon.

8 JUSTICE ALITO: But, you know, in the long
9 run we're all dead. But what's going to happen in --

10 (Laughter.)

11 JUSTICE ALITO: -- in -- in the interim?
12 What was the reason why Congress did not require
13 contraceptive coverage right away under the
14 grandfathered plans? It required coverage right away
15 under the grandfathered plans for 25-year-olds so that
16 they could get coverage under their parents' health
17 insurance plan. It would have been no great
18 administrative difficulty for the grandfathered plans to
19 put in contraceptive coverage, preventive care coverage
20 right away, just as they did for the 25-year-olds. And
21 yet Congress said, for the really important things, like
22 covering the 25-year-old graduate student, yes, you have
23 to do that right away. But for these other things,
24 including what we're talking about today, you can
25 continue to have -- not to provide that coverage for

1 women as long as you maintain your grandfathered status.

2 GENERAL VERRILLI: Your Honor, when Congress
3 passed the Americans with Disabilities Act, it made --
4 it didn't impose an immediate requirement that every
5 building be retrofitted so that access to the disabled
6 was possible. What it said was, in that context, that
7 where it's feasible to do so, buildings shall retrofit,
8 and then new buildings shall have these access
9 requirements. No one would say that the government
10 lacks a compelling interest in enforcing the Americans
11 with Disabilities Act because Congress decided on a
12 transitional system.

13 This was a big program. There were reliance
14 interests. Congress decided on transition. It
15 understood that this number was going to drop
16 dramatically over time. You want -- a good place to
17 know why it's going to drop dramatically over time, look
18 at the declaration from the Dioceses of Pittsburgh at
19 page 86 of the Joint Appendix where they say, we are
20 sticking with our grandfathered plan now because we
21 don't want to trigger the contraceptive coverage
22 requirement, but it's costing us a fortune. We have to
23 change. And that's the reality, and that's why it's
24 going to go down.

25 And with respect to contraception itself,

1 Your Honor, the grandfathered plan says the -- the
2 Institute of Medicine and its study, which is in the
3 record, said that contraceptive coverage is standard
4 practice now. And we cited a study that said 86 percent
5 of all plans have contraceptive coverage. So most of
6 these women are going to have contraceptive coverage.
7 Now, they are not going to have it cost free, and that's
8 the difference. But the idea that --

9 JUSTICE ALITO: Well, but to -- to come
10 back -- to come back to the point that you were making
11 about the Americans with Disabilities Act, that
12 certainly is a good point for the Americans with
13 Disabilities Act. It can be very expensive to retrofit
14 facilities to accommodate people with disabilities.

15 But are you saying that the burden of simply
16 instituting coverage for preventive care as it was done
17 for coverage for 25-year-olds is comparable to making
18 architectural changes?

19 GENERAL VERRILLI: No. But what I'm saying,
20 Your Honor, is that this is -- unlike the exemption for
21 small employees under Title VII, which exempts 17
22 million people from these fundamental protections
23 against race and gender and religious discrimination,
24 and does so permanently, this is a transitional device
25 where over time you're going to get down to a situation

1 where virtually nobody has -- is in the situation, being
2 in a grandfathered plan, and most of them are getting
3 some form of contraceptive coverage anyway. So I don't
4 think it undermines a compelling interest one bit.

5 JUSTICE SOTOMAYOR: General, can we go back
6 to the substantial burden question? And I think that
7 Justice Breyer has been talking about how to draw this
8 line. When is it that government has to act to
9 accommodate, and when doesn't it have to act to
10 accommodate? There is some amici that have suggested a
11 line that at least to me helps draw some clarity to the
12 cases, our cases, which is, if what your religious
13 belief is asking the government to do is to change its
14 behavior with respect -- its regulatory behavior with
15 respect to others, then it can't be a substantial
16 burden, because we live in a pluralistic society in
17 which government has to function.

18 And hence, you're a military objector. You
19 can't tell the government, no, you can't draft someone
20 else. You have to -- you can't spend your money on war.
21 We don't have to use you to promote the war. But if you
22 want to use others to promote the war, you're entitled
23 to do that as government. Does this line make any sense
24 to you?

25 GENERAL VERRILLI: Yes, Your Honor,

1 that's --

2 JUSTICE SOTOMAYOR: Because here, what the
3 religious groups I understand are asking is the
4 government not to use its regulatory power with third
5 parties who don't have a religious objection, and
6 forcing a burden on the women who its trying to help,
7 third parties that don't have the same religious
8 objection, and burdening them to do other things.

9 GENERAL VERRILLI: I think that is the
10 essence of our position on substantial burden, Your
11 Honor, and I believe that trying to answer Justice
12 Breyer's question about where that comes from, I believe
13 it comes from Lyng and Bowen, which both recognize that
14 there is an objective limit in Lung.

15 For example, the Court said that the -- it
16 did not doubt that the -- the government actions were
17 going to have a devastating impact on a religious
18 exercise of the --

19 CHIEF JUSTICE ROBERTS: This is -- this is
20 not just a case of the government dealing with a third
21 party based on the Petitioners' objection. The
22 objection is that the government is hijacking their
23 process, their insurance company, their third-party
24 administrator that they have hired and set up to provide
25 these services. I understand the distinction between

1 yes, you can do what you want, but you can't compel
2 other people to take actions that are consistent with
3 your religious beliefs.

