Nos. 19-431 & 19-454

In the Supreme Court of the United States

LITTLE SISTERS OF THE
POOR SAINTS PETER AND PAUL HOME,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
AND STATE OF NEW JERSEY,
Respondents.

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, ET AL.,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA
AND STATE OF NEW JERSEY,
Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF PHYLLIS C. BORZI AND DANIEL J. MAGUIRE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE[1]

This case involves a requirement under the Patient Protection and Affordable Care Act (ACA), 42 U.S.C. 18001 *et seq.*, that group health plans and insurance companies that offer group or individual health insurance provide enrolled women with cost-free contraceptive coverage. In an attempt to limit the impact of this contraception coverage requirement on the religious beliefs of certain employers who sponsor healthcare plans, the government, through notice-and-comment rulemaking, promulgated an accommodation designed to allow employers claiming a religious objection to opt out of arranging or paying for such coverage, while ensuring that women in such plans would still have access to free contraception as prescribed by their doctors. The government then changed course, effectively scrapping that accommodation and adopting in its place regulations under which any employer that objects on either religious or moral grounds to providing contraceptive coverage for women enrolled in a plan sponsored by that employer may exempt themselves from the contraceptive coverage requirement, thereby preventing women enrolled in such plans from receiving the contraceptive coverage to which they are entitled under the ACA.

Amici are two former, high-ranking United States Department of Labor officials who worked extensively on legislative and regulatory issues surrounding the ACA, including the religious accommodation.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than amici curiae or its counsel made a monetary contribution to fund the preparation or submission of this brief.

Phyllis C. Borzi was, from 2009 to 2017, the Assistant Secretary of Labor of the Employee Benefits Security Administration (EBSA), the branch of the United States Department of Labor that oversees millions of private-sector pension and welfare benefit plans, including healthcare plans that provide benefits to 142 million Americans. Even before heading EBSA, Ms. Borzi was a leading expert on healthcare law and policy, having served as a research professor at the Department of Health Policy at George Washington University's Medical Center, as an of counsel advisor at O'Donoghue & O'Donoghue LLP, on legal issues affecting employee benefit plans, and, from 1979 to 1995, as pension and employee benefit counsel for the United States House of Representatives, Subcommittee on Labor-Management Relations of the Committee on Education and Labor. In her time as Assistant Secretary at the Department of Labor, Ms. Borzi worked extensively on the passage and regulatory roll-out of the ACA, including on the contraceptive coverage requirement and the religious accommodation.

Daniel J. Maguire served as the Director of the Office of Health Plan Standards and Compliance Assistance in EBSA from 2000 until his retirement in 2015. In that capacity, he worked on many legal and policy issues related to healthcare coverage under employee benefit plans, and on the regulatory guidance leading up to and following the passage of the ACA. As most relevant here, Mr. Maguire worked on the religious accommodation regulation. Prior to heading the Office of Health Plan Standards, Mr. Maguire worked for many years in the Department of Labor's Office of the Solicitor, where, among other things, he assisted with developing numerous healthcare regulations and agency guidance on many healthcare topics, after which he headed a Department of Labor task force on healthcare. Like Ms. Borzi, Mr. Maguire is a leading expert on healthcare policy in general, and specifically on the ACA,

including its contraceptive coverage requirement and the Obama-era religious accommodation.

As former Department of Labor officials who worked for many years on health policy issues, including those engendered by the ACA, *amici* offer both expertise and a unique perspective on the technical and policy issues raised in this matter. Indeed, having worked extensively on the religious accommodation that Petitioners insist necessitated the regulatory exemption, Ms. Borzi and Mr. Maguire are uniquely suited to addressing the operation and intended scope of that accommodation.

BACKGROUND AND SUMMARY OF THE ARGUMENT

To address the disproportionately high costs for medical care historically borne by women, related in no small part to reproductive health, pregnancy, and childbirth, Congress included a provision in the ACA requiring health insurance providers to cover, without cost to enrolled women, "preventive care and screenings * * * as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA]." 42 U.S.C. 300gg-13(a)(4). With respect to the vast majority of employer-sponsored healthcare plans, this preventive-services requirement is incorporated into the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1185d.

Consistent with the clear understanding of Congress that such preventive services would include contraception, see 155 Cong. Rec. 29,237, 29,768 (Sen. Durbin, Dec. 3, 2009), the HRSA issued guidelines providing just that. Under these guidelines, included in the "preventive services" that must be provided free of cost to women in almost all healthcare plans and policies are "[a]ll Food and Drug Administration approved contraceptive methods,

sterilization procedures, and patient education and counseling for all women with reproductive capacity," as prescribed by a doctor. 77 Fed. Reg. 8725 (Feb. 15, 2012).

