No. 14-392

In the Supreme Court of the United States

UNIVERSITY OF NOTRE DAME, PETITIONER

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Petitioner is a non-profit university that provides or arranges health coverage for its employees and students. Petitioner objects on religious grounds to federal laws requiring that such coverage include contraceptive services prescribed for women by their doctors. In *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), this Court held that the application of that requirement to certain for-profit corporations violated the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* Unlike the employers in *Hobby Lobby*, however, petitioner is a non-profit entity eligible for regulatory accommodations that allow it to opt out of the contraceptive coverage requirement. In this suit, petitioner contends that those accommodations themselves violate RFRA. The district court denied petitioner's motion for a preliminary injunction, and the court of appeals affirmed. The question presented is:

Whether this Court should vacate the interlocutory decision below and remand for further consideration in light of *Hobby Lobby* and this Court's interim order in *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 53a-98a) is reported at 743 F.3d 547. The opinion of the district court (Pet. App. 1a-46a) is reported at 988 F. Supp. 2d 912.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 2014. A petition for rehearing was denied on May 7, 2014 (Pet. App. 99a-100a). On June 16, 2014, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including October 4, 2014. The petition was filed on October 3, 2014. 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,[1] generally requires health insurance issuers and employers offering group health plans to cover certain preventive services without cost-sharing—that is, without requiring copayments, deductibles, or coinsurance payments. 42 U.S.C. 300gg-13. The required services 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, 2762 (2014) (*Hobby Lobby*).

In developing the required guidelines, HRSA relied on a list of services recommended by experts at the Institute of Medicine (IOM). See *Hobby Lobby*, 134 S. Ct. at 2762. IOM's recommendations included the "full range" of contraceptive methods approved by the Food and Drug Administration (FDA), which IOM found can greatly decrease the risk of unwanted pregnancies, adverse pregnancy outcomes, and other negative health consequences, and reduce medical expenses for women. IOM, *Clinical Preventive Services for Women: Closing the Gaps* 10 (2011); see *id.* at 102-110.

Consistent with IOM's recommendations, the HRSA guidelines include all FDA-approved contraceptive methods, as prescribed by a health care provider. 77 Fed. Reg. 8725 (Feb. 15, 2012); see *Hobby*

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

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 employers 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).

2. In response to religious objections to the contraceptive-coverage requirement, the Departments have implemented regulatory accommodations "that seek[] to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives" as employees of other organizations. *Hobby Lobby*, 134 S. Ct. at 2759.

a. The accommodations are set forth in regulations originally promulgated on July 2, 2013. 78 Fed. Reg. 39,870. They are 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 account of religious objections." 45 C.F.R. 147.131(b); accord 26 C.F.R. 54.9815-2713A(a); 29 C.F.R. 2590.715-2713A(a). To opt out of the contraceptive-coverage requirement under the original version of the accommodations, an organization was only required to "self-certify" its eligibility using a form provided by the Department of Labor and transmit that certification to a third party. *Hobby Lobby*, 134 S. Ct. at 2782.[2]

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[2] "'[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-

If the eligible organization purchases coverage for its employees from a health insurance issuer, it opts out by transmitting its self-certification to the issuer. An issuer that receives such a certification is required to "provide separate payments for contraceptive services * * * 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)(2).

Rather than purchasing insurance coverage from an issuer, some employers "self-insure" by bearing the financial risk of employee health claims themselves. Those 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. An eligible organization with a self-insured plan opts out under the accommodations by transmitting its self-certification to its TPA. The TPA ordinarily "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).