4 But that's not what's going on here. It is
5 the relationship between the insurer that the Little
6 Sisters have hired or the third-party administrator with
7 respect to other -- other entities that is being used by
8 the government to provide these services. It's not just
9 a third party that's being compelled. They want -- it's
10 not just that they want third parties to take certain
11 action.

12 GENERAL VERRILLI: I would agree with you to
13 this limited extent, Mr. Chief Justice, that that's the
14 context in which the government action occurs here, that
15 the fact that the -- there is this relationship between
16 Petitioners and their employees is the occasion for
17 government acting. But there is two points that are
18 critical, I think, and go to why we shouldn't consider
19 this to be a cognizable burden.

20 And the first one is that what we are doing
21 when we act here is trying to make an alternative
22 arrangement that comes as close as we can to ensuring
23 that the employees who may not share the Petitioner's
24 religious beliefs get what the law entitles them to
25 while at the same time ensuring that the employer does

1 not have any legal obligation to pay for the coverage,
2 to provide the coverage in any way. I mean, I think
3 that the -- the practical features of this are critical.

4 The employer cannot be charged for the
5 co-pay, even insurance -- insurance plan, self-insured,
6 either way, cannot be charged. The insurance company or
7 third-party administrator has got to use separate
8 segregated funds. It's got to provide separate
9 segregated notices. In many instances, it provides a
10 separate insurance card to the employees for this part
11 of the coverage. So what -- so in that respect, it is
12 an independent arrangement with third parties. And
13 the -- we may --

14 CHIEF JUSTICE ROBERTS: They are -- they are
15 not third parties. They are the insurance company that
16 the Petitioners have hired. It's the third-party
17 administrator that they have hired.

18 GENERAL VERRILLI: Right.

19 CHIEF JUSTICE ROBERTS: It seems to me that
20 the balance is pretty clear. You want the coverage for
21 contraceptive services to be provided, I think as you --
22 as it said, seamlessly. You want it to be in the one
23 insurance package. That's done. That is the compelling
24 government interest.

25 And on the other side, the question is

1 whether or not people who have sincere religious
2 objections to being complicit in that through the hiring
3 of the insurance company, the third-party administrator
4 on terms where they provided, whether the government's
5 compelling interest outweighs those sincere religious
6 objections. Is that a fair understanding of the case?

7 GENERAL VERRILLI: I think it is one fair
8 understanding of the case. We think that --

9 CHIEF JUSTICE ROBERTS: Is there a fairer
10 one?

11 GENERAL VERRILLI: Let me put it this way,
12 Mr. Chief Justice. We would be content if the Court
13 were to conclude that with respect to substantial
14 burden, it could assume a substantial burden but that
15 the government has satisfied its burden under RFRA to
16 show a compelling interest, and that this is the least
17 restricted means of achieving --

18 JUSTICE GINSBURG: Now, you aren't giving up
19 on the substantial burden?

20 GENERAL VERRILLI: No, we are not giving up
21 on it, because we do think -- but we do think the
22 discussion this morning is suggestive that this is a
23 hard question, and it is important to us. And that's
24 why we're fighting on it and not giving up on it.

25 JUSTICE BREYER: So that's why -- you see,

1 that's exactly what I have found difficult, exact. And
2 I -- I read the briefs. Neuborne said that. Your brief
3 said that. We'll look to see -- it's not the kind of
4 burden that counts for purposes of RFRA or the -- or the
5 First Amendment. Where the burden is of a certain kind.

6 Now what kind? And would you say, well, a
7 kind where it arises out of the fact that we have a
8 program that affects third parties in a big way? Okay?
9 Well, we have the Vietnamese church of the escapees in
10 Los Angeles who are so poor they have to meet in the
11 basement of a house, and the parking regulations stop
12 their congregation from coming even if they want to meet
13 only on Sunday. Think about that one. We can put that
14 easily into the context of third parties being hurt. So
15 they can't practice their religion. So -- so that one.

16 I can think of a lot of counter examples.
17 But maybe you couple that with what we have in the tax
18 cases. Administrative. Widespread administrative rules
19 the government has -- has leeway where third parties,
20 widespread, administrative. You see? So I'm -- I'm
21 trying to get the thinking of the people who have
22 thought about this, which are you and -- and the others
23 here on what's the best way to treat that burden. It's
24 not hard to find in religious writing. And the people
25 when they go into society assume some burdens that they

1 are going to find totally obnoxious.

2 GENERAL VERRILLI: We are not urging you to
3 state a comprehensive standard here that tells --

4 JUSTICE BREYER: Well, then what do I do?

5 GENERAL VERRILLI: I think -- I think we're
6 urging a more incremental approach that recognizes that
7 the principles articulated in Lyng and Bowen apply in a
8 situation where the government is acting -- making
9 arrangements with third parties in order to fill a
10 regulatory gap that the -- that has been created by the
11 government granting an exemption to a religious entity.

