Nos. 14-1453 and 14-1505

In the Supreme Court of the United States

PRIESTS FOR LIFE, ET AL., PETITIONERS

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Under federal law, health insurers and employer-sponsored group health plans generally must cover certain preventive health services, including contraceptive services prescribed for women by their doctors. Petitioners object to providing contraceptive coverage on religious grounds and are eligible for a regulatory accommodation that would allow them to opt out of the contraceptive-coverage requirement. Petitioners contend, however, that the accommodation itself violates the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, by requiring third parties to provide their employees with separate contraceptive coverage after petitioners opt out. The question presented is:

Whether RFRA entitles petitioners not only to opt out of providing contraceptive coverage themselves, but also to prevent the government from arranging for third parties to provide separate coverage to the affected women.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-93a)[1] is reported at 772 F.3d 229. The opinion of the district court in No. 14-1453 (14-1453 Pet. App. 96-135) is reported at 7 F. Supp. 3d 88. The opinion of

[1] Unless otherwise noted, citations to "Pet. App." refer to the appendix to the petition for a writ of certiorari in No. 14-1505.

the district court in No. 14-1505 (Pet. App. 94a-211a) is reported at 19 F. Supp. 3d 48.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2014. A petition for rehearing was denied on May 20, 2015 (Pet. App. 222a-224a). The petitions for writs of certiorari were filed on June 9, 2015, and June 19, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Patient Protection and Affordable Care Act (Affordable Care Act or Act), Pub. L. No. 111-148, 124 Stat. 119,[2] seeks to ensure universal access to quality, affordable health coverage. Some of the Act's provisions make insurance available to people who previously could not afford it. See *King* v. *Burwell*, 135 S. Ct. 2480, 2485-2487 (2015). Other reforms seek to improve the quality of coverage for all Americans, including the roughly 150 million people who continue to rely on employer-sponsored group health plans. See, *e.g.*, 42 U.S.C. 300gg-11 to 300gg-19a.[3]

One of the Act's reforms requires insurers and employer-sponsored group health plans to cover immunizations, screenings, and other preventive services without imposing copayments, deductibles, or other cost-sharing requirements. 42 U.S.C. 300gg-13. Congress determined that broader and more consistent

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

[3] See Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits 2014 Annual Survey* 56 (2014), http://files.kff.org/attachment/2014-employer-health-benefits-survey-full-report (*Health Benefits Survey*).

use of preventive services is critical to improving public health and that people are more likely to obtain appropriate preventive care when they do not have to pay for it out of pocket. Pet. App. 57a-58a; see 78 Fed. Reg. 39,872 (July 2, 2013).

The Act specifies that the preventive services to be covered without cost-sharing include "preventive care and screenings" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" (HRSA), a component of the Department of Health and Human Services (HHS). 42 U.S.C. 300gg-13(a)(4); see *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (*Hobby Lobby*). Congress included a specific provision for women's health services "to remedy the problem that women were paying significantly more out of pocket for preventive care and thus often failed to seek preventive services." Pet. App. 4a; see *Hobby Lobby*, 134 S. Ct. at 2785-2786 (Kennedy, J., concurring).

In identifying the women's preventive services to be covered, HRSA relied on recommendations from independent experts at the Institute of Medicine (IOM). *Hobby Lobby*, 134 S. Ct. at 2762. IOM recommended including the full range of contraceptive methods approved by the Food and Drug Administration (FDA), which IOM found can greatly decrease the risk of unintended pregnancies, adverse pregnancy outcomes, and other negative health consequences for women and children. IOM, *Clinical Preventive Services for Women: Closing the Gaps* 10, 109-110 (2011) (*IOM Report*). IOM also noted that "[c]ontraceptive coverage has become standard practice for most private insurance and federally funded insurance programs" and that "health care professional associa-

tions"—including the American Medical Association and the American Academy of Pediatrics—"recommend the use of family planning services as part of preventive care for women." *Id.* at 104, 108.

Consistent with IOM's recommendation, the HRSA guidelines include all FDA-approved contraceptive methods, as prescribed by a doctor or other health care provider. 77 Fed. Reg. 8725 (Feb. 15, 2012); see *Hobby Lobby*, 134 S. Ct. at 2762. Accordingly, the regulations adopted by the three Departments responsible for implementing the relevant provisions of the Affordable Care Act (HHS, Labor, and the Treasury) include those contraceptive methods among the preventive services that insurers and employer-sponsored group health plans must cover without cost-sharing. 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).[4]

2. Recognizing that some employers have religious objections to providing contraceptive coverage, the Departments developed "a system that seeks to respect the religious liberty" of objecting organizations "while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives" as other women. *Hobby Lobby*, 134 S. Ct. at 2759; see 77 Fed. Reg. 16,503 (Mar. 21, 2012).

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[4] Under the Act's grandfathering provision, health plans that have not made specified changes since the Act's enactment are exempt from many of the Act's reforms, including the requirement to cover preventive services. *Hobby Lobby*, 134 S. Ct. at 2763-2764; see 42 U.S.C. 18011. The percentage of employees in grandfathered plans is "quickly phasing down," Pet. App. 72a n.25, having dropped from 56% in 2011 to 26% in 2014. *Health Benefits Survey* 7, 210.