The Departments of Health & Human Services (HHS), Labor, and Treasury, which collectively are responsible for implementing the ACA, promulgated regulations that incorporate the HRSA contraception guidelines. 45 C.F.R. 147.130(a)(1)(iv) (HHS); 29 C.F.R. 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. 54.9815-2713(a)(1)(iv) (Treasury). The three Departments also took steps to minimize the impact on certain employers who objected on religious grounds to providing coverage for some or all forms of contraception. First, the Departments authorized the HRSA to exempt from the requirement to provide contraceptive coverage "religious employers" as defined in the Internal Revenue Code, see 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011), which is limited to "churches, their integrated auxiliaries, * * * conventions or associations of churches, [and] * * * the exclusively religious activities of any religious order." 26 U.S.C. 6033(a)(3)(A)(i) and (iii). This exemption for churches was never challenged, and is not at issue here.

Second, the Departments promulgated regulations that permit an objecting non-profit organization to opt out of providing contraceptive coverage by providing notice either to a plan's insurer or, if self-funded, to the plan's third-party administrator (TPA). 29 C.F.R. 2590.715-2713A; 45 C.F.R. 147.131. Following this Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) and the Court's interim order in *Wheaton College v. Burwell*, 573 U.S. 958 (2014), the Departments expanded this regulatory accommodation to encompass closely-held for-profit entities, and to allow objecting entities to opt-out by providing notice to HHS, rather than to the Plan's insurer or TPA. 29 C.F.R. 2590.715-2713A(b)(1)(ii)(B) and

(c)(1)(ii). The insurer or the TPA would then provide the contraceptive coverage without further involvement by or payment from the sponsoring employer. See 29 C.F.R. 2510.3-16(b) and (c), 2590.715-2713A(b)(2).

This regulatory accommodation is the prelude to what is directly at issue in this case: a newly formulated regulation that abandons the carefully balanced accommodation in favor of two regulations that create expansive new exemptions from the contraceptive coverage requirement. These new regulations allow virtually any employer that objects on either religious or moral grounds to no-cost contraceptive coverage for women covered under its healthcare plan to opt out of this statutory requirement. 83 Fed. Reg. 57,536, 57,558-65 (Nov. 15, 2018); 83 Fed. Reg. 57,592, 57,614, 57617-18 (Nov. 15, 2018). Under these broad exemptions, no notice is required and no alternative provision for the contraceptive coverage is made. For the women who are the intended beneficiaries of the ACA's preventive services requirement, the regulations mean that their access to the free contraceptive services that the law requires is entirely dependent on the choice of their employers.[2]

The Petitioners argue that this newly-formulated broad exemption is justified because, with respect to some objecting employers, the ACA's contraceptive coverage requirement violates the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb *et seq*., and the accommodation

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[2] The new exemptions did not technically rescind the accommodation but instead allow objecting plan sponsors to choose to use the accommodation on a voluntary basis. 82 Fed. Reg. 47,792, 47,808-11 (October 13, 2017). However, it seems quite likely that most if not all objecting employers will choose the easier route of simply exempting themselves from the contraception requirement, thus rendering the accommodation an all but dead letter.

did not avoid that violation. Brief for the Petitioners in *Trump v. Pennsylvania*, No. 19-454 (Trump Pet. Br.) 12, 20-27; Brief for the Petitioner in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, No. 19-431 (Little Sisters Pet. Br.) 34, 37. RFRA is designed to strike "sensible balances between religious liberty" and competing governmental interests. 42 U.S.C. 2000bb(a)(5). To that end, it provides that, even with respect to "a rule of general applicability," the government may "substantially burden a person's exercise of religion," only if that burden is "the least restrictive means of furthering [a] compelling government interest." 42 U.S.C. 2000bb-1(a), (b).

Petitioners insist that the accommodation substantially burdened the religious practices of at least some employers because, they claim, the accommodation process "commandeers their own health plans to provide coverage, and requires [such employers] to facilitate notification to the health plan issuer or third-party administrator that will, upon receiving such notification, provide contraceptive coverage in connection with their plans." Trump Pet. Br. at 23 (citations omitted). See also Little Sisters Pet. Br. at 34 (objecting that, under the accommodation, "contraceptives will be furnished 'seamlessly' via the religious employers' own health plans").