12 JUSTICE ALITO: Could you -- could you
13 address Mr. Clement's hypothetical about where the --
14 the government would come into a -- an unoccupied room
15 in the Little Sisters facility that's not being used for
16 anything. They don't interfere at all. They even pay
17 rent. And they come in there, and they establish a
18 Title X clinic, and they are distributing contraceptives
19 on the Little Sisters property. And there's no
20 financial burden. There's actually financial benefit to
21 them. Is that different from the situation here, and if
22 so, why?

23 GENERAL VERRILLI: Yes. We think that would
24 trigger RFRA, and it would be a substantial burden. The
25 difference is that in that situation, you're actually on

1 their premises. And in this situation -- and trying to
2 get back to what I was discussing with you, Mr. Chief
3 Justice -- Aetna is a -- is a different entity from
4 Petitioners. Blue Cross is a different entity from
5 Petitioners. The government makes its arrangements with
6 Aetna or with Blue Cross, and we make arrangements with
7 Aetna and with Blue Cross and other insurance companies
8 and TPAs to provide contraceptive coverage to other
9 third parties, the employees.

10 JUSTICE ALITO: Well, you say in your brief,
11 you admit in your brief that, at least in the case of
12 the self-insured plan, the -- the notice or the -- the
13 form or the notice becomes part of the plan. This is
14 their health insurance plan established under ERISA, and
15 you are putting a new objectionable element into the
16 plan. Isn't that correct?

17 GENERAL VERRILLI: I don't think that's
18 quite right, Justice Alito. I think there's been some
19 confusion on that on the Petitioner's side.

20 There are two separate notices that operate
21 here on the self-insured plan. The first is the notice
22 that the employer provides to the government. That's an
23 ERISA plan document, but what that -- what -- the legal
24 effect of that document is to exempt the employer from
25 any obligation to provide contraceptive coverage.

1 There is a second document, a different
2 document, that the government then sends to the
3 third-party administrator. That document is the
4 document that has a legal effect that creates the
5 obligation on the part of the third-party administrator
6 to provide the coverage.

7 So it is not the case that the document that
8 comes to us is an authorizing document. That's an
9 exempting document.

10 JUSTICE ALITO: But it -- it is -- it's
11 their plan, and you admit that you are putting something
12 into their plan that they object to on religious
13 grounds.

14 GENERAL VERRILLI: So I --

15 JUSTICE ALITO: So the difference between
16 that and Mr. Clement's hypothetical is that one involves
17 something tangible, physical property, and the other
18 involves something that's intangible.

19 GENERAL VERRILLI: Well, I think --

20 JUSTICE ALITO: That's the distinction.

21 GENERAL VERRILLI: Well, it's not just that
22 it's like intangible property. The -- the plaintiffs
23 really have a set of rules, and the third-party
24 administrator becomes -- for purpose of administering
25 this, it becomes the plan administrator, the sole plan

1 administrator, for this portion of the plan. But even
2 if one thought that there was -- that -- that this did
3 create a legally sufficient reason to find a substantial
4 burden for -- for third-party administrators, it's not
5 true about the situation with insurance companies. It's
6 not true about church plans. And so then it seems to me
7 the question is whether switching from having a
8 self-insured third-party administrator situation to an
9 insurance company situation would -- whether this would
10 be a substantial burden.

11 JUSTICE ALITO: Well, in the case of an
12 insurance plan, isn't the insurance policy part of the
13 plan? Isn't the insurance policy the way in which
14 the -- the employer provides the benefits that are
15 available under the plan?

16 GENERAL VERRILLI: Yes. And then -- and
17 then the government makes an arrangement with the
18 insurance company that operates in parallel to that
19 plan. And so -- but -- but it isn't through that plan.
20 It's in parallel to that plan. So I think there's a
21 significant difference there, but --

22 CHIEF JUSTICE ROBERTS: What -- what is
23 the -- the government's interest in requiring --
24 requiring compliance by Catholic Charities of
25 Pittsburgh, but totally exempting Catholic Charities of

1 Erie?

2 GENERAL VERRILLI: So this gets to the
3 question of the church exemption, Your Honor. And let
4 me try to explain that.

5 I think it's helpful to understand how it
6 came about. The church -- initially HHS decided that it
7 would create an exemption for churches. And then -- and
8 there were some back-and-forth, regulatory proceedings.
9 Petitioners participated in that, created the exemption
10 for churches. And then the religious nonprofits came in
11 and said, well, the exemption ought to be extended to
12 us.

13 The government made a judgment that as a
14 categorical matter, it wasn't willing to extend the
15 exemption to all religious nonprofits, as was requested,
16 but it, instead, would use this accommodation, which we
17 thought was the best way that we could both protect
18 their religious liberty and --

19 CHIEF JUSTICE ROBERTS: The difference, of
20 course, is, as you -- it's properly phrased in the
21 briefing, is the accommodation is the way in which the
22 organizations comply with the mandate. With respect to
23 Catholic Charities of Erie, though, they don't have to
24 comply to the accommodation or any other way.