That regulatory accommodation is available to any nonprofit organization that holds itself out as a religious organization and that opposes covering some or all of the required contraceptive services on religious grounds. 45 C.F.R. 147.131(b). In light of this Court's decision in *Hobby Lobby*, the Departments have also extended the same accommodation to closely held for-profit entities that object to providing contraceptive coverage based on their owners' religious beliefs. 80 Fed. Reg. 41,324-41,330, 41,346 (July 14, 2015) (to be codified at 45 C.F.R. 147.131(b)(2)(ii)).[5]

a. The accommodation exempts objecting employers from any obligation to provide contraceptive coverage and instead requires third parties to provide separate payments for contraceptive services for employees and their covered dependents who choose to use those services. 78 Fed. Reg. at 39,875-39,880.

If the employer invoking the accommodation has an insured plan—that is, if it purchases coverage from a health insurance issuer such as BlueCross BlueShield—then the obligation to provide separate coverage falls on the insurer. The insurer must "exclude contraceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries."

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[5] "'[C]hurches, their integrated auxiliaries, and conventions or associations of churches,' as well as 'the exclusively religious activities of any religious order,'" are exempt from the contraceptive-coverage requirement under a separate regulation that incorporates a longstanding definition from the Internal Revenue Code. *Hobby Lobby*, 134 S. Ct. at 2763 (quoting 26 U.S.C. 6033(a)(3)(A) and citing 45 C.F.R. 147.131(a)).

Hobby Lobby, 134 S. Ct. at 2763; see 45 C.F.R. 147.131(c).[6]

Rather than purchasing coverage from an insurance issuer, some employers "self-insure" by paying employee health claims themselves. Self-insured employers typically hire an insurance company or other outside entity to serve as a third-party administrator (TPA) responsible for processing claims and performing other administrative tasks. 78 Fed. Reg. at 39,879-39,880 & n.40. If a self-insured employer invokes the accommodation, its TPA "must 'provide or arrange payments for contraceptive services' for the organization's employees without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries." *Hobby Lobby*, 134 S. Ct. at 2763 n.8 (quoting 78 Fed. Reg. at 39,893); see 29 C.F.R. 2590.715-2713A(b)(2). The TPA may then obtain compensation for providing the required coverage through a reduction in fees paid by insurers to participate in the federally-facilitated insurance Exchanges created under the Affordable Care Act. *Hobby Lobby*, 134 S. Ct. at 2763 n.8.

The accommodation operates differently if a self-insured organization has a "church plan" as defined in 29 U.S.C. 1002(33). Church plans are generally exempt from regulation under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* See 29 U.S.C. 1003(b)(2). The government's authority to require a TPA to provide coverage under the accommodation derives from ERISA. See 29 C.F.R. 2510.3-16(b); 80 Fed. Reg. at 41,323. Accordingly, if an eligible organization with a self-insured

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[6] The same procedure applies to colleges and universities that arrange health insurance for their students. 45 C.F.R. 147.131(f).

church plan invokes the accommodation, its TPA is not legally required to provide separate contraceptive coverage to the organization's employees, but the government will reimburse the TPA if it provides coverage voluntarily. 79 Fed. Reg. 51,095 n.8 (Aug. 27, 2014).

In all cases, an employer that opts out under the accommodation has no obligation "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874. The employer also need not inform plan participants of the separate coverage provided by third parties. Instead, insurers and TPAs must provide such notice themselves, must do so "separate from" materials distributed in connection with the employer's group health coverage, and must make clear that the objecting employer plays no role in covering contraceptive services. 29 C.F.R. 2590.715-2713A(d); 45 C.F.R. 147.131(d).[7] The accommodation thus "effectively exempt[s]" objecting employers from the contraceptive-coverage requirement. *Hobby Lobby*, 134 S. Ct. at 2763.

b. The original accommodation regulations provided that an eligible employer could invoke the accommodation, and thereby opt out of the contraceptive-coverage requirement, by "self-certifying" its eligibility using a form provided by the Department of Labor

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[7] A model notice informs employees that their employer "will not contract, arrange, pay, or refer for contraceptive coverage" and that the issuer or TPA "will provide separate payments for contraceptive services." HHS, *Notice of Availability of Separate Payments for Contraceptive Services*, https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/Downloads/cms-10459-enrollee-notice.pdf (last visited Aug. 11, 2015).

and transmitting that form to its insurer or TPA. *Hobby Lobby*, 134 S. Ct. at 2782; see 29 C.F.R. 2590.715-2713A(b)(1)(ii)(A); 45 C.F.R. 147.131(c)(1)(i). In light of this Court's interim order in *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014) (*Wheaton*), the Departments have also made available an alternative procedure for invoking the accommodation.

In *Wheaton*, the Court granted an injunction pending appeal to Wheaton College, which had challenged the accommodation under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* As a condition for injunctive relief, the Court required Wheaton to inform HHS in writing that it satisfied the requirements for the accommodation. *Wheaton*, 134 S. Ct. at 2807. The Court provided that Wheaton "need not use the form prescribed by the Government" and "need not send copies to health insurance issuers or [TPAs]." *Ibid.* At the same time, the Court specified that "[n]othing in [its] order preclude[d] the Government from relying on" Wheaton's written notice "to facilitate the provision of full contraceptive coverage under the Act" by requiring Wheaton's insurers and TPAs to provide that coverage separately. *Ibid.* The government was able to do so because, as the Court was aware, Wheaton had identified its insurers and TPAs in the course of the litigation. *Id.* at 2815 (Sotomayor, J., dissenting).

In light of this Court's interim order, the Departments augmented the accommodation to provide all eligible employers with an option essentially equivalent to the one made available to Wheaton. The regulations allow an eligible employer to opt out by notifying HHS of its objection rather than by sending the self-certification form to its insurer or TPA. 79 Fed.