In all cases, an organization that opts out under the accommodations has no obligation "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874. An eligible organization also need not inform

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coverage requirement under a separate regulation. *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)).

plan participants or enrollees of the coverage provided by third parties. Instead, issuers and TPAs must provide such notice and must do so "separate from" materials distributed in connection with the eligible organization's group health coverage. 29 C.F.R. 2590.715-2713A(d); 45 C.F.R. 147.131(d). The accommodations thus "effectively exempt[]" objecting organizations from the contraceptive-coverage requirement. *Hobby Lobby*, 134 S. Ct. at 2763.

b. The Departments recently augmented the accommodations in light of this Court's interim order in *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014). In that case, the Court granted an injunction pending appeal to Wheaton College, a non-profit religious college that challenged the original accommodations 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 eligibility requirements for the accommodations. *Wheaton Coll.*, 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.* But the Court also specified that "[n]othing in [its] order precludes the Government from relying on" the written notice provided by Wheaton "to facilitate the provision of full contraceptive coverage under the Act." *Ibid.* Accordingly, the Court emphasized that "[n]othing in [its] interim order affects the ability of [Wheaton's] employees and students to obtain, without cost, the full range of FDA approved contraceptives." *Ibid.*

Although the Court's interim order in *Wheaton College* cautioned that it "should not be construed as

an expression of the Court's views on the merits," 134 S. Ct. at 2807, the Departments have now augmented the original accommodations to provide all eligible organizations with an option equivalent to the one made available to Wheaton by the Court's injunction. Under interim final regulations promulgated on August 27, 2014, an eligible organization may opt out by notifying HHS of its objection to providing contraceptive coverage rather than by sending a self-certification to its insurer or TPA. 79 Fed. Reg. 51,092. An organization need not use any particular form and need only indicate the basis on which it qualifies for the accommodations, as well as the type of plan it offers and contact information for the plan's issuers 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).

If an eligible organization notifies HHS that it is opting out using this alternative method, the Departments make the necessary communications to ensure that the organization's issuers or TPAs make or arrange separate payments for contraceptive services for its employees. 45 C.F.R. 147.131(c)(2) (insured plans); 29 C.F.R. 2590.715-2713A(b)(2) (self-insured plans). As with the preexisting accommodations, an eligible organization that opts out has no obligation to inform plan participants or enrollees of the availability of the separate payments made by third parties. 79 Fed. Reg. at 51,094-51,095.

3. Petitioner is a nonprofit Catholic university. Pet. App. 2a. It provides health coverage for its employees through a self-insured plan administered by a TPA, and it arranges health coverage for its students through a contract with a health insurance issuer. *Id.* at 55a-56a. Petitioner objects to the contraceptive-

coverage requirement on religious grounds, but it is eligible to opt out of that requirement under the accommodations. *Id.* at 56a-58a.[3] Although the regulations challenged here were issued in July 2013, petitioner waited to file suit until December 2013, just weeks before the regulations went into effect for petitioner's employee group health plan on January 1, 2014. Petitioner's suit asserted that the accommodations set forth in the regulations themselves violate RFRA. *Id.* at 60a. The district court denied petitioner's motion for a preliminary injunction, concluding that petitioner had not demonstrated that it was likely to succeed on the merits. *Id.* at 1a-46a.

4. Petitioner filed an interlocutory appeal. The court of appeals granted a motion to intervene filed by three of petitioner's students, who objected to petitioner's attempt to deny them contraceptive coverage to which they are entitled under federal law. Pet. App. 75a-76a. The court then affirmed the denial of a preliminary injunction. *Id.* at 53a-83a.

a. The court of appeals first held that petitioner had not shown that it was likely to suffer irreparable harm absent preliminary relief. Pet. App. 65a. In the district court, petitioner sought a preliminary injunction allowing it to refuse to provide contraceptive coverage without completing the self-certification form required by the original accommodations. After being denied an injunction pending appeal, however, petitioner elected not to seek such an injunction from this Court, and instead executed a self-certification and

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[3] The accommodation for eligible organizations offering insured plans to their employees also applies to "student health insurance coverage arranged by an eligible organization that is an institution of higher education." 45 C.F.R. 147.131(f).

transmitted that certification to its TPA. *Id.* at 60a-61a; see *id.* at 47a-52a. The TPA, in turn, began providing contraceptive coverage to petitioners' employees under the terms of the accommodations. *Id.* at 61a.[4]