25 GENERAL VERRILLI: But --

1 CHIEF JUSTICE ROBERTS: They are exempt.

2 GENERAL VERRILLI: The reason we drew the
3 line is because we think -- and I think Professor
4 Laycock's brief is quite instructive on this point -- is
5 that while there -- no line is perfect, and I'm sure
6 this line isn't perfect, and there's going to be some
7 overlap between entities that maybe you think of -- or
8 look closer to being on one side of the line than the
9 other. But the line is a valid line. And it's a valid
10 line largely for the reasons Justice Kennedy identified
11 earlier, because in that category of religious
12 nonprofits may be some entities, like the one Your Honor
13 has identified, that appear very close to entities that
14 have an exemption. But there are also going to be lots
15 of other entities whose connection to that core
16 religious mission is much more attenuated --

17 CHIEF JUSTICE ROBERTS: You have to draw the
18 line? Is it -- could you apply the same requirements
19 you apply to the Little Sisters to the church entity
20 itself?

21 GENERAL VERRILLI: And so I -- I think we
22 could, Your Honor, yes, under -- I think under -- I
23 think we would -- it would be an appropriate
24 accommodation, and I think if we had the same compelling
25 interest, and we'd make the same narrowly tailored means

1 argument. But we have constrained ourselves. We've
2 tried to be especially careful with houses of worship.
3 And that's a normal thing that governments do with
4 respect to houses of worship.

5 CHIEF JUSTICE ROBERTS: No. But you
6 understand the argument. It's -- and we've said this in
7 cases like O Centro and others, that if you have a lot
8 of exemptions, it undermines your argument that this is
9 such a compelling interest.

10 GENERAL VERRILLI: Right. And let me try to
11 walk through this carefully, because I do think it's
12 important.

13 They have identified three. First is
14 grandfathered plans. We've had a lengthy discussion
15 about that. I think I've tried to show you that that --
16 I don't think you can argue that that exemption
17 undermines the government's compelling interest.

18 They claim that there is an exemption for
19 employers who have fewer than 50 employees, but that's
20 just wrong. In fact, there's no reason to think that
21 virtually anybody in the -- in that category of
22 employees of those small employers isn't getting
23 contraceptive coverage as part of their regular health
24 care from the regular doctors. And let me explain why
25 that is.

1 There is no exemption from the contraceptive
2 requirement for that group. Proof of it is that several
3 Petitioners are in that group of fewer than 50
4 employees, and they're asking for the -- and they're
5 asking for the -- and they're -- and they've raised the
6 RFRA claim here. So -- and that's because when
7 employers in that group provide coverage, they have to
8 meet the contraceptive coverage requirements so the
9 employees get the coverage from their regular doctor as
10 part of their regular health plan.

11 Then also, if your employer is not providing
12 you coverage in that group, then you go on an Exchange,
13 and then you purchase a policy on the Exchange. And
14 that policy provides you with contraceptive coverage as
15 part of your regular health plan from your regular
16 doctor, or you -- you -- if you are eligible, you apply
17 for Medicaid. And Medicaid gives you contraceptive
18 coverage as part of your regular health plan from your
19 regular doctor.

20 JUSTICE ALITO: Well, for the employees who
21 have to buy the plans on the Exchange because they work
22 for a small employer and the employer doesn't offer
23 health insurance, does that arrangement frustrate the
24 government's compelling interest?

25 GENERAL VERRILLI: No. Because in that

1 circumstance, Your Honor, the only option that that
2 employee has is to buy an individual policy on the
3 Exchange. And that individual policy will contain the
4 contraceptive coverage from your regular doctor as part
5 of your regular health care.

6 The difference is with -- when somebody
7 works for a grandfathered plan, for example, in that
8 category, or for a church, the -- those people are
9 already getting insurance. And -- and so for them,
10 there -- it is an obstacle because you're forcing them
11 to purchase a second insurance policy. And -- and that
12 really becomes a financial penalty for them, because
13 part of their compensation is, of course, the health
14 insurance they're getting from their regular doctors.

15 JUSTICE KENNEDY: That just underscores that
16 the church plans here, religious organization plans
17 here, are, in effect, subsidizing the conduct that they
18 deemed immoral.

19 GENERAL VERRILLI: So, Your Honor, I think
20 the answer to that is that they're not subsidizing it,
21 because the way in which this plan is structured, the
22 way in which the accommodation is structured, is that
23 they are not to -- employers are not to bear any
24 financial burden for the contraceptive coverage that has
25 to be provided without charging the employer, and funds

1 have to be segregated, and all activity has to be
2 segregated. So there -- it's -- it's quite carefully
3 designed to avoid the existence of any subsidy with
4 respect to them. And then -- and so we talked about --

5 JUSTICE KENNEDY: If it's so easy to
6 provide, if it's so free, why can't they just get it
7 through another plan?

8 GENERAL VERRILLI: Well, because they have
9 to sign up for a second plan and pay for a second plan,
10 Your Honor. And that's precisely the kind of obstacle
11 that Congress is trying to insure did not exist when it
12 passed the Preventive Services provision of this
13 statute. The whole idea here is to ensure that these
14 employees get the health care, get this covered, get
15 this care from their regular doctor as part of their
16 regular health care without these added obstacles and
17 the need to go out and sign up for another plan and then
18 find the doctors who are going to provide coverage under
19 that plan. All of those are precisely the kinds of
20 obstacles that Congress was trying to eliminate because
21 all the --

22 CHIEF JUSTICE ROBERTS: So it comes down to
23 a question of who has to do the paperwork? If it's the
24 employee that has to do it, that's -- that's no good.
25 If it's the religious organization that has to do it,

1 that's okay?