As explained below, Petitioners are wrong that their plans are employed under the accommodation to provide contraceptive services, and their argument fundamentally misunderstands the nature and operation of ERISA plans. An ERISA plan, at its core, is an enforceable promise to provide specified benefits made by an employer to its employees and their beneficiaries that is carried out through an ongoing administrative scheme maintained by the employer. Because the accommodation allowed objecting religious employers to opt out of their statutory obligation to provide contraceptive coverage as a benefit under the

healthcare plans they sponsor, it is simply not accurate to say that the contraceptive coverage that was then provided by the insurer or TPA was in fact provided by the plan or plan sponsor. The accommodation did not, in any sense, employ the healthcare plans sponsored by objecting employers to provide the contraceptive coverage once the employer provided notification of its wish to opt out of the contraceptive requirement on religious grounds. Any mistaken belief by plan sponsors with regard to how the accommodation functioned cannot provide a basis for concluding that the accommodation burdened their practice of religion, nor can it justify the new regulation exempting objecting employers completely and stymieing Congress's command that women enrolled in healthcare plans be provided with cost-free preventive services.

ARGUMENT

ONCE AN OBJECTING EMPLOYER INVOKED THE ACCOMMODATION, CONTRACEPTIVE COVERAGE WAS NOT PROVIDED THROUGH THE HEALTH PLAN SPONSORED BY THAT EMPLOYER

A. Governing ERISA principles

ERISA Section 3(1), in relevant part, defines an "employee welfare benefit plan" or "welfare plan" as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or

> day care centers, scholarship funds, or prepaid legal services, * * *

29 U.S.C. 1002(1).

Although this definition is somewhat "circular," this Court has had little trouble parsing its meaning by applying the "common understanding of the word 'plan' as referring to a scheme decided upon in advance." *Pegram v. Herdrich*, 530 U.S. 211, 223 (2000) (citations omitted). An ERISA plan "comprises a set of rules that define the rights of a beneficiary and provide for their enforcement" with respect to the sponsoring employer. *Ibid.* Thus, "a plan, fund, or program falls within the ambit of ERISA only if the plan, fund, or program covers ERISA participants because of their employee status in an employment relationship, and an employer or employee organization is the person that establishes or maintains the plan, fund, or program." *Donovan v. Dillingham*, 688 F.2d 1367, 1371 (11th Cir. 1982).

Plans may be either insured or self-funded. Under an insured plan, the sponsoring employer purchases a group insurance policy to fund the benefits. A self-funded plan, in contrast, is one in which the sponsoring employer does not purchase insurance, but instead assumes direct financial responsibility for benefits under the plan. See *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 941 (2016). Typically, with respect to self-funded healthcare plans, employers hire an insurance company or other outside entity as a TPA responsible for such tasks as developing a network of healthcare providers who agree to provide coverage under the plan, negotiating payment rates and processing claims for benefits. See 78 Fed. Reg. 39,870, 39,879-39,880 & n.40 (July 2, 2013). In doing so, the TPA acts as a plan fiduciary and, as such, is subject to duties under ERISA. See,

e.g., *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 111 (2008) (holding that making a benefits determination is a "fiduciary act * * * in which the administrator owes a special duty of loyalty to plan beneficiaries").

However, regardless of whether the ERISA plan is insured or self-funded, neither the plan nor its assets belong to the sponsoring employer. Instead, under guiding trust-law principles, the plan sponsor is akin to the settlor of a trust, *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (citations omitted), and the plan's assets are owned as a legal matter by a trustee for the beneficial interest of the participants and beneficiaries. See *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 262 (2008).

B. The accommodation provided contraceptive benefits separate from the ERISA plan

As discussed below, it is clear that, under the accommodation, contraceptive benefits were not provided through the plan or its sponsor once the sponsor gave notice of its eligibility and intent to opt out of the contraceptive requirement.

The accommodation provided two opt-out methods. Under the first method, an objecting religious employer could opt out of its contraceptive coverage obligation by using a Department of Labor form self-certifying that it had a religious objection to providing contraceptive coverage, that it was eligible to opt out, and providing the name and contact information of the person making the certification. 29 C.F.R. 2590.715-2713A(b)(1)(ii)(A); 45 C.F.R. 147.131(d)(1)(i); see also *EBSA Form 700*, https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/ebsa-form-700-revised.pdf. The objecting

employer was then required to send the form to the insurance company if the plan was insured, or, if the plan was self-funded, to the TPA. *Ibid.*

Under the second opt-out method, the objecting employer was required to provide written notification of its objection to the Secretary of HHS. The objecting employer was not required to use any particular form, but only needed to provide information comparable to what was required under the first method: the basis on which the organization was eligible to opt out, as well as the type of plan it offered and contact information for the plan's insurer or TPA. 29 C.F.R. 2590.715-2713A(b)(1)(ii)(A) and (c)(1); 45 C.F.R. 147.131(d)(1)(i). The Department of Labor, working with the HHS, was then tasked with sending a notice to the plan's insurance issuer or TPA informing the issuer or TPA that the government had received an opt-out notice from an eligible organization.