The court of appeals explained that although petitioner's actions had not "mooted the case," petitioner had not explained "what [it] wants in the way of preliminary relief" after having already availed itself of the accommodations. Pet. App. 64a-65a. And because the specific preliminary relief sought by petitioner was unclear, the court could not "make a determination that [petitioner] will suffer irreparable harm if [the court] affirm[ed] the denial of such relief." *Id.* at 65a.

b. The court of appeals also held that petitioner had not shown that its RFRA claim was likely to succeed. Pet. App. 65a-78a. Under RFRA, the government may not "substantially burden a person's exercise of religion" unless that burden is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1(a) and (b). The court noted that the district court proceedings had been highly expedited and emphasized that its views on the merits were "necessarily tentative" and "should not be considered a forecast of the ultimate resolution of this still so young litigation." Pet. App. 61a. But the court of appeals held that petitioner had failed to demonstrate that the accommodations substantially burdened its exercise of religion. *Id.* at 65a-78a.

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[4] When the court of appeals issued its decision, the issuer that provides coverage for petitioner's students had not yet begun covering contraceptives because the next plan year for petitioner's student health plan did not begin until August 2014. Pet. App. 61a.

The court of appeals held that the accommodations do not substantially burden petitioner's exercise of religion because they allow it to opt out of providing contraceptive coverage and instead impose that obligation on third parties. Pet. App. 63a-64a. The court rejected the argument that the opt-out procedure substantially burdens petitioner's exercise of religion because the act of opting out "triggers" or "enables" the provision of contraceptive coverage by others. *Id.* at 66a-72a. The court explained that "[f]ederal law, not [petitioner's] signing and mailing the [self-certification] form, requires health-care insurers, along with [TPAs], to cover contraceptive services." *Id.* at 67a. The court also emphasized that if petitioner's contrary position were sustained, any accommodation in which a third party is required to act in a religious objector's stead would constitute a substantial burden because the very act of opting out could be said to "trigger" the third party's conduct. *Id.* at 70a-71a. For example, as petitioner's counsel conceded, petitioner's theory means that exempting a conscientious objector from the military draft would substantially burden the objector's exercise of religion because, by allowing him to claim the exemption, "the government [would have] forced him to 'trigger' the drafting of a replacement." *Id.* at 71a.

Finally, the court of appeals distinguished its decision in *Korte* v. *Sebelius*, 735 F.3d 654 (7th Cir. 2013), cert. denied, 134 S. Ct. 2903 (2014). Pet. App. 74a-75a. *Korte* held that the contraceptive-coverage requirement violated RFRA as applied to closely-held for-profit companies that were *not* eligible for the accommodations. 735 F.3d at 659. The court agreed with the district court that petitioner's ability to opt out

under the accommodations means that it "is in an entirely different position than the plaintiffs in *Korte*." Pet. App. 9a; see *id.* at 74a-75a.

c. Judge Flaum dissented. Pet. App. 84a-98a. He concluded that the accommodations impose a substantial burden under RFRA because "as [petitioner] sees it," even the opt-out procedure "involve[s] [petitioner] in the provision of contraceptives." *Id.* at 90a.

ARGUMENT

Petitioner does not seek plenary consideration of its claim that the accommodations violate RFRA—a claim that has been rejected by all three courts of appeals to consider it. See *Priests for Life* v. *HHS*, 772 F.3d 229, 237 (D.C. Cir. 2014); *Michigan Catholic Conference & Catholic Family Servs.* v. *Burwell*, 755 F.3d 372, 390 (6th Cir. 2014), petition for cert. pending, No. 14-701 (filed Dec. 12, 2014) (*Michigan Catholic Conference*); Pet. App. 76a. Instead, petitioner contends (Pet. 9-35) that this Court should grant the petition, vacate the court of appeals' interlocutory decision, and remand for further consideration (GVR) in light of *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014). But none of the prerequisites for a GVR is satisfied here. There is no reasonable probability that a GVR would lead the court of appeals to reconsider its view of the merits because the court was already bound by circuit precedent materially identical to *Hobby Lobby* on the substantial-burden issue—and because *Hobby Lobby* and *Wheaton College* actually confirm the validity of the accommodations. In addition, the decision below also rested on the independent ground that petitioner failed to establish a likelihood of irreparable injury because it did