2 GENERAL VERRILLI: I think it's a lot more
3 than that, Your Honor. You've got to go out and
4 find the -- you've got to go out and find the
5 separate --

6 CHIEF JUSTICE ROBERTS: They're on the
7 Exchanges, right?

8 GENERAL VERRILLI: But -- but, Your Honor,
9 put yourself in the position of this --

10 JUSTICE SOTOMAYOR: They're not on the
11 Exchanges.

12 GENERAL VERRILLI: So --

13 JUSTICE SOTOMAYOR: That's a falsehood. The
14 Exchanges require full-service health insurance policies
15 with minimum coverages that are set forth that are very
16 comprehensive.

17 CHIEF JUSTICE ROBERTS: Is that true with
18 respect to --

19 JUSTICE SOTOMAYOR: We're creating a new
20 program.

21 CHIEF JUSTICE ROBERTS: Is that true with
22 respect to every policy sold on the Exchanges?

23 GENERAL VERRILLI: Yes. Every policy sold
24 on the Exchanges --

25 CHIEF JUSTICE ROBERTS: What about pediatric

1 dentistry?

2 GENERAL VERRILLI: Well, except for that
3 one.

4 CHIEF JUSTICE ROBERTS: Oh, except for
5 pediatric dentistry.

6 GENERAL VERRILLI: But that's a --

7 CHIEF JUSTICE ROBERTS: So you could have a
8 separate health coverage product sold on the Exchanges.
9 You, in fact, do it already.

10 GENERAL VERRILLI: You couldn't do it under
11 current law, Your Honor.

12 CHIEF JUSTICE ROBERTS: Well, the way
13 constitutional objections work is you might have to
14 change current law.

15 (Laughter.)

16 GENERAL VERRILLI: But in this circumstance,
17 I think, you don't need to get to that question of
18 whether there is an obligation to change current law
19 because even if you did have a second contraceptive-only
20 policy available on an Exchange, that would be precisely
21 the kind of barrier that Congress is trying to
22 eliminate.

23 You have two policies instead of one policy.
24 That creates the disincentives. A lot of women
25 employees, I'm certain, will reach the conclusion that,

1 well, you know, I've got this coverage over here --

2 CHIEF JUSTICE ROBERTS: No, no, no. But I
3 guess that substantiates the point I was trying to make,
4 that it's a question of who does the paperwork.

5 GENERAL VERRILLI: Well --

6 CHIEF JUSTICE ROBERTS: You said, yes, it is
7 a hassle to go to the Exchange, although it's - you
8 know, I've heard about how easy it is. You get an
9 Exchange, you get it, or you allow your infrastructure,
10 as Petitioners have said, to be used as the vehicle for
11 -- for providing it.

12 I'm not saying it comes out one way or
13 another from your perspective. I'm just trying to focus
14 on exactly what is at issue.

15 GENERAL VERRILLI: Right.

16 CHIEF JUSTICE ROBERTS: It's a question
17 whether you want the employee to sign a paper or you
18 want the Little Sisters to sign a paper. In the one
19 case, it's an administrative burden as you've said. In
20 the other case, it's -- it's a violation of a basic
21 principle of faith.

22 GENERAL VERRILLI: No. I think that the
23 point, Your Honor, is that Congress and the Institute of
24 Medicine -- Congress made a judgment here that this does
25 impose a very significant obstacle with these kinds of

1 requirements, result in significantly less use of
2 medically-necessary services.

3 And it's not -- it doesn't just come down to
4 this, Your Honor --

5 JUSTICE KENNEDY: That's why it's necessary
6 to hijack the plans.

7 GENERAL VERRILLI: It's -- Your Honor,
8 it's -- it is why the -- it is why the government's
9 interest is advanced in the -- in the least restrictive
10 manner, in the most effective manner.

11 JUSTICE BREYER: Is this right? Is it that
12 the reason I get that you don't want to have the women
13 to have to ask for the coverage is because vast numbers
14 of women will, quite a few who have religious objections
15 won't, and then there will be that middle set of people
16 who are inertia bound. And since they are inertia
17 bound, we can't say so what, because poor people who
18 don't object religiously, if they get the
19 contraceptives, that lowers the cost of health coverage
20 later on.

21 So the government has an interest in that.
22 And therefore, there is an interest of some kind in not
23 allowing a system -- in not having a system where the
24 inertia bound have to take initiative.

25 Have I got that right?

1 GENERAL VERRILLI: I think that the --

2 JUSTICE BREYER: All right. Do I have the
3 other part right, which is this is not hijacking because
4 there is a Federal regulation that says the
5 infrastructure of the insurers' contraceptive-related
6 plan belongs to the insurer, not to the person who buys
7 the insurance? Am I correct about that?

