Nos. 14-1418 and 15-191

In the Supreme Court of the United States

MOST REVEREND DAVID A. ZUBIK, ET AL., PETITIONERS

v.

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

GENEVA COLLEGE, PETITIONER

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 THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
ADAM C. JED
PATRICK G. NEMEROFF
MEGAN BARBERO
JOSHUA M. SALZMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statement 2
Argument 13
Conclusion 35

TABLE OF AUTHORITIES

Cases:

Bowen v. *Roy*, 476 U.S. 693 (1986) 17
Burwell v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) ..... *passim*
Catholic Health Care Sys. v. *Burwell*, No. 14-427, 2015 WL 4665049 (2d Cir. Aug. 7, 2015) 15, 16, 18
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 28, 34
East Texas Baptist Univ. v. *Burwell*, No. 14-20112, 2015 WL 3852811 (5th Cir. June 22, 2015), petition for cert. pending, No. 15-35 (filed July 8, 2015) 15, 16, 17, 18, 20, 22
Eternal World Television Network v. *Secretary, HHS*, 756 F.3d 1339 (11th Cir. 2014) 32
Hobby Lobby Stores, Inc. v. *Sebelius*, 723 F.3d 1114 (10th Cir. 2013) 31
King v. *Burwell*, 135 S. Ct. 2480 (2015) 2
Korte v. *Sebelius*, 735 F.3d 654 (7th Cir. 2013), cert. denied, 134 S. Ct. 2903 (2014) 31, 32
Little Sisters of the Poor Home for the Aged v. *Burwell*, No. 13-1540, 2015 WL 4232096, (10th Cir. July 14, 2015), petitions for cert. pending, Nos. 15-105 and 15-119 (filed July 23 and 24, 2015) ..... *passim*
Little Sisters of the Poor Home for the Aged v. *Sebelius*, 134 S. Ct. 1022 (2014) 29

Cases—Continued: Page

Lyng v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).....17
Michigan Catholic Conference & Catholic Family Servs. v. *Burwell*, 755 F.3d 372 (6th Cir. 2014), vacated, 135 S. Ct. 1914 (2015).....16, 32
Priests for Life v. *HHS*, 772 F.3d 229 (D.C. Cir. 2014), petitions for cert. pending, Nos. 14-1453 and 14-1505 (filed June 9 and 19, 2015).....*passim*
Priests for Life v. *HHS*, No. 13-5368, 2015 U.S. App. LEXIS 8326 (D.C. Cir. May 20, 2015).....24, 25, 29, 30
University of Notre Dame v. *Burwell*, 786 F.3d 606 (7th Cir. 2015).....16, 24, 25, 27, 32, 33
Roman Catholic Archbishop of Wash. v. *Sebelius*, 19 F. Supp. 3d 48 (D.D.C. 2013).....33
Wheaton College v. *Burwell*, 134 S. Ct. 2806 (2014).....8, 9, 28, 29, 30
Wheaton College v. *Burwell*, 791 F.3d 792 (7th Cir. 2015).....15, 32

Constitution, statutes and regulations:

U.S. Const. Amend. I (Free Exercise Clause).....20
Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*.....7
29 U.S.C. 1002(33).....7
29 U.S.C. 1002(33)(A).....10
29 U.S.C. 1002(33)(C)(ii)(II).....10
29 U.S.C. 1002(33)(C)(iii).....10
29 U.S.C. 1003(b)(2).....7
Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.....2
Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119.....2

Statutes and regulations—Continued: Page

Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.* 8
42 U.S.C. 2000bb-1 11
26 U.S.C. 6033(a)(3)(A) 6
26 U.S.C. 6033(a)(3)(A)(i) 12
26 U.S.C. 6033(a)(3)(A)(iii) 12
42 U.S.C. 300gg-11 to 300gg-19a 3
42 U.S.C. 300gg-13 3
42 U.S.C. 300gg-13(a) 22
42 U.S.C. 300gg-13(a)(4) 3
42 U.S.C. 18011 5
26 C.F.R. 54.9815-2713(a)(1)(iv) 5
29 C.F.R.:
Section 2510.3-16(b) 7, 23
Section 2590.715-2713(a)(1)(iv) 4
Section 2590.715-2713A(b)(1)(ii) 29
Section 2590.715-2713A(b)(1)(ii)(A) 8
Section 2590.715-2713A(b)(1)(ii)(B) 9
Section 2590.715-2713A(b)(2) 7, 23
Section 2590.715-2713A(c)(1) 9, 29
Section 2590.715-2713A(d) 8
45 C.F.R.:
Section 147.130(a)(1)(iv) 4, 22
Section 147.131(a) 6
Section 147.131(b) 5
Section 147.131(b)(2)(ii) 5
Section 147.131(c) 6
Section 147.131(c)(1)(i) 8
Section 147.131(c)(1)(ii) 9, 29
Section 147.131(c)(2)(i) 23