Reg. at 51,092. The employer need not use any particular form and need only indicate the basis on which it qualifies for the accommodation, as well as the type of plan it offers and contact information for the plan's insurers and TPAs. *Id.* at 51,094-51,095; see 29 C.F.R. 2590.715-2713A(b)(1)(ii)(B) and (c)(1); 45 C.F.R. 147.131(c)(1)(ii). If an employer opts out using this alternative procedure, HHS and the Department of Labor notify its issuers and TPAs of their obligation to provide separate contraceptive coverage. *Ibid.*

3. Petitioners are nonprofit religious organizations that provide or arrange health coverage for their employees and students, but that object on religious grounds to covering contraceptive services.

a. The petitioners in No. 14-1453 are Priests for Life and three of its employees (collectively, PFL). Pet. App. 12a n.3. PFL provides coverage to its employees through an insured plan and is eligible to opt out of the contraceptive-coverage requirement under the accommodation. *Id.* at 14a-15a.

b. The petitioners in No. 14-1505 are the Archdiocese of Washington, formally known as the Roman Catholic Archbishop of Washington (RCAW), and nine Catholic nonprofit organizations (collectively, the RCAW petitioners). Pet. App. 13a, 14a n.4. Catholic University of America has insured plans for its employees and students. *Id.* at 14a-15a. Thomas Aquinas College has a self-insured plan for its employees. *Id.* at 14a. The remaining RCAW petitioners offer coverage to their employees through RCAW's self-insured church plan, which is not subject to ERISA. *Ibid.* RCAW itself is exempt from the contraceptive-coverage requirement. *Id.* at 13a; see note 5, *supra*.

The other RCAW petitioners are all eligible to opt out under the accommodation. Pet. App. 14a.

4. Petitioners filed two separate suits challenging the accommodation under RFRA, which provides that the government may not "substantially burden a person's exercise of religion" unless that burden is "the least restrictive means of furthering [a] compelling government interest." 42 U.S.C. 2000bb-1. Petitioners asserted that the accommodation substantially burdens their exercise of religion because the government will arrange for their insurers and TPAs to provide their employees and students with separate contraceptive coverage if petitioners themselves opt out. The district court dismissed PFL's complaint for failure to state a claim. 14-1453 Pet. App. 108-122. A different district judge granted summary judgment to Thomas Aquinas College, but rejected the RFRA claims of the remaining RCAW petitioners. Pet. App. 94a-211a.

5. The court of appeals consolidated the appeals in petitioners' cases and rejected their RFRA challenges on two independent grounds. Pet. App. 1a-93a.[8]

a. The court of appeals first held that the accommodation does not substantially burden petitioners' exercise of religion. Pet. App. 27a-49a. The court distinguished *Hobby Lobby*, which held that the contraceptive-coverage requirement imposed a substantial burden on closely held for-profit corporations that (at the time) were *not* eligible for the accommodation. *Id.* at 24a-25a. The court emphasized that, unlike the

[8] In addition to their RFRA claims, petitioners also raised several other challenges to the accommodation. The court of appeals rejected those challenges, Pet. App. 73a-93a, and petitioners have not renewed them here.

employers in *Hobby Lobby*, petitioners may "avoid both providing the contraceptive coverage and the penalties associated with non-compliance by opting out of the contraceptive coverage requirement altogether." *Id.* at 24a. The court explained that "[t]he accommodation here works in the way such mechanisms ordinarily do: the objector completes the written equivalent of raising a hand" to register its religious objection, and once it "expresses its desire to have no involvement in the practice to which it objects, the government ensures that a separation is effectuated and arranges for other entities to step in and fill the gap." *Id.* at 35a.

The court of appeals did not question the sincerity of petitioners' religious objections to the accommodation. Pet. App. 28a-29a. But the court emphasized that once an employer invokes the accommodation, "all action taken to pay for or provide its employees with contraceptive services is taken by a third party." *Id.* at 34a. The court therefore concluded that petitioners' objections either rested on legal errors about the way the accommodation operates or "amount[ed] to an objection to the regulations' requirement that third parties provide to [petitioners'] beneficiaries products and services that [petitioners] believe are sinful." *Id.* at 37a; see *id.* at 39a-48a. The court held that those objections to requirements imposed on third parties do not constitute a substantial burden under RFRA, explaining that petitioners "have no RFRA claim against the government's arrangements with others to provide coverage to women left partially uninsured as a result of [petitioners'] opt out." *Id.* at 38a.

b. In the alternative, the court of appeals held that the accommodation is the least restrictive means of furthering the government's "compelling interest in providing women full and equal benefits of preventive health coverage, including contraception." Pet. App. 66a; see *id.* at 49a-73a. After reviewing the "legislative and regulatory record," *id.* at 58a, the court concluded that the accommodation serves compelling interests because "appropriate and consistent use of contraceptives furthers women and children's health in a variety of ways," *id.* at 60a, and because health coverage that omitted contraceptives "would not give women access, equal to that enjoyed by men, to the full range of health care services recommended for their specific needs," *id.* at 64a.

The court of appeals further held that the accommodation is the least restrictive means of furthering the interests at stake. Pet. App. 66a-72a. The court explained that petitioners' proffered alternatives—such as offering "tax deductions or credits for the purchase of contraceptive services"—"would not serve the government's compelling interest with anywhere near the efficacy of the challenged accommodation" because they would impose "financial, logistical, informational, and administrative burdens" on women seeking contraceptive services. *Id.* at 68a-69a. The court concluded that those burdens would frustrate the basic aim of the Affordable Care Act's preventive-services requirement, which seeks to remove obstacles to the appropriate and effective use of preventive services. *Id.* at 69a. The court also explained that imposing those burdens on employees would run afoul of the principle that "RFRA does not permit religious exercise to 'unduly restrict other persons, such as

employees, in protecting their own interests, interests the law deems compelling.'" *Id.* at 70a (quoting *Hobby Lobby*, 134 S. Ct. at 2787 (Kennedy, J., concurring)).