not adequately specify the preliminary relief it sought once it had executed and transmitted the self-certification and its TPA had begun providing coverage to petitioners' employees—a case-specific holding not implicated by this Court's intervening decisions. And in any event, a GVR would not affect the ultimate outcome of this litigation because petitioner's claim remains pending and the lower courts will have a full opportunity to consider *Hobby Lobby*, *Wheaton College*, and other intervening developments—including the additional accommodations provided by the government in the wake of *Wheaton College*—when litigation in the district court resumes. The petition should be denied.

1. A GVR is "potentially appropriate" where "intervening developments * * * reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996); accord *Greene* v. *Fisher*, 132 S. Ct. 38, 45 (2011). That condition is not satisfied here.

a. Petitioner principally contends (Pet. 13-27) that there is a reasonable probability that the court of appeals would analyze the substantial-burden question differently if it reconsidered the matter in light of *Hobby Lobby*. In that case, this Court held that the contraceptive-coverage requirement violated RFRA as applied to closely-held for-profit corporations that were *not* eligible for the accommodations. 134 S. Ct. at 2785. The Court concluded that the requirement imposed a substantial burden on the exercise of religion by requiring the companies to provide coverage for contraceptives to which they objected on religious

grounds. *Id.* at 2775. In so doing, the Court emphasized that "it is not for [the courts] to say that [the companies'] religious beliefs are mistaken or insubstantial." *Id.* at 2779. For two independent reasons, this Court's decision in *Hobby Lobby* would not lead the court of appeals to reconsider its substantial-burden holding.

First, *Hobby Lobby* did not change the law governing the substantial-burden analysis in the Seventh Circuit. That law was established by *Korte* v. *Sebelius*, 735 F.3d 654 (2013), cert. denied, 134 S. Ct. 2903 (2014). Like *Hobby Lobby*, *Korte* held that the contraceptive-coverage requirement violated RFRA as applied to closely-held for-profit corporations. *Id.* at 659. And like *Hobby Lobby*, *Korte* emphasized that "the substantial-burden inquiry does *not* invite the court to determine the centrality of the religious practice to the adherent's faith" or to "ask whether the claimant has correctly interpreted his religious obligations." *Id.* at 683. Instead, "[i]t is enough that the claimant has an 'honest conviction' that what the government is requiring, prohibiting, or pressuring him to do conflicts with his religion." *Ibid.* (quoting *Thomas* v. *Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981)); see *Hobby Lobby*, 134 S. Ct. at 2779 ("[The Court's] 'narrow function * * * is to determine' whether the line drawn [by the plaintiffs] reflects 'an honest conviction.'") (quoting *Thomas*, 450 U.S. at 716).

Korte was "heavily cited in [petitioner's] briefs" in the court of appeals, Pet. App. 74a, and petitioner relied on that precedent to make precisely the same arguments it now seeks to raise following a GVR—often phrased in the same terms. For example, petitioner

now contends (Pet. 14) that the court of appeals' substantial-burden analysis was wrong because "*Hobby Lobby* makes clear that th[e] inquiry is limited to the substantiality *of the pressure* the Government imposes on the plaintiff to violate his beliefs." But petitioner already argued that "*Korte* makes clear that 'the substantial-burden test under RFRA focuses primarily on the *intensity of the coercion* applied by the government to act contrary to [religious] beliefs." Pet. C.A. Br. 21-22 (citation and internal quotation marks omitted; brackets in original). The court of appeals rejected petitioner's arguments based on *Korte*, holding that petitioner's ability to opt out under the accommodations meant that it could "derive no support" from a decision holding that the contraceptive-coverage requirement imposed a substantial burden on plaintiffs ineligible to opt out. Pet. App. 74a. There is no reason to think the court would reach a different conclusion if presented with the same arguments based on *Hobby Lobby*.