8 GENERAL VERRILLI: And that's all -- that's
9 all correct, Your Honor. And that's why when I say when
10 we make an arrangement with Aetna or Blue Cross, we are
11 not making an arrangement with Petitioners or anything
12 that Petitioners own.

13 JUSTICE ALITO: Couldn't the Executive deal
14 with the problem of what's available on the Exchanges at
15 the present time in this way: Policies are available
16 that provide comprehensive coverage. Could the
17 Executive say, as a matter of our enforcement
18 discretion, we are not going to take any action against
19 insurers who offer contraceptive-only policies, and in
20 fact, we are going to subsidize those insurers at 115
21 percent, just as we do in the situation of the
22 self-insured plans?

23 GENERAL VERRILLI: No. I don't believe we
24 would have --

25 JUSTICE ALITO: Why would that not be -- why

1 would that not be a valid exercise of your enforcement
2 discretion?

3 GENERAL VERRILLI: Well, it -- I don't think
4 it would be. But even if it were, it presents the same
5 problem of creating the obstacle which creates the
6 inertia problem, which undermines the compelling
7 interest, which is not just the compelling interest of
8 the Institute of Medicine and HHS, but if Congress
9 itself -- because the whole point of the statutory
10 provision here is that this is supposed to be part of
11 your --

12 JUSTICE ALITO: Well, I understand you're
13 saying it would be inadequate.

14 GENERAL VERRILLI: -- health care with
15 regular doctors.

16 JUSTICE ALITO: But why would it be not
17 something that you could do in accordance with your
18 understanding of executive power?

19 GENERAL VERRILLI: Well, I don't -- I don't
20 think that it would address the problem, Justice Alito,
21 because it would --

22 JUSTICE GINSBURG: Could you -- could you,
23 General Verrilli, explain the difference between the
24 employer filing a form, identifying an insurer -- say,
25 Aetna or Blue Cross -- that covers contraceptives for

1 many other people that it insures, the difference
2 between that notice and the woman who now doesn't have
3 this coverage, has to go out affirmatively and get it
4 from someplace else?

5 Is it just a matter of filing --

6 GENERAL VERRILLI: I -- I --

7 JUSTICE GINSBURG: -- the form for her, or
8 is there a real difference between -- between an
9 employer saying we're not going to cover contraceptives,
10 just our insurer's name, and the woman who suddenly
11 doesn't have it as part of her package and has to go out
12 --

13 GENERAL VERRILLI: Right. I think that's
14 exactly the point here, is that the -- the woman
15 employee -- and I do, and I try to --

16 CHIEF JUSTICE ROBERTS: I'm sorry. What --
17 the difference -- you were asked what the difference is?

18 GENERAL VERRILLI: The difference is this:
19 It's not just about filling out paperwork; that if
20 you're a woman employee, you go to your regular doctor,
21 you say you have a medical condition -- I -- that puts
22 me at risk of being pregnant, or I just want
23 contraceptive coverage, or I need contraception to treat
24 a medical condition. And the way this works now, if --
25 if the RFRA exemption is granted here, is that the

1 doctor has to say I cannot help you with that.

2 CHIEF JUSTICE ROBERTS: All right. That's
3 the interest on one side of the equation. What do you
4 understand to be the interest on the other side of the
5 equation?

6 GENERAL VERRILLI: The -- I understand the
7 interest to be avoiding complicity in what they consider
8 to be sin. We take that very seriously, but --

9 CHIEF JUSTICE ROBERTS: Which way -- which
10 way does RFRA cut in -- in analyzing that balance?

11 GENERAL VERRILLI: I think RFRA cuts, in
12 this situation, quite decisively in favor of the
13 government here because the interests are compelling.
14 And the -- and as we've tried to explain, none of the
15 alternatives that the Petitioners have proposed have
16 come anywhere close to being equally effective in
17 ensuring that women get this coverage.

18 And so -- and the obstacles that -- that you
19 get told by your regular doctor, I can't help you, I
20 can't even counsel you about this. And -- and numerous
21 other Petitioners have filed declarations saying that
22 our -- our insurance will not cover even any counseling
23 about contraception. So you've got to go out and find
24 another doctor. And then you've got -- and -- and
25 you've got to find a way to pay for that doctor, and

1 then you've got to find a way to pay for the
2 contraceptive coverage. It's a whole host of very
3 serious obstacles. It's not just about signing a form.
4 And that gets to the heart of the problem here.

5 JUSTICE ALITO: Why do you assume that the
6 doctor to whom the women would go for other services
7 under the plan would be unwilling to provide those
8 services under a plan -- under a separate plan that
9 covers contraceptives?

10 GENERAL VERRILLI: Well, that would --

11 JUSTICE ALITO: Why do you make that
12 assumption?

13 GENERAL VERRILLI: Well, that would be a
14 happenstance. Somebody's got to offer that separate
15 plan, and that separate plan has got to -- and then the
16 doctor that she goes to as a regular doctor has to be
17 the same -- has to be under the same plan. There's no
18 reason to think that she could get that, and --

19 JUSTICE SOTOMAYOR: General, the -- we've
20 used -- the hijack analogy has been mentioned. Can you
21 explain why you don't see this as a hijacking?