6. The court of appeals denied rehearing en banc. Pet. App. 222a-278a. Judge Pillard, joined by Judges Rogers and Wilkins, concurred in the denial. *Id.* at 224a-230a. Judge Brown, joined by Judge Henderson, dissented. *Id.* at 231a-251a. Judge Kavanaugh filed a separate dissent. *Id.* at 252a-278a.

ARGUMENT

Petitioners contend that RFRA entitles objecting employers not only to opt out of providing contraceptive coverage themselves, but also to prevent the government from eliminating the resulting harm to their female employees and beneficiaries by arranging for third parties to provide those women with separate coverage. Six courts of appeals have considered that claim, and all six have rejected it. As those courts have explained, the accommodation is entirely consistent with RFRA and with this Court's decision in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), which was premised on the availability of the accommodation and which did not suggest that objecting employers may prevent their employees from receiving contraceptive coverage from third parties willing to provide it. The petitions should be denied.[9]

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[9] Several other pending petitions present the same question. See *Geneva College* v. *Burwell*, No. 15-191 (filed August 11, 2015); *Southern Nazarene Univ.* v. *Burwell*, No. 15-119 (filed July 24, 2015); *Little Sisters of the Poor Home for the Aged* v. *Burwell*, No. 15-105 (filed July 23, 2015); *East Texas Baptist Univ.* v. *Burwell*, No. 15-35 (filed July 8, 2015); *Zubik* v. *Burwell*, No. 14-1418 (filed May 29, 2015).

1. The accommodation exempts religious objectors from the generally applicable requirement to provide contraceptive coverage, while also seeking to ensure that the objectors' employees still receive the coverage to which they are legally entitled from third parties. In our pluralistic society, that sort of substitution of obligations is an appropriate means of accommodating religious objectors while also protecting the important interests of third parties, such as women's interest in full and equal health coverage. As the courts of appeals to consider the question have uniformly recognized, such an accommodation does not impose a substantial burden on the exercise of religion.

a. To opt out of the contraceptive-coverage requirement under the accommodation, an eligible employer need only take either of two actions: notify HHS that it objects to providing contraceptive coverage and identify its insurers and TPAs, or notify its insurers and TPAs directly using a form provided by the government. Taking either step relieves the employer of any obligation to provide, arrange, or pay for the coverage to which it objects. *Hobby Lobby*, 134 S. Ct. at 2763. The responsibility to provide separate coverage instead falls on insurers and TPAs.[10] The accommodation thus "effectively exempt[s]" objecting employers from the contraceptive-coverage requirement. *Ibid.*

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[10] If an employer invoking the accommodation has an ERISA-exempt church plan, its TPA is not legally required to provide contraceptive coverage, but the government will reimburse the TPA if it provides coverage voluntarily. 79 Fed. Reg. at 51,095 n.8; see pp. 6-7, *supra*.

Petitioners do not object to notifying their insurers and TPAs that they have religious objections to providing contraceptive coverage. They have done so in the past, see, *e.g.*, RCAW Pet. 8, and presumably would continue to do so even if they obtained the relief they seek here, in order to ensure that petitioners themselves did not provide contraceptive coverage. Petitioners also do not object to notifying the government of their objection and identifying their insurers and TPAs—in fact, they have done so in this litigation. Pet. C.A. Br. 11, 15-16. Petitioners' objection thus is "not to any action that the government has required [petitioners] themselves to take," but is instead to "the government's independent actions in mandating contraceptive coverage" by third parties. Pet. App. 37a (citation omitted). As the court of appeals explained, however, the government's arrangements with third parties cannot establish a substantial burden cognizable under RFRA. A sincere religious objection to "what the law requires of a third party is not, in itself, a substantial burden." *Id.* at 48a-49a.

Every other court of appeals to consider the issue has reached the same conclusion, likewise holding that the accommodation does not substantially burden the exercise of religion because "RFRA does not entitle [religious objectors] to block third parties from engaging in conduct with which they disagree." *East Texas Baptist Univ.* v. *Burwell*, No. 14-20112, 2015 WL 3852811, at *7 (5th Cir. June 22, 2015) (*ETBU*), petition for cert. pending, No. 15-35 (filed July 8, 2015); accord *Catholic Health Care Sys.* v. *Burwell*, No. 14-427, 2015 WL 4665049, at *14-*16 (2d Cir. Aug. 7, 2015); *Little Sisters of the Poor Home for the Aged* v. *Burwell*, No. 13-1540, 2015 WL 4232096, at *30 (10th

Cir. July 14, 2015) (*Little Sisters*), petitions for cert. pending, Nos. 15-105 and 15-119 (filed July 23 and 24, 2015); *Wheaton College* v. *Burwell*, No. 14-2396, 2015 WL 3988356, at *9 (7th Cir. July 1, 2015) (*Wheaton*); *University of Notre Dame* v. *Burwell*, 786 F.3d 606, 618-619 (7th Cir. 2015) (*Notre Dame*); *Geneva College* v. *Secretary HHS*, 778 F.3d 422, 439-440 (3d Cir. 2015), petitions for cert. pending, Nos. 14-1418 and 15-191 (filed May 29 and Aug. 11, 2015); see also *Michigan Catholic Conference & Catholic Family Servs.* v. *Burwell*, 755 F.3d 372, 389 (6th Cir. 2014) (*Michigan Catholic Conference*), vacated, 135 S. Ct. 1914 (2015).