Second, even if the court of appeals had not already distinguished a materially identical substantial-burden precedent, there would be no reasonable probability that *Hobby Lobby*'s "very specific" holding, 134 S. Ct. at 2760, would lead the court to reconsider its analysis of the distinct question presented here. *Hobby Lobby* did not suggest that the accommodations at issue here substantially burden the exercise of religion. To the contrary, the Court emphasized that the accommodations "seek[] to respect the religious liberty of religious nonprofit corporations," *id.* at 2759, and "effectively exempt[]" eligible organizations from the contraceptive-coverage requirement, *id.* at 2763.

The Court did not, of course, hold that the accommodations "compl[y] with RFRA for purposes of all religious claims." *Hobby Lobby*, 134 S. Ct. at 2782. But the Court relied on the existence of the accommodations to hold that the contraceptive-coverage requirement could not survive RFRA scrutiny as applied to the for-profit corporations in that case, reasoning that the accommodations are a "less restrictive" alternative that "serves HHS's stated interests equally well." *Ibid.* The Court also emphasized that if the same accommodations were extended to closely held for-profit companies like the *Hobby Lobby* plaintiffs, the effect of its decision on the women employed by those companies "would be precisely zero" because "these women would still be entitled to all FDA-approved contraceptives without cost sharing." *Id.* at 2760.[5]

Petitioner contends (Pet. 15) that the court of appeals departed from the principles enunciated in *Hobby Lobby* by second-guessing petitioner's "*religious* judgment" that the accommodations make it "complicit in the provision of contraceptive coverage." But the court did not purport to question petitioner's religious beliefs. Rather, it observed that RFRA does not permit a religious objector to "prevent other institutions, whether the government or a health insurance company, from engaging in acts that merely offend the institution" or are inconsistent with its beliefs, no matter how sincerely held. Pet. App. 62a-63a (citing *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485

[5] Consistent with *Hobby Lobby*, the Departments are currently engaged in notice-and-comment rulemaking on a proposal to extend the accommodations to "closely held for-profit entit[ies]." 79 Fed. Reg. 51,121 (Aug. 27, 2014).

U.S. 439, 450-451 (1988), and *Bowen* v. *Roy*, 476 U.S. 693, 699-700 (1986)). And the court further held that a RFRA plaintiff cannot transform an accommodation into a substantial burden by asserting that the very act of opting out of a requirement to which it objects "triggers" or "enables" conduct by a third party. Pet. App. 66a-72a. As the court emphasized, "United States law and public policy have a history of accommodating religious beliefs" through analogous mechanisms, and petitioner's claim that "the exemption process itself imposes a substantial burden" on its exercise of religion is "paradoxical and virtually unprecedented." *Id.* at 73a.[6]

All three courts of appeals to address the validity of the accommodations have reached the same conclusion. As the D.C. Circuit explained, "[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." *Priests for Life*, 772 F.3d at 246. Ac-

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[6] The court of appeals also rejected petitioner's argument that the accommodations impose a substantial burden by requiring it "to identify[] and contract * * * with a third party willing to provide" the contraceptive coverage to which petitioner objects. Pet. App. 73a (internal quotation marks omitted; brackets in original). The court explained that because petitioner's current issuer and TPA do not object to providing contraceptive coverage, any potential burden from being required to "identify" third parties willing to provide coverage was "entirely speculative." *Ibid.*; see *id.* at 58a. And to the extent that petitioner objects (Pet. 21) to "maintaining a contractual relationship with [a] third party that is obligated, authorized, or incentivized to provide contraceptive coverage," petitioner's argument again focuses on the actions of third parties rather than any burden imposed on petitioner itself.

cordingly, RFRA does not permit objecting organizations like petitioner "to control their employees' relationships with other entities willing to provide health insurance coverage to which the employees are legally entitled." *Id.* at 256. The Sixth Circuit likewise concluded that "[t]he government's imposition of an independent obligation on a third party does not impose a substantial burden on [an eligible organization's] exercise of religion." *Michigan Catholic Conference*, 755 F.3d at 388.[7] Both of those courts relied on the court of appeals' decision in this case, and they adopted or adhered to their holdings after *Hobby Lobby*. See *Priests for Life*, 772 F.3d at 244-256; *Michigan Catholic Conference*, 755 F.3d at 387-389.[8] There is thus no merit to petitioner's suggestion that *Hobby Lobby* would lead the court of appeals to reconsider the analysis in the decision below.