Under either method, once the insurer or TPA received a notification from the employer or from the Department of Labor that the eligible employer (or organization) was opting out of providing coverage, the employer had no further obligation to, and was no longer responsible for, contracting, arranging, paying or referring plan participants and beneficiaries for contraceptive coverage. 29 C.F.R. 2590.715-2713A(b)(2); 45 C.F.R. 147.131(d)(2)(ii). At that point as well, the accommodation required the insurer or TPA to take sole responsibility for notifying the employees of the availability of coverage for contraceptive services, to provide that notice "separate from" any communications related to the coverage provided by the sponsoring employer, and to make clear that the employer "does not administer or fund contraceptive benefits." 29 C.F.R. 2590.715-2713A(d); 45 C.F.R. 147.131(e).

The accommodation worked somewhat differently for insured plans than for self-funded plans. With respect to insured plans, if an insurer received the self-certification notice or the notification from the Secretary of Labor, from that point on, the insurer and not the employer was charged with the responsibility to provide the contraceptive coverage. 78 Fed. Reg. 39,870, 39,874-39,880 (July 2, 2013); 45 C.F.R. 147.131(d)(2). The insurer was required to expressly exclude contraceptive coverage from the group health coverage provided in connection with the employer's plan, and to provide separate payments for any contraceptive services required to be covered for plan employees and their covered dependents. 45 C.F.R. 147.131(d)(2)(i). The accommodation expressly provided that the issuer could not impose any cost-sharing requirements (such as a copayment, coinsurance or a deductible) on the plan participant or beneficiary, or impose any premium, fee or other charge, or any portion thereof, directly or indirectly on the group health plan (or eligible organization). 29 C.F.R. 2590.715-2713A(b)(2); 45 C.F.R. 147.131(d)(2)(ii). The accommodation further required the insurer to segregate premium revenue collected from the eligible employer or organization from the monies used to provide payments for contraceptive services. 29 C.F.R. 2590.715-2713A(b)(2); 45 C.F.R. 147.131(d)(2)(ii).

Under the accommodation, an employer that maintained a self-funded plan and contracted with "one or more" TPAs could opt out of the contraceptive requirement either by providing each TPA with a copy of the self-certification or providing notice to HHS. 26 C.F.R. 54.9815-2713A(b)(1); 29 C.F.R. 2590.715-2713A(b)(1). As with insured plans, at that point, the employer was excused from providing contraceptive coverage, and the TPAs that administer the healthcare plans were, in most instances,

charged under ERISA with providing or arranging for contraceptive coverage without cost-sharing with the employer or the plan participants and beneficiaries. 26 C.F.R. 54.9815-2713A(b)(1); 29 C.F.R. 2590.715-2713A(b)(1). See also 78 Fed. Reg at 39,879-80.[3] As with insured plans, the group health plan sponsored by the employer was not used in any way to provide the contraceptive coverage separately provided by the TPA.

By allowing objecting religious employers who sponsor plans to opt out of providing contraceptive coverage while ensuring that third-parties (either the insurer or the TPA) provided women who participate in or are beneficiaries under such plans with required contraceptive coverage, the accommodation struck precisely the "sensible balance[]" that RFRA contemplates, 42 U.S.C. 2000bb (a)(5). Indeed, this Court in *Hobby Lobby* recognized that the accommodation "effectively exempted" objecting employers from the contraceptive coverage requirement, and pointed to the accommodation as a less restrictive means to avoid burdening the religious beliefs of closely-held, for-profit employers such as the plaintiff in that case. 573 U.S. at 698, 730-32.

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[3] Because ERISA exempts from its coverage "church plans," 29 U.S.C. 1003(b)(2), TPAs for such plans would not be subject to direct regulation, and their provision of contraceptive coverage would be voluntary. It is likely, however, that many if not most church plans would already be excused from the contraception mandate under the exemption for churches, 26 U.S.C. 6033(a)(3)(A)(i) and (iii), which is not at issue here. Moreover, as with other TPAs for self-funded plans, TPAs for church plans could obtain compensation for the cost of providing contraceptive coverage by seeking a reduction in the user fees to participate in the ACA exchanges. 29 C.F.R. 2590.715-2713A(b)(3); 45 C.F.R. 156.50(d). And, in any event, the employer was relieved of its obligation with respect to contraceptive coverage regardless of whether the TPA choose to provide coverage.