Regulations—Continued: Page

Section 147.131(d) 8
Section 147.131(f) 6

Miscellaneous:

77 Fed. Reg.:
(Feb. 15, 2012):
p. 8725 4
p. 8728 27
(Mar. 21, 2012):
p. 16,503 ....5, 25
78 Fed. Reg. (July 2, 2013):
p. 39,872 3
p. 39,873 27
p. 39,874 7
pp. 39,875-39,880 6
pp. 39,879-39,880 6
p. 39,888 ....25, 27
p. 39,893 7
79 Fed. Reg. (Aug. 27, 2014):
p. 51,092 9
pp. 51,094-51,095 9
p. 51,095 ....7, 14
80 Fed. Reg. (July 14, 2015):
p. 41,323 ....7, 31
pp. 41,324-41,330 5
p. 41,328 19
p. 41,436 5
Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* (2011) 4, 25, 27

Miscellaneous—Continued: Page

Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits 2014 Annual Survey* (2014), http://files.kff.org/attachment/2014-employer-health-benefits-survey-full-report.....3, 5

U.S. Dep't of Health & Human Servs., *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. 19, 2015) 8

In the Supreme Court of the United States

No. 14-1418

MOST REVEREND DAVID A. ZUBIK, ET AL., PETITIONERS

v.

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

No. 15-191

GENEVA COLLEGE, PETITIONER

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 THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a)[1] is reported at 778 F.3d 422. The opinion of the district court granting a preliminary injunction in No. 14-1418 (Pet. App. 50a-130a) is reported at 983 F. Supp. 2d 576. The order of that court converting the preliminary injunction to a permanent injunction (Pet.

[1] Unless otherwise noted, citations to "Pet. App." refer to the appendix to the petition for a writ of certiorari in No. 14-1418.

App. 131a-134a) is not published in the *Federal Supplement* but is available at 2013 WL 6922024. An opinion of the district court granting a preliminary injunction in No. 15-191 (No. 15-191 Pet. App. 50a-79a) is reported at 960 F. Supp. 2d 588. An opinion of that court granting a second preliminary injunction (No. 15-191 Pet. App. 83a-121a) is reported at 988 F. Supp. 2d 511.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 2015. Petitions for rehearing were denied on April 6, 2015, and April 13, 2015 (Pet. App. 135a-137a; 15-191 Pet. App. 125a-127a). The petition for a writ of certiorari in No. 14-1418 was filed on May 29, 2015. On June 30, 2015, Justice Alito extended the time within which to file a petition for a writ of certiorari in No. 15-191 to and including August 11, 2015, and the petition was filed on that date. 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

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

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 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. 78 Fed. Reg. 39,872 (July 2, 2013); see *Priests for Life* v. *HHS*, 772 F.3d 229, 259-260 (D.C. Cir. 2014) (*PFL*), petitions for cert. pending, Nos. 14-1453 and 14-1505 (filed June 9 and 19, 2015).

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." *PFL*, 772 F.3d at 235; see *Hobby Lobby*, 134 S. Ct. at 2785-2786 (Kennedy, J., concurring).

---

[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*).

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 associations"—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). 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]

---

[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," *PFL*, 772 F.3d at 266 n.25, having dropped from 56% in 2011 to 26% in 2014. *Health Benefits Survey* 7, 210.

[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.

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." *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-

---

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)).

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

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 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 employ-

er'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 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

---

[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. 19, 2015).