b. Petitioners err in asserting (PFL Pet. 19-21; RCAW Pet. 15-18) that those decisions departed from this Court's guidance in *Hobby Lobby* by questioning the objecting employers' religious judgment that the accommodation is inconsistent with their beliefs. *Hobby Lobby* reiterated that it is not the function of the courts to "say that [a RFRA claimant's] religious beliefs are mistaken or insubstantial." 134 S. Ct. at 2779. But that is not what the courts of appeals have done. Like its sister circuits, the court of appeals here emphasized that it was neither questioning the sincerity of petitioners' beliefs nor second-guessing their religious judgment. Pet. App. 28a-29a; see also, *e.g.*, *Catholic Health Care Sys.*, 2015 WL 4665049, at *7, *14; *Little Sisters*, 2015 WL 4232096, at *19; *ETBU*, 2015 WL 3852811, at *4-*5, *7-*8. Instead, the court held that petitioners' sincere objections to the accommodation do not establish a substantial burden because, *as a legal matter*, "[r]eligious objectors do not suffer substantial burdens under RFRA where the only harm to them is that they sincerely feel aggrieved by their inability to prevent what other people

would do to fulfill regulatory objectives after they opt out." Pet. App. 27a.

That holding follows from decisions establishing that a religious adherent "may not use a religious objection to dictate the conduct of the government or of third parties." Pet. App. 28a. This Court has made clear, for example, that the free exercise of religion "simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen* v. *Roy*, 476 U.S. 693, 699 (1986); see *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-452 (1988). For the same reason, petitioners "have no right under RFRA to challenge the independent conduct of third parties." *ETBU*, 2015 WL 3852811, at *9. And although petitioners sincerely believe that invoking the accommodation would make them complicit in objectionable conduct by others, RFRA does not permit them to collapse the *legal* distinction between requirements that apply to them and actions taken by the government and by third parties. See *Roy*, 476 U.S. at 701 n.6 ("Roy's religious views may not accept this distinction between individual and governmental conduct. It is clear, however, that the Free Exercise Clause, and the Constitution generally, recognize such a distinction.") (citation omitted).

c. Petitioners' description of the two asserted burdens imposed by the accommodation confirms that their objections are based on the government's arrangements with third parties, not on any requirement imposed on petitioners themselves.

First, petitioners assert that the accommodation requires them to "maintain[] an objectionable insur-

ance relationship." RCAW Pet. 17-18; see PFL Pet. 20-21. But the accommodation does not require petitioners to enter into any new contracts or to modify their existing arrangements with their insurers and TPAs. Petitioners will continue to inform their insurers and TPAs that they do not wish to provide contraceptive coverage, and their contracts with those entities will continue to be "solely for services to which [they] do not object." *ETBU*, 2015 WL 3852811, at *7. The only difference is that the insurers and TPAs will separately provide contraceptive coverage for the affected women, as required by federal law. But petitioners' contracts with their insurers and TPAs "do not provide them an avenue to dictate these entities' independent interactions with the government, even if [petitioners] find these actions objectionable." *Catholic Health Care Sys.*, 2015 WL 4665049, at *14.

Second, petitioners state that the accommodation requires them to "submit[] objectionable documentation." RCAW Pet. 17-18; see PFL Pet. 20. But petitioners regard the information they must furnish as "objectionable" only because of what *the government* and *third parties* will do after that information is submitted. They would have no objection if they were required to provide exactly the same information when opting out, but the government thereafter took no action to fill the resulting gap. RFRA and the Free Exercise Clause have never been understood to allow religious adherents to establish a substantial burden based on the government's internal actions or its arrangements with third parties. See pp. 16-17, *supra*. And, as Judge Smith explained for a unanimous panel of the Fifth Circuit, "[a]ccepting such claims could subject a wide range of federal programs to strict

scrutiny." *ETBU*, 2015 WL 3852811, at *7; see *ibid.* (providing examples and concluding that "[t]he possibilities are endless, but we doubt Congress, in enacting RFRA, intended for them to be").

It would be particularly inappropriate to hold that the government's dealings with third parties create a substantial burden where, as here, the government is acting to fill a gap left because petitioners themselves have chosen to opt out of a requirement to which they object on religious grounds. In our pluralistic society, it has long been common to allow religious objectors to claim exemptions from generally applicable requirements while obligating others to fill their shoes. Pet. App. 35a; *Little Sisters*, 2015 WL 4232096, at *16; see *id.* at *24 & n.31 (collecting examples of "the diverse array of mechanisms that federal, state, and local governments have used to accommodate objectors"). Under petitioners' view, however, all such accommodations could be recast as substantial burdens on the exercise of religion and subjected to strict scrutiny. For example, "a religious conscientious objector to a military draft" could claim that being required to claim conscientious-objector status constitutes a substantial burden on his exercise of religion because it would "'trigger' the draft of a fellow selective service registrant in his place and thereby implicate the objector in facilitating war." Pet. App. 26a-27a (citation omitted).

