IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GENEVA COLLEGE; MOST REVEREND DAVID A. ZUBIK, et al.; MOST REVEREND LAWRENCE T. PERSICO, et al.,
Plaintiffs-Appellees,

v.

Nos. 13-3536, 14-1374, 14-1376 & 14-1377

SYLVIA M. BURWELL, Sec'y of the U.S. Dep't of Health & Human Servs., et al.,
Defendants-Appellants.

STATUS REPORT

As the Court is aware, the Supreme Court remanded the above-captioned cases for further proceedings. *See Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam). This status report informs the Court of recent administrative developments. For the reasons discussed below, we ask that the Court take no action at this time and allow the government 65 days in which to submit the next status report.

1. After consideration of supplemental briefing, the Supreme Court remanded to the courts of appeals these and other cases raising parallel RFRA challenges to the accommodation regulations. *Zubik*, 136 S. Ct. at 1560-61. The Court emphasized that it "expresse[d] no view on the merits of the cases" and, in particular, that it did not "decide whether [plaintiffs'] religious exercise has been substantially burdened, whether the Government has a compelling interest, or whether the current regulations

are the least restrictive means of serving that interest." *Id.* at 1560. But the Court stated that in light of what it viewed as "the substantial clarification and refinement in the positions of the parties" in their supplemental briefs, the parties "should be afforded an opportunity to arrive at an approach going forward that accommodates [plaintiffs'] religious exercise while at the same time ensuring that women covered by [plaintiffs'] health plans 'receive full and equal health coverage, including contraceptive coverage.'" *Id.* (citation omitted).

As the government explained in its Supreme Court filings, the Departments that issued the accommodation regulations believe that the existing regulations are consistent with RFRA. At the same time, the Departments are committed to respecting the beliefs of religious employers that object to providing contraceptive coverage, and they have consistently sought to accommodate religious objections to the contraceptive-coverage requirement even where not required to do so by RFRA. Consistent with that approach, on July 21, 2016, the Departments issued a Request for Information (RFI) to determine whether further modifications to the existing accommodation could resolve the RFRA objections asserted by various organizations while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage. *See* https://www.federalregister.gov/articles/2016/07/22/2016-17242/requests-for-information-coverage-for-contraceptive-services. The Departments requested comments within 60 days of the issuance of the RFI.

As the RFI explains, the Departments are using the RFI procedure because the issues addressed in the supplemental briefing in *Zubik* affect a wide variety of stakeholders, including many who are not parties to the cases that were before the Supreme Court. Those stakeholders include other objecting employers (who may have different views), insurance issuers, third-party administrators (TPAs), and women enrolled in objecting employers' health plans. RFIs are commonly used to solicit public comments on potential rulemaking, and information gathered through this RFI will be used to determine whether changes to the current accommodation regulations should be made and, if so, to inform the nature of those changes.

In light of the issuance of the RFI, the government respectfully requests that the Court take no action at this time and allow the government 65 days to submit its next status report. In that report, the government will indicate how much additional time is needed to evaluate the information submitted in response to the RFI. Our request that the Court take no further action at this time is consistent with the Supreme Court's statement that it "anticipate[d] that the Courts of Appeals will allow the parties sufficient time to resolve any outstanding issues between them." 136 S. Ct. at 1560.

2. Before the Supreme Court's decision, most of the plaintiffs in *Zubik* and the other pending cases raising parallel RFRA challenges to the accommodation had secured interim relief against the enforcement of the contraceptive-coverage requirement. The Supreme Court's decision provides continued interim relief,

specifying that during the pendency of these cases "the Government may not impose taxes or penalties on [plaintiffs] for failure to provide the . . . notice" required by the existing accommodation regulations. *Zubik*, 136 S. Ct. at 1560-1561. But the Court also expressly provided that neither its decision nor any prior interim order prevents the Departments from notifying plaintiffs' issuers and TPAs of their obligation to make separate payments for contraceptives under the accommodation, thereby ensuring that the affected women receive the coverage to which they are entitled by law:

> Nothing in this opinion, or in the opinions or orders of the courts below, is to affect the ability of the Government to ensure that women covered by [plaintiffs'] health plans "obtain, without cost, the full range of FDA approved contraceptives." *Wheaton College v. Burwell*, 573 U.S. —, —, 134 S. Ct. 2806, 2807, 189 L. Ed. 2d 856 (2014). Through this litigation, [plaintiffs] have made the Government aware of their view that they meet "the requirements for exemption from the contraceptive coverage requirement on religious grounds." *Id.*, at —, 134 S. Ct., at 2807. Nothing in this opinion, or in the opinions or orders of the courts below, "precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage" going forward. *Ibid.*

Zubik, 136 S. Ct. at 1560-61. As the Supreme Court was aware, the Departments sent comparable notifications to the issuer and TPA of the relevant employer's plans after the Supreme Court issued a similar order in *Wheaton College*. *See Zubik*, Mem. for Resps. in Opp. 28-29, No. 14A1065 (U.S.) ("Consistent with the Court's interim order, the Departments have sent notifications to the insurers and TPAs for

Wheaton's non-grandfathered employee health plans describing their obligation to provide separate coverage under the applicable regulations.").

To the extent plaintiffs have identified their insurance issuers and/or TPAs in the course of the litigation, the Departments soon will begin notifying the identified issuers and TPAs of their obligation to make or arrange separate payments for contraceptives, without cost to or involvement by plaintiffs.[1]

Respectfully submitted,

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[1] *See generally* 29 C.F.R. § 2590.715-2713A(b); 45 C.F.R. § 147.131(c). For the plaintiffs that have identified their plan as a self-insured church plan, the Departments will notify the TPA of the incentive available under the regulations to make or arrange separate payments for contraceptives. *See* 80 Fed. Reg. 41,318, 41,323 n.22 (July 14, 2015).

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2016, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Megan Barbero
MEGAN BARBERO