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 in *Wheaton*, 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 to covering some or all contraceptive services.

a. The petitioners in No. 14-1418 are two Catholic Dioceses, two Catholic Bishops in their capacity as heads of the Dioceses, and several nonprofit organizations controlled by the Dioceses (collectively, the Zubik petitioners). Pet. App. 24a. The Zubik petitioners provide health coverage for their employees through self-insured plans sponsored by the Dioceses. *Ibid.* The Zubik petitioners have not indicated whether those plans are subject to ERISA, but it appears likely that they are ERISA-exempt church plans.[8] The Dioceses themselves are exempt from the contraceptive-coverage requirement. *Id.* at 24a-25a; see note 5, *supra*. The remaining Zubik petitioners are eligible to opt out under the accommodation. Pet. App. 14a.

b. The petitioner in No. 15-191 is Geneva College (Geneva), a religious college that contracts with insurance issuers to provide health coverage for its employees and students. Pet. App. 20a. Geneva is eligible to opt out of the contraceptive-coverage requirement under the accommodation. *Id.* at 14a.

4. Petitioners filed three 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

---

[8] A church plan is defined as "a plan established and maintained * * * for its employees (or their beneficiaries) by a church or by a convention or association of churches." 29 U.S.C. 1002(33)(A). For purposes of that definition, the employees of tax-exempt organizations "controlled by or associated with" a church are deemed to be employees of the church and are eligible to be covered under the church's ERISA-exempt plan. 29 U.S.C. 1002(33)(C)(ii)(II); see 29 U.S.C. 1002(33)(C)(iii).

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 granted preliminary and then permanent injunctions in the two suits brought by the Zubik petitioners. Pet. App. 50a-134a. A different district judge granted preliminary injunctive relief to Geneva. 15-191 Pet. App. 50a-124a.

5. The court of appeals consolidated the three cases and reversed, holding that the accommodation does not substantially burden the exercise of religion. Pet. App. 1a-47a. The court began by observing that the issue in this case is very different from the one presented in *Hobby Lobby*, which held that the contraceptive-coverage requirement violated RFRA as applied to closely held for-profit corporations that (at the time) were *not* eligible for the accommodation. *Id.* at 31a-33a. The court explained that, unlike the employers in *Hobby Lobby*, petitioners can invoke the accommodation and thereby "avoid both providing contraceptive coverage to their employees and facing penalties for noncompliance." *Id.* at 33a.

The court of appeals did not question the sincerity or reasonableness of petitioners' religious objections to the accommodation. Pet. App. 29a-30a. But the court emphasized that once an objecting employer invokes the accommodation, it plays "no role whatsoever in the provision of the objected-to contraceptive services." *Id.* at 34a. Instead, the coverage is provided by third parties—insurers and TPAs. *Id.* at 36a-37a. The court therefore concluded that petitioners'

challenge to the accommodation amounts to an objection "to the actions of the insurance issuers and [TPAs], required by law, once [petitioners] give notice of their objection." *Id.* at 37a. The court held that such objections to requirements imposed on others do not give rise to a substantial burden on petitioners cognizable under RFRA. It explained that RFRA does not grant religious objectors "the right to enlist the government to effectuate * * * a religious veto against legally required conduct of third parties." *Ibid.* (quoting *PFL*, 772 F.3d at 251).

Finally, the court of appeals rejected the Zubik petitioners' contention that they suffer a substantial burden because the Dioceses are automatically exempt from the contraceptive-coverage requirement whereas the affiliated nonprofit organizations are eligible to opt out under the accommodation. Pet. App. 45a-47a. The court explained that the automatic exemption for houses of worship incorporates a definition from "longstanding Internal Revenue Code provisions." *Id.* at 46a (citing 26 U.S.C. 6033(a)(3)(A)(i) and (iii)); see *Hobby Lobby*, 134 S. Ct. at 2763. The court concluded that the Zubik petitioners had failed to demonstrate that the availability of that automatic exemption imposed any burden on their religious exercise. Pet. App. 46a-47a.

6. The court of appeals denied petitions for rehearing en banc. Pet. App. 135a-137a; 15-191 Pet. App. 125a-127a. It also denied the Zubik petitioners' motion to stay the mandate pending the filing and disposition of a petition for a writ of certiorari. Pet. App. 138a-139a. This Court denied the Zubik petitioners' application for a stay of the mandate, but granted an

interim injunction similar to the one it had granted in *Wheaton*. 135 S. Ct. 2924.