22 GENERAL VERRILLI: All right. I think what
23 we've tried to -- the -- the way I've tried to explain
24 that, Your Honor, is that we have tried -- and I think
25 the Court recognized this in Hobby Lobby, that the goal

1 of this is to exempt the employer from providing the
2 contraceptive coverage, to exempt them and to provide it
3 as separate means through separate funds without their
4 involvement, and therefore, it's not hijacking.

5 What I'd like to do, if I could, I want to
6 make one point about the --

7 CHIEF JUSTICE ROBERTS: Maybe if I could
8 follow up on your answer before you do. The
9 contraceptive services would be provided pursuant to
10 what plan?

11 GENERAL VERRILLI: When you're hired by one
12 of the religious organizations, you get a brochure or a
13 package with all your insurance coverage and, you know,
14 everything it is. And where would the contraceptive
15 services be listed? It won't be in that brochure, it
16 can't be in that brochure, there's got to be a separate
17 communication from the insurance company to the employee
18 telling the employee you're getting this separately from
19 us. That's how it works.

20 Now, there --

21 JUSTICE SOTOMAYOR: Mr. Francisco, I think,
22 earlier said if Aetna offers a separate policy giving
23 insurance, that he thought that that would be an
24 adequate -- an adequate accommodation.

25 GENERAL VERRILLI: So I think that that

1 raises all the problems identified.

2 JUSTICE SOTOMAYOR: No, no. I meant -- I
3 meant: He says, generally, if Aetna, under some other
4 policy, offers it on the Exchange to women who might
5 want to go on the Exchange and buy that policy, that's
6 okay if they -- if that's the -- what they do.

7 What's different from that from what happens
8 here? It's basically the same thing, isn't it?

9 GENERAL VERRILLI: No. Two policies instead
10 of one. You have got to pay for that policy.

11 JUSTICE SOTOMAYOR: Well, it is two policies
12 instead of one because the contraceptives are being
13 provided by government regulation. The only
14 seamlessness is that I think the woman doesn't have to
15 apply and pay separately or something else.

16 GENERAL VERRILLI: Well, I think -- I think
17 if it's a separate policy, you're going to have to apply
18 and pay separately. There is a whole separate regime.

19 I do want to make one point about the
20 notice, because my friend on the other side raised the
21 idea of notice, that it's not just about us using the
22 plan, but the notice they provide. That notice
23 argument, I think, can't constitute a substantial burden
24 because it's entirely derivative of the objection to us
25 setting up this third-party arrangement. And I -- I

1 think Mr. Clement told you that this morning because he
2 said if government didn't take this step of providing
3 the coverage, we would be happy to provide any
4 information they want on a form.

5 And so I think that -- what that tells you
6 is that the objection here, the focus of the objection,
7 is the -- is the arrangement to provide the separate
8 coverage and not the notice, per se; that on its own
9 terms, it's unobjectionable.

10 JUSTICE ALITO: Before you sit down, General
11 Verrilli, could I just ask you this informational
12 question about this particular situation of the Little
13 Sisters?

14 Their regular third-party administrator also
15 will not provide -- has said it will not provide the
16 coverage if -- even if they were to comply with the --
17 the form of the notice requirement. And, therefore, you
18 say they probably cannot be -- there is probably no way
19 under ERISA to obtain contraceptive coverage for their
20 employees unless you can find another third-party
21 administrator that you could deal with there.

22 In that situation, would the Little Sisters
23 still be subject to fines for failing to comply?

24 GENERAL VERRILLI: No, we don't think so.
25 If I could, just in closing, what I'd ask this Court to

1 do is to weigh the alternatives that have been put
2 before you here on this case. On the one side, you've
3 got a serious, thoughtful effort to respect Petitioners'
4 religious beliefs by creating a system that allows them
5 to exempt themselves from the requirement in a
6 straightforward manner and that protects the fundamental
7 rights and liberties and dignity of the -- of their
8 employees, many of whom may not share their religious
9 beliefs about contraception.

10 On the other side of the scale, what you've
11 got is a demand that those rights or those employees who
12 may not share Petitioners' beliefs be extinguished --
13 extinguished until such time as Congress creates and
14 enacts a different program that will require a separate
15 one-off jerry-rigged channel for them to provide and
16 obtain contraceptive coverage that will impose precisely
17 the burdens that Congress said in the relevant statutory
18 provision are unacceptable for all preventive services.

19 JUSTICE ALITO: Well, that's one way of
20 characterizing what's involved here. But you could
21 also -- it can also be said that, and it is true, that
22 this is a case in which a great array of religious
23 groups -- and it's not just Catholics and Baptists and
24 Evangelicals, but Orthodox Jews, Muslim groups, the
25 Church of Jesus Christ of the Latter Day Saints, an

1 Indian tribe, the Church of Lukumi Babalu Aye -- have
2 said that this presents an unprecedented threat to
3 religious liberty in this country.

4 What would you say to that?

5 GENERAL VERRILLI: What I would say to that,
6 Your Honor, is that, I think, essentially what eight
7 court of appeals have said, which is that RFRA requires
8 a sensible balance. A sensible balance is essential in
9 a pluralistic society like ours, in which people of
10 every faith on earth live and work side by side, and the
11 government has got to administer rules that are fair to
12 everyone.