That sweeping understanding of RFRA is inconsistent with our Nation's traditions and finds no support in this Court's precedents. "When the government establishes a scheme that anticipates religious concerns by allowing objectors to opt out but ensuring that others will take up their responsibilities, [the

objectors] are not substantially burdened merely because their decision to opt out cannot prevent the responsibility from being met." *Little Sisters*, 2015 WL 4232096, at *26.

d. Petitioners' RFRA claims do not depend on the details of the accommodation. As the petitions take pains to explain, petitioners object to any attempt by the government to respond to their opt-out by ensuring that the affected women receive separate contraceptive coverage, and to any system in which such coverage is provided by third parties with which they have contracts—no matter how the government identifies the third-party providers or structures its arrangements with them. See PFL Pet. 20-21; RCAW Pet. 1, 17-20. But petitioners mischaracterize the operation of the accommodation at issue here in numerous respects.

For example, petitioners assert that, by invoking the accommodation, an eligible organization "authorizes, obligates, and/or incentivizes its insurance company or TPA" to provide contraceptive coverage. RCAW Pet. 5; see PFL Pet. i, 9-10. In fact, as the court of appeals explained, the obligation to provide separate contraceptive coverage "originates from the [Affordable Care Act] and its attendant regulations, not from [petitioners'] self-certification or alternative notice" to HHS. Pet. App. 40a; see, *e.g.*, *Little Sisters*, 2015 WL 4232096, at *22 ("Federal law, not the Form or notification to HHS, provides for contraceptive coverage without cost sharing to plan participants and beneficiaries."). Petitioners need only register their objection and claim an opt-out; *the government* then imposes an "independent obligation on insurers and TPAs" to take their place. Pet. App. 42a.

The RCAW petitioners also assert (Pet. 20-22) that insurers and TPAs do not have an "independent" obligation to provide separate contraceptive coverage because the regulations assign that responsibility only after the employer itself opts out. But that is an "uncontested and unremarkable feature of the accommodation scheme" that does not distinguish it from other religious accommodations that likewise "shift responsibility to non-objecting entities only after an objector declines to perform a task on religious grounds." *Little Sisters*, 2015 WL 4232096, at *23-*24. The obligations imposed on insurers and TPAs are nonetheless "independent" because they are imposed by federal law, not by any act of the objecting employer.[11]

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[11] If the objecting employer maintains an insured plan, moreover, the accommodation does not even impose any new coverage obligation on the insurer. Insurers are already required to cover preventive services, including contraceptive services, without cost-sharing. 42 U.S.C. 300gg-13(a); see 45 C.F.R. 147.130(a)(1)(iv). When an insured employer invokes the accommodation, the result is simply to make the provision of contraceptive coverage "the issuer's *sole* responsibility" and to require that such coverage be strictly separated from the coverage provided under the plan purchased by the employer. *Little Sisters*, 2015 WL 4232096, at *22. In the self-insured context, the accommodation regulations designate an objecting employer's TPA as the entity legally responsible for complying with the contraceptive-coverage requirement only after the organization itself opts out. 29 C.F.R. 2510.3-16(b), 2590.715-2713A(b)(2); see *Little Sisters*, 2015 WL 4232096, at *24 n.32. But the obligation is still imposed by the government, not by the objecting employer. *Ibid.* Moreover, to the extent that petitioners object to particular features of the accommodation that apply only to self-insured organizations, they "could avoid the situation they deem objectionable by employing an insured plan." *Little Sisters*, 2015 WL 4232096, at *24 n.32.

2. The court of appeals also correctly held that even if petitioners could establish a substantial burden on their exercise of religion, the accommodation would survive scrutiny under RFRA because it is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1(b)(2).

a. The accommodation furthers "the government's compelling interest in providing women full and equal benefits of preventive health coverage," Pet. App. 66a, and in filling the gaps in the Affordable Care Act's comprehensive regulatory scheme created when religious objectors opt out. Although this Court was not required to decide the issue in *Hobby Lobby*, see 134 S. Ct. at 2780, five Justices recognized that the contraceptive-coverage requirement "serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee." *Id.* at 2785-2786 (Kennedy, J., concurring); accord *id.* at 2799-2800 & n.23 (Ginsburg, J., dissenting).

As Judge Kavanaugh explained, "[i]t is not difficult to comprehend why a majority of the Justices" reached that conclusion. Pet. App. 270a. Contraceptive coverage "enables women to avoid the health problems unintended pregnancies may visit on them and their children"—health problems that are particularly acute for women with medical conditions that render pregnancy "hazardous, even life threatening." *Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting). "About 50% of all pregnancies in the United States are unintended." Pet. App. 270a (Kavanaugh, J., dissenting from the denial of rehearing en banc). Reducing that number by making it easier for women

to obtain the most effective and appropriate forms of contraception for them would not only "further women's health," but also "advance women's personal and professional opportunities, reduce the number of abortions, and help break a cycle of poverty that persists when women who cannot afford or obtain contraception become pregnant unintentionally at a young age." *Id.* at 270a-271a; see *id.* at 52a-66a; *Notre Dame*, 786 F.3d at 608; *IOM Report* 102-109.

b. The accommodation is the least restrictive means of furthering the compelling interests at stake. The Departments engaged in an extensive rulemaking process that included multiple rounds of public comment and consultation with "representatives of religious organizations, insurers, women's groups, insurance experts, and other interested stakeholders." 77 Fed. Reg. at 16,503. They considered a wide variety of alternative approaches, but explained that those alternatives "were not feasible and/or would not advance the government's compelling interests as effectively" as the accommodation. 78 Fed. Reg. at 39,888.

Petitioners assert (PFL Pet. 23; RCAW Pet. 27-28) that the government could instead provide contraceptive coverage to their employees through other means, such as by offering tax credits subsidizing the purchase of contraceptives or allowing petitioners' employees to seek coverage through Medicaid. But petitioners do not state that those alternatives would resolve their religious objections to the accommodation, which would appear to apply to *any* system in which their employees gain an entitlement to contraceptive coverage from third parties after petitioners opt out. See RCAW Pet. 5-6, 21-22.