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]

1. The accommodation exempts religious objectors from the generally applicable requirement to provide contraceptive coverage, while also seeking to ensure that third parties provide the affected women with the coverage to which they are legally entitled. In our pluralistic society, that sort of substitution of obligations is an appropriate means of accommodating religious objectors while also protecting important inter-

[9] Several other pending petitions present the same question. See *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); *Roman Catholic Archbishop of Wash.* v. *Burwell*, No. 14-1505 (filed June 19, 2015); *Priests for Life* v. *HHS*, No. 14-1453 (filed June 9, 2015).

ests 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 government instead places the responsibility to provide separate coverage on insurers and TPAs—or, if the employer has an ERISA-exempt church plan, the government offers to compensate TPAs for providing separate coverage voluntarily. 79 Fed. Reg. at 51,095 n.8; see p. 7, *supra*. The accommodation thus "effectively exempt[s]" objecting employers from the contraceptive-coverage requirement. *Hobby Lobby*, 134 S. Ct. at 2763.

Petitioners do not object to notifying their insurers and TPAs that they have religious objections to providing contraceptive coverage—indeed, they "conceded at oral argument" in the court of appeals "that the mere act of completing [the self-certification form] does not impose a burden on their religious exercise." Pet. App. 28a. 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.[10] Instead, petitioners object "to what happens after [that notification] is provided—that is, to the actions of the insurance issuers and [TPAs], required by law, once [petitioners] give notice of their objection." *Id.* at 37a. As the court of appeals explained, however, the government's arrangements with third parties cannot establish a substantial burden on petitioners cognizable under RFRA: "The fact that the regulations require the insurance issuers and [TPAs] to modify their behavior does not demonstrate a substantial burden on [petitioners]." *Ibid.* (citation omitted).

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*, 791 F.3d 792, 799-

[10] The Zubik petitioners have identified the TPAs for their self-insured plans. 13-cv-303 Docket entry No. 9-10, at 2 (Oct. 8, 2013); 13-cv-1459 Docket entry No. 4-11, at 2 (Oct. 8, 2013). Geneva has identified the insurer for its student plan, Geneva C.A. Br. 5-6, but the record does not include the identity of the insurer for its employee plan.

801 (7th Cir. 2015) (*Wheaton*); *University of Notre Dame* v. *Burwell*, 786 F.3d 606, 618-619 (7th Cir. 2015) (*Notre Dame*); *Priests for Life* v. *HHS*, 772 F.3d 229, 259-260 (D.C. Cir. 2014), petitions for cert. pending, Nos. 14-1453 and 14-1505 (filed June 9 and 19, 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 (Zubik Pet. 20-23; Geneva Pet. 30-36) 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. The decision below recognized that *Hobby Lobby* "reinforced" the rule that courts "should defer to the reasonableness of [RFRA claimants'] religious beliefs." Pet. App. 30a. Like its sister circuits, the court of appeals therefore emphasized that it was not "testing [petitioners'] religious beliefs" about the accommodation. *Id.* at 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; *PFL*, 772 F.3d at 247.[11] In-

[11] Petitioners maintain (Zubik Pet. 21-22; Geneva Pet. 33-35) that the court of appeals improperly second-guessed their religious judgment by stating that the accommodation does not make objecting employers "complicit" in the provision of contraceptive coverage. Pet. App. 36a (citation omitted). But the court's statement was not a conclusion about the *religious* implications of the

stead, the court held that petitioners' sincere objections to the accommodation do not establish a substantial burden because, *as a legal matter*, RFRA "draws a distinction between what the law may impose on a person over religious objections, and what [the law] permits or requires a third party to do." Pet. App. 41a.

That conclusion 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." *PFL*, 772 F.3d at 246; see Pet. App. 37a. 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 the government's arrangements with third parties. See *Roy*, 476 U.S. at

---

accommodation—a judgment that the court emphasized it had no authority to make. *Id.* at 29a-30a. Instead, the court made that statement in the course of explaining that petitioners had mischaracterized "how the [accommodation] actually works." *Id.* at 30a; see *id.* at 33a-36a. Petitioners do not contend that RFRA requires courts to defer to a religious objector's legal errors about the operation of the challenged regulation.

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 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 imposes a substantial burden because the government will arrange for their insurers and TPAs to provide contraceptive coverage. The Zubik petitioners describe this feature of the accommodation as a requirement that they "maintain[] an objectionable contractual relationship." Pet. 1; see *id.* at 24. 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, consistent with 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.