13 The accommodation -- the accommodation
14 achieves that balance. Petitioners' position is very,
15 very far from that balance and, therefore, the court of
16 appeals should be affirmed.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Clement, four minutes.

20 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

21 ON BEHALF OF THE PETITIONERS IN

22 NOS. 15-35, 15-05, 15-119 & 15-191

23 MR. CLEMENT: Thank you, Mr. Chief Justice.

24 A few points in rebuttal.

25 I'd like to start with the universities,

1 Justice Kennedy, because I don't think it's the case
2 that just because Congress exempts churches, that it has
3 to exempt the universities. What it needs, though, is a
4 rationale for drawing the line.

5 Now, my friend on the other side says the
6 line doesn't have to be perfect. Well, under compelling
7 interest and least restrictive alternatives, it at least
8 has to be pretty good. And the line that they have
9 drawn here is absurd, and I would urge you to look at
10 the amicus brief filed by the Dominican Sisters and
11 authored by a former head of the tax division, because
12 it explains the line they have picked, using 6033 of the
13 tax code, makes no sense. That's an informative filing
14 requirement, but there is no substantive difference.

15 If my clients filed the form, they get the
16 same tax exempt status as the churches. The only
17 difference in that provision is whether you filed the
18 form. The substantive treatment is exactly the same.

19 To use that line to draw a distinction
20 between churches and universities or the Little Sisters
21 of the Poor is a terrible line to draw. And if you go
22 back to thinking --

23 JUSTICE GINSBURG: But going back to that
24 line-drawing problem -- and that is in a brief that's
25 been mentioned several times, the Baptist Joint

1 Committee -- our leading proponent of RFRA discusses
2 this line-drawing problem. Do you just say that's
3 wrong?

4 MR. CLEMENT: No, I would say that that gets
5 me to the next point. But if I could just finish this
6 point for one second.

7 Their original justification for the line
8 they drew, Justice Kennedy, was that the exempted
9 organizations would be more likely to hire
10 co-religionists and, therefore, less likely to have
11 employees who would use the products.

12 My clients equally enjoy the Title VII
13 exemption which gives them the right to hire
14 co-religionists so their original rationale applies
15 equally to my clients. You have to draw a sensible
16 line.

17 Now as to the exemptions, I mean, I will
18 respectfully disagree with Professor Laycock.

19 JUSTICE SOTOMAYOR: Would it have been
20 better to say, churches, you've got to tell us you're
21 going to claim an exemption, because not every church is
22 religious, has the same religious tenets. So is that
23 what you would have preferred? Is that the -- the sort
24 of incentive you want to put out there? Is that the
25 message you're giving, which is, there is lots of rules

1 that apply differently to churches because we recognize
2 they are special? Others may be special like them, but
3 it's clear to tell what a church is.

4 MR. CLEMENT: Let me answer both questions
5 together. First of all, the exemption is not just
6 limited to churches. It applies to religious orders.
7 And if my clients would have just stuck to their
8 knitting and not helped the elderly poor, they could
9 qualify.

10 But to answer both of these questions
11 together, not all exemptions are created equal. And
12 Professor Laycock is a great scholar, but even he
13 admitted he didn't understand the details of this
14 particular plan. He didn't get into that. He left it
15 to the parties.

16 And I think he subsequently said that if
17 there really was a requirement for these entities to
18 contract, and there is, then even he would recognize
19 there is a substantial burden. But the important point
20 is not all exemptions are created equal. If you create
21 an exemption for small employers, that's a rationale
22 exercise with enforcement discretion. If you create an
23 exemption for -- take the O Centro case. If the
24 exemption for peyote had been for a Schedule 5 substance
25 that was less dangerous, maybe the government would have

1 won.

2 Their problem there was that the government
3 had already exempted the sacramental use of peyote, a
4 Schedule 1 substance. So of course, they had a hard
5 time arguing why they couldn't provide an exemption for
6 a different Schedule 1 substance.

7 All of these exemptions have to be treated
8 the same, Justice Breyer. There is no excuse. There is
9 no other way than to do the hard work of looking at the
10 exemptions and seeing whether they make sense.

11 One of the cases that Congress clearly
12 wanted to embrace in RFRA was Yoder. Now,
13 Yoder was a relatively hard case because there basically
14 were no exemptions. If the State of Wisconsin had
15 already provided an exemption for the Mennonites and it
16 already provided an exemption for the students upstate
17 where the schools are farther apart, Yoder would have
18 been an easy, easy case. You can't make an exemption
19 for all these grandfathered plans. And please, it's not
20 that this is a sunset provision. If you look at Joint
21 Appendix page 956, they link the grandfather provision
22 to the idea that if you like your plan, you can keep it.
23 So that's not going away.

24 Just in closing, my clients would love to be
25 a conscientious objector, but the government insists

1 that they be a conscientious collaborator. There is no
2 such thing.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 The case is submitted.

5 (Whereupon, at 11:37 a.m., the case in the
6 above-entitled matter was submitted.)

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