b. Like *Hobby Lobby*, the interim order in *Wheaton College* provides no sound basis for a GVR. Most ob-

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[7] Petitioner and its amicus attempt to portray these decisions as outliers. See Pet. 11 & n.1; Becket Fund Amicus Br. 3-4 & n.7, 1a-5a. But they do so only by including in their tally of decisions on the other side orders granting interim relief pending appeal—orders that, in some cases, expressly provided that they should not be construed as an expression of the issuing courts' views on the merits. See, *e.g.*, *Wheaton Coll.*, 134 S. Ct. at 2807; *Eternal Word Television Network, Inc.* v. *Secretary, HHS*, 756 F.3d 1339, 1340 (11th Cir. 2014) (per curiam). Only three courts of appeals have considered the question presented in opinions issued after briefing and argument, and all three of them have rejected petitioner's position.

[8] As petitioner notes (Pet. 12 n.2), the Sixth Circuit decided *Michigan Catholic Conference* before *Hobby Lobby* was issued, but then denied a petition for rehearing en banc that relied heavily on this Court's decision.

viously, that order expressly cautioned that it "should not be construed as an expression of the Court's views on the merits." *Wheaton Coll.*, 134 S. Ct. at 2807. Petitioner cites no authority supporting a GVR in light of such an order.

In any event, the *Wheaton College* order actually undermines petitioner's claim. Petitioner notes (Pet. 34) that this Court granted injunctive relief in connection with Wheaton's challenge to the original accommodations. But the Court also required Wheaton to provide written notice that it satisfied the prerequisites for the accommodations, and the Court specified that "[n]othing in [its] order precludes the Government from relying on this notice * * * to facilitate the provision of full contraceptive coverage under the Act." *Wheaton Coll.*, 134 S. Ct. at 2807. The Court therefore emphasized that its interim order would not "affect[] the ability of [Wheaton's] employees and students to obtain, without cost, the full range of FDA approved contraceptives." *Ibid.*

Those features of the Court's order—which petitioner fails to acknowledge—cannot be reconciled with petitioner's asserted right to prevent its issuer and TPA from providing contraceptive coverage. Moreover, the Departments have now augmented the accommodations to afford petitioner and all other objecting organizations an option essentially equivalent to the one this Court's interim order provided for Wheaton. Like Wheaton, petitioner can now opt out of the contraceptive-coverage requirement by "inform[ing] [HHS] in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services." *Wheaton Coll.*, 134 S. Ct. at 2807. And

like Wheaton, petitioner "need not use [a] form prescribed by the Government" and "need not send copies to health insurance issuers or [TPAs]." *Ibid.*; see 29 C.F.R. 2950.715-2713A(b)(1)(ii)(B) and (c)(1); 45 C.F.R. 147.131(c)(1).[9] There is thus no reasonable probability that the court of appeals would decide the case differently in light of *Wheaton College*.

c. In any event, a GVR would not be appropriate even if petitioner were correct (Pet. 9) that "[t]he Seventh Circuit's 'substantial burden' analysis is irreconcilable with this Court's decision in *Hobby Lobby*" or with the interim order in *Wheaton College*. Even then, this would not be a case in which the decision below "rests upon" a premise undermined by intervening developments, *Lawrence*, 516 U.S. at 167, because the court of appeals' decision did not rest upon its substantial-burden analysis alone. To the contrary, the court also affirmed the denial of a preliminary injunction because it concluded that petitioner's failure to specify the form of preliminary relief it sought meant that the court could not "make a determination that [petitioner] will suffer irreparable harm if [the court] affirm[ed] the denial of such relief." Pet. App. 65a.