The same principle refutes Geneva's repeated assertions that the accommodation imposes a substantial burden because it seeks to ensure that the affected women receive "seamless coverage" of contraceptive services. 80 Fed. Reg. at 41,328; see Geneva Pet. i, 1-2, 13-14, 20-21, 24-25, 33. As the Departments explained, coverage under the accommodation is "seamless" because separate payments for contraceptive services are provided by the same insurers and TPAs that are "already paying for other medical and pharmacy services on behalf of the women seeking the contraceptive services." 80 Fed. Reg. at 41,328. But the "seamless" nature of the coverage does not reflect any involvement by the objecting employers—to the contrary, as this Court explained, the accommodation goes to great lengths to ensure that employers play no role in those separate payments. *Hobby Lobby*, 134 S. Ct. at 2763 & n.8.

Second, petitioners assert that the accommodation imposes a substantial burden because the government will respond to their opt-out by arranging for third parties to provide contraceptive coverage to their employees. Zubik Pet. 1, 9-10, 24; Geneva Pet. 2, 24. The Zubik petitioners attempt (Pet. 24) to characterize this as an objection to "acts that they *themselves* are compelled to take" by stating that they object to "signing and submitting the required self-certification or notification" to HHS. But petitioners object to notifying HHS (or their insurers and TPAs) only because of what *the government* and *third parties* will do after that notification is provided. They would have no objection if they were required to provide exactly the same notification in order to opt out of the contraceptive-coverage requirement, but the govern-

ment thereafter took no action to fill the resulting gap. Pet. App. 28a. But 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. 17-18, *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 is not unusual to allow religious objectors to claim exemptions from generally applicable requirements while obligating others to fill their shoes. *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." *PFL*, 772 F.3d at 246 (citation omitted); see Pet. App. 37a n.14 (providing a similar example of a religious adherent who objects to requesting time off on the Sabbath because his employer will require someone else to work in his place).

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 that 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 Zubik Pet. 1, 9-10, 24; Geneva Pet. 2, 24. But petitioners also mischaracterize the operation of the accommodation at issue here in numerous respects.

First, the Zubik petitioners assert (Pet. 7) that, by invoking the accommodation, an eligible organization "authorizes, obligates, and/or incentivizes its insurance company or TPA" to provide contraceptive coverage. In fact, as the courts of appeals have ex-

plained, "[*f*]*ederal law*, rather than any involvement by [petitioners] in filling out or submitting the self-certification form, creates the obligation of the insurance issuers and [TPAs] to provide coverage for contraceptive services." Pet. App. 33a; accord, *e.g.*, *ETBU*, 2015 WL 3852811, at *5-*6; *Little Sisters*, 2015 WL 4232096, at *22. Petitioners need only register their objection and claim an opt-out; *the government* then requires insurers and TPAs to take their place.

Second, the Zubik petitioners assert (Pet. 25-27) that insurers and TPAs do not have an "independent" obligation to provide separate contraceptive coverage because the regulations assign that responsibility—or, in the case of a self-insured church plan, offer reimbursement—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.[12]

---

[12] If the objecting employer has an insured plan, moreover, the accommodation does not even impose any new coverage obligation. 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 context of self-

Third, Geneva asserts (Pet. 21) that if it invoked the accommodation, the contraceptive coverage to which it objects would be provided "*by means of* Geneva's own health plan." But the accommodation allows objecting employers to "extricate themselves fully from the burden of providing contraceptive coverage to employees, pay nothing toward such coverage, and have the [third-party] providers tell the employees that their employers play no role and in no way should be seen to endorse the coverage." *PFL*, 772 F.3d at 250. And when the objecting employer has an insured plan, as Geneva does, the regulations provide that the insurer must "[*e*]*xpressly exclude* contraceptive coverage from the group health insurance coverage provided in connection with the group health plan" and instead "[p]rovide *separate* payments" for contraceptive services. 45 C.F.R. 147.131(c)(2)(i) (emphases added); see *Hobby Lobby*, 134 S. Ct. at 2763.