Unlike *Hobby Lobby*, moreover, this is not a case in which a proposed less-restrictive alternative is "an existing, recognized, workable, and already-implemented framework to provide coverage." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). This Court explained that accepting the RFRA challenge in *Hobby Lobby* "need not result in any detrimental effect on any third party" because the accommodation already in place for religious nonprofit organizations could be extended to closely held for-profit companies. *Id.* at 2781 n.37. The Court thus repeatedly emphasized that the effect of its decision on female employees and beneficiaries "would be precisely zero." *Id.* at 2760; see *id.* at 2759, 2782-2783. Here, in contrast, petitioners seek to invalidate the very regulatory accommodation that *Hobby Lobby* identified. And all of their proffered alternatives would require Congress to establish "a whole new program" of contraceptive coverage, *id.* at 2786 (Kennedy, J., concurring), or to significantly modify an existing program. Unless Congress took such action, women who rely on objecting employers for their health coverage would be denied contraceptive coverage altogether.

Even if ultimately enacted by Congress, however, petitioners' proffered alternatives would not "equally further[] the Government's interest," *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring), or "protect the asserted needs of women as effectively" as the accommodation, *id.* at 2782. At a minimum, those alternatives would require women to "take steps to learn about, and to sign up for, a new government funded and administered health benefit." *Id.* at 2783 (citation omitted). They would also require women to

"identify different providers or reimbursement sources" or to "pay out of pocket and wait for reimbursement." Pet. App. 69a; accord *Notre Dame*, 786 F.3d at 616-617.

The RCAW petitioners dismiss (Pet. 28) those burdens as "'minor' inconvenience[s]." But what petitioners trivialize as mere "inconvenience" has proven in practice to be a substantial barrier to full, equal health coverage for women. The point of requiring coverage of preventive services without cost-sharing is that even small burdens impair access to those services. The Departments explained that "[r]esearch * * * shows that cost sharing can be a significant barrier to effective contraception," 77 Fed. Reg. at 8728, and that "[i]mposing additional barriers to women receiving the intended coverage * * * by requiring them to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women," 78 Fed. Reg. at 39,888; see *id.* at 39,873; *IOM Report* 18-20, 109. Those barriers would also prevent women from enjoying *equal* access to health coverage that is appropriate to their specific needs. Accordingly, as the court of appeals explained, "[p]roviding contraceptive services seamlessly together with other health services, without cost sharing or additional administrative or logistical burdens and within a system familiar to women, is necessary to serve the government's interest." Pet. App. 68a.

The accommodation serves that interest while minimizing the burden on objecting organizations. In contending that even more is required, and that RFRA grants them a right to prevent their employees from obtaining separate coverage from third parties,

petitioners disregard this Court's admonition that courts applying RFRA "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Hobby Lobby*, 134 S. Ct. at 2781 n.37 (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005)). The free exercise of religion protected by RFRA cannot "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Id.* at 2787 (Kennedy, J., concurring).

3. Although this Court cautioned that its interim orders in *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014), and *Zubik* v. *Burwell*, 135 S. Ct. 2924 (2015), should not be construed as an expression of its views on the merits, those orders further confirm that the accommodation is consistent with RFRA.

In both *Wheaton* and *Zubik*, the Court granted interim injunctive relief to organizations challenging the accommodation. But nothing in the Court's orders suggested that RFRA grants objecting employers a right to prevent employees from receiving contraceptive coverage from third parties. To the contrary, the Court expressly stated that its orders did not "preclude[] the Government from relying on [the notice provided by the organizations], to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act." *Wheaton*, 134 S. Ct. at 2807; *Zubik*, 135 S. Ct. at 2924. The Court therefore emphasized that its orders would not "affect[] the ability of [the organizations' employees] to obtain, without cost, the full range of FDA approved contraceptives." *Ibid.*

In light of the *Wheaton* order, moreover, the Departments augmented the accommodation to provide

all eligible employers with an option essentially equivalent to the one this Court's interim orders provided to the challengers in *Wheaton* and *Zubik*. Like those organizations, any eligible employer (including a closely held for-profit company) may now opt out of the contraceptive-coverage requirement by informing HHS that it objects to providing contraceptive coverage and is eligible for the accommodation. 29 C.F.R. 2590.715-2713A(b)(1)(ii) and (c)(1); 45 C.F.R. 147.131(c)(1)(ii). And as in *Wheaton* and *Zubik*, the employer need not use a particular form to notify the government of its objection, and it need not send a form to its insurers and TPAs. *Ibid.*

In dissenting from the denial of rehearing en banc, Judge Kavanaugh suggested that the augmented accommodation is not the least restrictive means of serving the government's compelling interests because it requires an objecting employer to identify its insurers and TPAs—information that this Court did not require in *Wheaton* and *Zubik*, or in a similar interim order issued prior to *Hobby Lobby* in *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, 134 S. Ct. 1022 (2014). Pet. App. 272a-277a. Judge Kavanaugh inferred from this Court's interim orders in *Wheaton* and *Zubik* that "the Government can independently determine the identity of the [objecting] organizations' insurers and thereby ensure that the insurers provide contraceptive coverage to the organizations' employees." *Id.* at 273a-274a. He therefore would have required the government to allow objecting employers to invoke the accommodation without identifying their insurers and TPAs. *Id.* at 277a.