The court of appeals correctly described a likelihood of irreparable injury as "a sine qua non" for a

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[9] Petitioner notes (Pet. 23) that the augmented accommodations require an eligible organization's written notice to include additional administrative details. But that information "represents the minimum information necessary" for the administration of the accommodation, 79 Fed. Reg. at 51,095, and petitioner does not suggest that the notice required under the accommodations is materially different from the one required by *Wheaton College* as a condition to an injunction pending appeal.

preliminary injunction. Pet. App. 65a; see *Winter* v. *NRDC*, 555 U.S. 7, 22 (2008) ("[The Court's] frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction."). The court's holding that petitioner had not established a likelihood of irreparable injury thus required it to affirm the denial of a preliminary injunction without regard to its views on the merits. See *Winter*, 555 U.S. at 22-24.

Petitioner fails to acknowledge the court of appeals' irreparable-injury holding, much less to demonstrate that *Hobby Lobby* and *Wheaton College* would lead the court to reconsider that case-specific procedural determination. And although petitioner presumably disagrees with the court's conclusion that it failed adequately to identify the preliminary relief it sought, a mere claim of error in the decision below is not grounds for a GVR. That by itself provides sufficient reason to deny the petition.

2. Petitioner not only has failed to demonstrate a reasonable probability that a remand would lead the court of appeals to reconsider its original decision, but also has failed to establish that "such a redetermination may determine the ultimate outcome of the litigation." *Lawrence*, 516 U.S. at 167; see *Greene*, 132 S. Ct. at 45. Petitioner cannot make that showing because the decision below merely affirmed the denial of preliminary relief. The case remains pending, and further proceedings—including "the ultimate outcome of the litigation," *Lawrence*, 516 U.S. at 167—will be governed by this Court's decisions in *Hobby Lobby* and *Wheaton College*, as well as any other relevant intervening developments.

Indeed, several cases already pending before the Seventh Circuit pose the same question that would be presented by a GVR in this case. The court of appeals heard argument in two of those appeals, *Grace Schools* v. *Burwell*, No. 14-1430, and *Diocese of Fort Wayne-South Bend, Inc.* v. *Burwell*, No. 14-1431, on December 3, 2014. It is thus likely that the court's decision in those cases, rather than any decision following a GVR, will establish the law in the Seventh Circuit and govern further proceedings in this case.[10] And if the court adopts petitioner's view of *Hobby Lobby* and *Wheaton College*, petitioner will be free to renew its request for preliminary relief.

3. Even where the foregoing factors are present and a GVR is "potentially appropriate," "[w]hether a GVR order is ultimately appropriate depends further on the equities of the case," including whether "the delay and further cost entailed in a remand" are "justified by the potential benefits of further consideration by the lower courts." *Lawrence*, 516 U.S. at 167-168. Petitioner has identified no equitable considerations justifying a GVR in this case. As demonstrated above, denying the petition would neither affect petitioner's ultimate entitlement to relief nor even prevent petitioner from renewing its request for a preliminary injunction if the court of appeals renders a favorable opinion in parallel cases that are already awaiting decision.

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[10] In the pending cases, the government has argued that the decision below remains good law because it is consistent with *Hobby Lobby*, but has also noted that circuit precedent inconsistent with this Court's decision "no longer controls." Gov't Supp. & Reply Br. at 10 n.2, *Grace Schools*, No. 14-1430 (Aug. 7, 2014); see *id.* at 6.

Petitioner's conduct of this litigation further undermines any claim that the equities warrant a GVR so that the court of appeals can reconsider the need for preliminary relief. Although the regulations establishing the accommodations were issued in July 2013, petitioner "filed suit at the last minute," waiting until less than a month before the January 1, 2014 start of its plan year. Pet. App 64a; see *id.* at 59a-60a. That timing and petitioner's other "litigation tactics" led the district court to "question [petitioner's] own view of the injury it faces under the accommodation[s]." *Id.* at 9a-10a.