2. Even if petitioners could establish a substantial burden on their exercise of religion, the accommodation would satisfy RFRA scrutiny because, as the D.C. Circuit held, "the regulatory opt-out mechanism is the least restrictive means to serve compelling govern-

---

insured plans subject to ERISA, 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 the Zubik 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.

mental interests." *PFL*, 772 F.3d at 237; see *id.* 256-267; *Notre Dame*, 786 F.3d at 616-618.

a. The accommodation furthers "the government's compelling interest in providing women full and equal benefits of preventive health coverage," *PFL*, 772 F.3d at 264, 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 has explained, "[i]t is not difficult to comprehend why a majority of the Justices" reached that conclusion. *Priests for Life* v. *HHS*, No. 13-5368, 2015 U.S. App. LEXIS 8326, at *65-*66 (D.C. Cir. May 20, 2015) (*PFL II*) (Kavanaugh, J., dissenting from the denial of rehearing en banc). Contraceptive coverage "enables women to avoid the health problems unintended pregnancies may visit on them and their children"—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." *PFL II*, 2015 U.S. App. LEXIS 8326, at *66 (Kavanaugh, J., dissenting from the denial of rehearing en banc). Reducing that number by making it easier for women to obtain the most effec-

tive 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." *Ibid.*; see *PFL*, 772 F.3d at 257-264; *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 concluded 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 have asserted 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 the affected women to seek coverage through another government program. Geneva Pet. 36 n.6; Zubik C.A. Br. 49-50. But petitioners have not stated 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 cover-

age from third parties after petitioners opt out. See Zubik Pet. 1, 9-10, 24; Geneva Pet. 24-25.[13]

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 the alternatives that have been suggested 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

---

[13] The Zubik petitioners' response to the augmented accommodation procedure is illustrative. In the court of appeals, they proposed as a less-restrictive alternative that the government could arrange for contraceptive coverage for their employees by "work-[ing] directly with the TPAs." Zubik C.A. Br. 49; see *id.* at 50. The government has now done just that: Once an objecting employer opts out by notifying HHS of its objection under the augmented accommodation procedure, the government "work[s] directly with the TPAs" to provide coverage. Yet the Zubik petitioners state (Pet. 9) that notwithstanding their earlier suggestion, their objection applies equally to the augmented accommodation procedure—indeed, they label the change "immaterial."

such action, women who rely on objecting employers for their health coverage would be denied contraceptive coverage altogether.

In addition, even if petitioners' proposed alternatives to the accommodation were ultimately enacted by Congress, those 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 (majority opinion). At a minimum, the 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." *PFL*, 772 F.3d at 265; accord *Notre Dame*, 786 F.3d at 616-617.

Those burdens would constitute a substantial barrier to full and 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 deny women *equal* access to health coverage that is appropriate to their specific needs. Accordingly, as the D.C. Circuit ex-

plained, "[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." *PFL*, 772 F.3d at 265.

The accommodation serves that interest while minimizing the burden on objecting employers. In contending that even more is required, and that RFRA grants them a right to prevent the affected women 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 orders granting interim relief to the Zubik petitioners and to Wheaton College should not be construed as an expression of its views on the merits, those orders further confirm that the accommodation is consistent with RFRA. 135 S. Ct. 2924; *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014). Nothing in this Court's interim 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 information provided by the [employers], to the extent

it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act." 135 S. Ct. at 2924; see *Wheaton*, 134 S. Ct. at 2807. The Court therefore emphasized that its orders would not "affect[] the ability of * * * 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 to the Zubik petitioners in this case. 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 under this Court's interim orders, 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 in *PFL*, 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 from the Zubik petitioners and Wheaton, 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). See *PFL II*, 2015 U.S. App. LEXIS 8326, at *67-*75. Judge

Kavanaugh inferred from this Court's interim orders that "the Government can independently determine the identity of the [objecting] organizations' insurers [and TPAs]." *Id.* at *70. Therefore, although he emphasized that "[t]he Government may of course continue to require the religious organizations' *insurers* [*and TPAs*] to provide contraceptive coverage to the religious organizations' employees," he would have required the government to allow objecting employers to invoke the accommodation without identifying those third parties. *Id.* at *75-*76.

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 interim orders in *Wheaton* and *Zubik* did not require the challengers to identify their insurers and TPAs because the government is able to determine that information "independently." *PFL II*, 2015 U.S. App. LEXIS 8326, at *70. But as this Court was aware, the government knew the identities of the insurers and TPAs used by Wheaton and the Zubik petitioners 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. 31 & n.17. 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 re-

quired 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 administration 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*.