Petitioners do not adopt Judge Kavanaugh's position, presumably because it would not address their

religious objections to a system in which, after petitioners themselves opt out, their employees receive contraceptive coverage from third parties with which petitioners have contracts. In any event, Judge Kavanaugh's dissent rested on a mistaken premise. He appeared to assume that the *Wheaton* and *Zubik* orders did not require the challengers in those cases to identify their insurers and TPAs because the government is able to determine that information "independently." Pet. App. 273a. But as this Court was aware, the government knew the identities of the insurers and TPAs in *Wheaton* and *Zubik* because the challengers themselves had already provided that information in the course of the litigation. *Wheaton*, 134 S. Ct. at 2815 (Sotomayor, J., dissenting); Mem. for Resp. in Opp. at 31 & n.17, *Zubik*, *supra* (No. 14A1065). The government does not have records of employers' insurers and TPAs as a general matter, and neither the Departments nor public commenters have identified "any alternative means the Departments c[ould] use to obtain the required information" if it were not provided by objecting employers. 80 Fed. Reg. at 41,323.

The information required by the alternative notice procedure thus "represents the minimum information necessary" for the Departments to administer the accommodation. 80 Fed. Reg. at 41,323. That information is neither religious in nature nor confidential. RFRA does not confer a right on a religious employer to withhold that limited factual information from the Departments responsible for implementing the Affordable Care Act. Furnishing such information is, rather, the kind of routine administrative task that may be required of a religious objector "in the admin-

istration of governmental programs." *Little Sisters*, 2015 WL 4232096, at *30.

4. The decision below does not conflict with any decision of another court of appeals. Six circuits have considered parallel challenges to the accommodation, and all six have held that the accommodation is consistent with RFRA and with this Court's decision in *Hobby Lobby*. See pp. 15-16, *supra*.

Petitioners incorrectly state (PFL Pet. 11-17; RCAW Pet. 29-36) that the decision below conflicts with decisions of the Seventh, Tenth, and Eleventh Circuits. The Seventh and Tenth Circuit decisions on which petitioners rely are inapposite because they involved RFRA challenges brought by for-profit corporations that (at the time) were *not* eligible for the accommodation. *Korte* v. *Sebelius*, 735 F.3d 654, 662 (7th Cir. 2013), cert. denied, 134 S. Ct. 2903 (2014); *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1123-1124 (10th Cir. 2013) (en banc). Those same circuits have now upheld the accommodation against RFRA challenges, distinguishing the decisions on which petitioners rely and endorsing the reasoning of the decision below. See *Little Sisters*, 2015 WL 4232096, at *19; *Notre Dame*, 786 F.3d at 615-616; see also *Wheaton*, 2015 WL 3988356, at *9.[12]

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[12] The RCAW petitioners assert that the Seventh Circuit's decision in *Notre Dame* is "not binding" because it arose from the denial of a preliminary injunction. Pet. 31 n.4 (citation omitted). But even if that were correct, the fact that the Seventh Circuit has twice distinguished *Korte* and rejected RFRA challenges to the accommodation refutes petitioners' assertion that *Korte* reflects the existence of a circuit conflict on any issue presented here. In addition, the RCAW petitioners' assertion that preliminary-injunction appeals cannot establish circuit precedent does not advance their claim of a circuit conflict because *Korte* also involved

Petitioners also cite *Eternal World Television Network* v. *Secretary, HHS*, 756 F.3d 1339, 1340 (11th Cir. 2014) (per curiam), which granted an injunction pending appeal to a party challenging the accommodation. But the Eleventh Circuit's three-sentence order stated that it "express[ed] no views on the ultimate merits" of the case. *Ibid.* That order neither establishes circuit precedent nor predicts the Eleventh Circuit's ultimate resolution of the question presented. Indeed, the Sixth, Tenth, and D.C. Circuits had granted similar interim relief before ultimately rejecting RFRA challenges to the accommodation. Pet. App. 19a; *Michigan Catholic Conference*, 755 F.3d at 398; *Diocese of Cheyenne* v. *Burwell*, 14-8040 Docket entry (10th Cir. June 30, 2014).

5. The RCAW petitioners contend (Pet. 36-37) that their petition would be an appropriate vehicle in which to consider the question presented. As demonstrated above, that question does not warrant this Court's review. Nevertheless, the government agrees that the petition filed by the RCAW petitioners lacks vehicle problems present in other pending petitions raising the same question. The RCAW petition presents all of the health coverage arrangements that have given rise to RFRA challenges to the accommodation: insured plans, self-insured plans subject to ERISA, and ERISA-exempt self-insured church plans. Pet. App. 14a-15a. The accommodation operates somewhat differently with respect to those different plan types, and some judges have concluded that the differences are material to the RFRA analysis. See, *e.g.*, *Little Sisters*, 2015 WL 4232096, at *41 (Baldock, J., dissent-

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appeals "from orders denying preliminary injunctive relief." 735 F.3d at 665.

ing in part); Pet. App. 128a-157a. In addition, the decision below "discusses all issues in the case: substantial burden, compelling interest, and least-restrictive means." RCAW Pet. 37. That would make this case a more suitable vehicle than one in which some of the potentially dispositive issues were not addressed below.

Vehicle issues are relevant, however, only if the question presented warrants review. It does not. The court of appeals correctly rejected petitioners' RFRA challenge to the accommodation, which exempts petitioners from any obligation to contract, arrange, pay, or refer for contraceptive coverage for employees or their beneficiaries. All five other courts of appeals that have decided the issue agree. Further review is therefore unwarranted.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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