Petitioner displayed a similar lack of urgency on appeal. After three of petitioner's students were granted leave to intervene, petitioner asked the court of appeals "to dismiss its appeal or in the alternative to order a limited remand" to allow petitioner to conduct discovery. Pet. App. 82a. As Judge Flaum observed, that motion indicated that petitioner was "willing to return to the district court and [forgo] any chance at a preliminary injunction." *Id.* at 86a (Flaum, J., dissenting). Since the court of appeals issued its decision, moreover, petitioner has made no effort to conduct discovery or otherwise prosecute its suit to a conclusion. Instead, petitioner informed the district court that it "[wa]s considering whether to file a petition for [a] writ of certiorari" and "monitor[ing] parallel litigation in other circuit courts" and asked the court to maintain a stay. 3:13-cv-01276 Docket entry No. 70, at 2 (June 18, 2014). And petitioner then took the maximum amount of time to file its petition, seeking and obtaining a 60-day extension. See Sup. Ct. R. 13(5). Under the circumstances, there is no justification for "the delay and further cost entailed in a

remand" for more interlocutory proceedings on petitioner's entitlement to preliminary relief. *Lawrence*, 516 U.S. at 168.

4. Finally, petitioner contends (Pet. 27-34) that the accommodations do not qualify as "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1(b). The court of appeals had no occasion to consider that question because it held that the accommodations do not impose a substantial burden on petitioner's exercise of religion. Accordingly, as petitioner appears to recognize (Pet. 27), its arguments on that issue do not advance its contention that a GVR is warranted. In any event, however, those arguments lack merit.

a. The accommodations serve compelling governmental interests in allowing religious objectors to opt out while seamlessly filling the resulting gaps and ensuring that women continue to receive important preventive health coverage on equal terms with men. The Court did not decide the issue in *Hobby Lobby*, see 134 S. Ct. at 2780, but 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). Accordingly, as the D.C. Circuit explained in rejecting arguments identical to those petitioner presses here, *Hobby Lobby* supports the conclusion that the accommodations serve "the government's compelling interest in providing women full and equal benefits of preventive health coverage." *Priests for Life*, 772 F.3d at 264.

b. The accommodations are also the least restrictive means of furthering the government's compelling interests. By allowing petitioner and other objecting organizations to opt out of any requirement "to contract, arrange, pay, or refer for contraceptive coverage," 78 Fed. Reg. at 39,874, "the accommodation [procedure] requires as little as it can from the objectors while still serving the government's compelling interests," *Priests for Life*, 772 F.3d at 237.

Petitioner contends (Pet. 31-33) that the government could instead provide its employees and students with contraceptive coverage through other programs. But petitioner's suggested alternatives are not legally viable.[11] And even if they were, "[t]hose alternatives would substantially impair the government's interest[s]" by imposing "financial, logistical, informational, and administrative burdens" on women seeking contraceptive coverage. *Priests for Life*, 772 F.3d at 265; cf. *Reno* v. *ACLU*, 521 U.S. 844, 874 (1997) (less-restrictive alternatives must be "at least as effective" as the challenged requirement). "Providing contraceptive services seamlessly together with other health

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[11] For example, petitioner asserts (Pet. 32) that "nothing prevents the Government from permitting employees of religious objectors to purchase fully subsidized coverage (either for contraceptives alone, or full plans)" on the Affordable Care Act's health insurance Exchanges. But those Exchanges generally may only make available "qualified health plan[s]" providing comprehensive coverage, and could not offer contraception-only policies. 42 U.S.C. 18031(d)(2)(B)(i); see 42 U.S.C. 18021(a)(1)(B); 78 Fed. Reg. at 39,882. And HHS could not allow petitioner's employees to purchase subsidized comprehensive coverage because the Act's subsidies have income-based requirements and are generally unavailable to individuals eligible for coverage under employer-sponsored plans. 26 U.S.C. 36B(c)(2)(B), 5000A(f)(1)(B).

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 in effective access." *Priests for Life*, 772 F.3d at 265.

The accommodations serve that interest while imposing the minimum possible burden on objecting organizations. In contending that more is required, and that RFRA grants it a right to prevent its employees and students from obtaining coverage from non-objecting third parties, petitioner disregards this Court's admonition that "in applying RFRA 'courts 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).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2015