Geneva acknowledges (Pet. 22, 36) that there is no disagreement among the courts of appeals on the question presented. But the Zubik petitioners erroneously assert (Pet. 27-32) that the decision below conflicts with decisions of the Seventh, Tenth, and Eleventh Circuits. The Seventh and Tenth Circuit decisions on which they rely are inapposite because they involved RFRA claims 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 as presenting very different questions. See *Little Sisters*, 2015 WL 4232096, at *19; *Notre Dame*, 786 F.3d at 615-616; see also *Wheaton*, 791 F.3d at 799-801.[14]

The Zubik 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 "express[ed] no views on the ultimate merits" of the case. *Ibid.* That order neither establishes circuit precedent nor predicts the Eleventh Circuit's 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. *PFL*, 772 F.3d at 242; *Michigan Catholic Conference*, 755 F.3d at 398; *Diocese of Cheyenne* v. *Burwell*, 14-8040 Docket entry (10th Cir. June 30, 2014).

The Zubik petitioners further assert (Pet. 32-34) that the courts of appeals are divided on whether the accommodation qualifies as the least restrictive means

---

[14] The Zubik 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. 30 n.6 (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 the assertion that *Korte* reflects the existence of a circuit conflict on any issue presented here. In addition, the Zubik petitioners' assertion that preliminary-injunction appeals cannot establish circuit precedent does not advance their claim of a circuit conflict because *Korte* also involved appeals "from orders denying preliminary injunctive relief." 735 F.3d at 665.

of furthering a compelling government interest. But no court of appeals has disagreed with the D.C. Circuit's holding that the accommodation satisfies RFRA scrutiny. In contending otherwise, the Zubik petitioners again rely on *Korte* and the Tenth Circuit's decision in *Hobby Lobby*. But the "least-restrictive-means questions posed by the lack of any accommodation [in those cases] are very different from those presented here." *PFL*, 772 F.3d at 256-257. And to the extent that the decisions on which petitioners rely suggested that the government lacks a compelling interest in ensuring access to contraceptive coverage, that conclusion was rejected by five Justices in this Court's subsequent decision in *Hobby Lobby*. See p. 24, *supra*. Accordingly, notwithstanding *Korte*, the Seventh Circuit has recognized that *Hobby Lobby* supports the D.C. Circuit's conclusion that the accommodation is the least restrictive means of furthering compelling interests. See *Notre Dame*, 786 F.3d at 607-608, 616-619; see also *id.* at 624-626 (Hamilton, J., concurring).

5. Even if the question presented warranted certiorari, these petitions would not be appropriate vehicles in which to consider it.

First, the petitions—even in combination—do not present the full range of coverage arrangements that have given rise to RFRA challenges to the accommodation. The accommodation operates somewhat differently with respect to insured plans, self-insured plans subject to ERISA, and ERISA-exempt self-insured church plans, and some judges have concluded that those differences are material to the RFRA analysis. See, *e.g.*, *Little Sisters*, 2015 WL 4232096, at *41 (Baldock, J., dissenting in part); *Roman Catholic Archbishop of Wash.* v. *Sebelius*, 19 F. Supp. 3d 48,

72-85 (D.D.C. 2013). In this case, Geneva has insured plans and the Zubik petitioners appear to have ERISA-exempt self-insured church plans. It thus appears that this case does not include a self-insured plan subject to ERISA.[15]

Second, the decision below addressed only the question whether the accommodation imposes a substantial burden on the exercise of religion; the court of appeals did not consider whether the accommodation qualifies as the least restrictive means of furthering a compelling government interest. That would make this case a less suitable vehicle than one in which all of the potentially dispositive issues were addressed below. See *Cutter*, 544 U.S. at 718 n.7 (this Court "is a court of review, not of first view"); cf. Br. in Opp. at 30-31, *Priests for Life* v. *HHS* and *Roman Catholic Archbishop of Wash.* v. *Burwell*, Nos. 14-1453 & 14-1505 (filed Aug. 12, 2015).

---

[15] The Zubik petition would be a poor vehicle for the additional reason that some of the plans at issue apparently have grandfathered status and therefore are not subject to the contraceptive-coverage requirement. 13-cv-1459 Docket entry No. 1, at 9 (Oct. 8, 2013); see note 4, *supra*.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
ADAM C. JED
PATRICK G. NEMEROFF
MEGAN BARBERO
JOSHUA M. SALZMAN
Attorneys

AUGUST 2015