While the accommodation required that the insurer or TPA allow covered women and their dependents to use the same network of doctors, hospitals and other providers as under the plan, so that covered women could receive contraceptive services from their regular doctors, 80 Fed. Reg. 41,318, 41,328 (July 14, 2015), this did not mean that the plan was itself involved in providing the contraceptive coverage. These provider networks do not belong to the sponsoring employers or to the plans and, indeed, are nearly always used by TPAs and insurers for many plans.

Thus, Petitioners are simply incorrect that "[f]or most eligible entities, the accommodation meant that plan participants would still receive contraceptive coverage through the objecting organization's health plan." Trump Pet Br. 4. See also *id*. at 12 (stating that "[m]any employers sincerely believe, on religious grounds, that the government's use of their health plans to provide contraceptive coverage makes them complicit in providing such coverage"); *id.* at 23 (stating that "employers believe that the accommodation * * * commandeers their own health plans to provide coverage"). "This argument, however, misunderstands what it is that makes a plan a plan." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 15 n. 9 (1987).

The plan is not the medical care provided or paid for by the insurer or TPA, nor is it the network of medical providers made available through the insurer or TPA. Nor does it consist of obligations imposed on the issuers or TPAs by virtue of accommodation, which was designed and operated to take the eligible objecting employer and the plan out of the picture for purposes of providing contraceptive coverage. As this Court held in *Fort Halifax*, it is not "employee benefits" that are regulated by ERISA, but employee benefit plans. 482 U.S. at 19. Such a plan comes into being

when "[a]n employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations" by "establish[ing] a uniform administrative scheme." *Id.* at 9. It is the "ongoing, predictable nature of [the employer's] obligation" that "creates the need for an administrative scheme to process claims and pay out benefits" and that thereby creates and constitutes the plan. *Id.* at 15 n.9.

The Little Sisters make much of the fact that, in *Zubik*, the government "admitted" that the contraceptive coverage provided by a TPA to a self-funded plan was "part of the same 'plan.'" Little Sisters Pet. Br. at 36 (quoting Brief for the Respondent in *Zubik v. Burwell*, No. 14-1418 (U.S. Br.) at 38, *Zubik, supra*). But the government said that this was so only "as a formal ERISA matter," in the "sense" that a plan "is simply 'a set of rules that define the rights of a beneficiary and provide for their enforcement.'" U.S. Br. at 38-39, *Zubik*, *supra* (quoting *Pegram*, 530 U.S. at 223). Indeed, in the same paragraph, the government also stated emphatically that contraceptive coverage under the accommodation is not provided "using any 'plan infrastructure' belonging to" plan sponsors. U.S. Br. at 38, *Zubik*, *supra*. More importantly, the government's statement about what constitutes an ERISA plan provides only part of the picture, omitting that the rights, rules and enforcement must be provided in the context of the employment relationship, *Dillingham*, 688 F.2d at 1371, and must entail an ongoing administrative scheme to systematically pay the promised benefits. *Fort Halifax*, 482 U.S. at 9, 15 n.9. As discussed, the accommodation removed the objecting employer entirely from its obligation to promise or provide contraceptive benefits on an ongoing basis.

To the contrary, once the eligible employer objected on religious grounds and the insurer or TPA received notice,

the employer was no longer committed to "systematically pay" the contraception benefits and the women wishing to receive such services would have no occasion to invoke the ongoing "administrative scheme" that constitutes the plan. As in *Fort Halifax*, the fact that, to invoke the accommodation, the employer was required on a one-time basis to give notice to the insurer, TPA or government agency in order to opt out of its obligation to provide contraceptive benefits, did not mean that it was the employer or the plan that paid for or provided those services. *Id*. at 15 n.9. Instead, from the moment the sponsoring employer or Department of Labor notified the insurer or TPA of the employer's religious objection, the accommodation took the employer and the plan out of the picture, absolving the plan and plan sponsor from any further obligations, financial or otherwise, with respect to the provision of contraceptive coverage for women who are participants in or beneficiaries under the plan. The employer was no longer required to promise to provide the contraceptive benefits and the plan no longer provided an ongoing scheme for administering these benefits.

Objecting employers may think that the accommodation required that they and the plans they sponsor be involved in providing contraceptive coverage once they opted out, but they are incorrect as a legal matter. A mistaken belief about what the law required is simply not a religious belief or practice that can form the basis of a RFRA claim of substantial burden or that can justify the broad new exemption that effectively replaced the accommodation.

CONCLUSION

The judgement of the court of appeals should be affirmed.

Respectfully submitted.

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