No. 14-701

In the Supreme Court of the United States

MICHIGAN CATHOLIC CONFERENCE, ET AL.,
PETITIONERS

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 SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Under federal law, health coverage provided by employers and insurers generally must cover certain preventive health services, including contraceptive services prescribed for women by their doctors. Petitioners object to that requirement on religious grounds. As religious nonprofit organizations, petitioners are eligible for regulatory accommodations that would allow them to opt out of the contraceptive-coverage requirement. They contend, however, that the accommodations themselves violate the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, by requiring non-objecting third parties to provide petitioners' employees with separate contraceptive coverage once 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 third parties from separately providing petitioners' employees with the coverage to which the employees are entitled under federal law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 89a-136a) is reported at 755 F.3d 372. The opinion of the United States District Court for the Western District of Michigan (Pet. App. 1a-29a) is reported at 989 F. Supp. 2d 577. The opinion of the United States District Court for the Middle District of Tennessee (Pet. App. 31a-55a) is not published in the *Federal Supplement* but is available at 2013 WL 6834375.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 2014. A petition for rehearing was denied on September 16, 2014 (Pet. App. 137a-138a). The petition for a writ of certiorari was filed on December

12, 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 (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." *Priests for Life* v. *HHS*, 772 F.3d 229, 235 (D.C. Cir. 2014); see *Hobby Lobby*, 134 S. Ct. at 2785-2786 (Kennedy, J., concurring).

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 preg-

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

nancies, adverse pregnancy outcomes, and other negative health consequences, and reduce medical expenses for women. IOM, *Clinical Preventive Services for Women: Closing the Gaps* 10, 102-110 (2011).

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 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. The regulations requiring coverage of contraceptives include an exemption for certain "religious employers." 45 C.F.R. 147.131(a). Incorporating a definition from the Internal Revenue Code, that exemption applies to "'churches, their integrated auxiliaries, and conventions or associations of churches,' as well as 'the exclusively religious activities of any religious order.'" *Hobby Lobby*, 134 S. Ct. at 2763 (quoting 26 U.S.C. 6033(a)(3)(A)). In addition, in response to religious objections to the contraceptive-coverage requirement, the Departments have implemented regulatory accommodations "that seek[] to respect the religious liberty of [other] 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. *Id.* 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 accommodations, an organization need only "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.

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" for employees who want those 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 coverage from an insurance 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 health plan opts out under the original 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). The TPA may obtain compensation for providing the required coverage from the federal government through a reduction in fees paid by insurers to participate on federally-facilitated Exchanges created by the Affordable Care Act. *Hobby Lobby*, 134 S. Ct. at 2763 n.8.

The self-insured accommodation operates differently if the eligible organization's self-insured plan is a "church plan." Unless they elect to be covered, church plans are 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); see also 29 U.S.C. 1002(33) (defining "church plan"). The government's authority to require a TPA to provide contraceptive coverage under the accommodations derives from ERISA. 79 Fed. Reg. 51,095 n.8 (Aug. 27, 2014). Accordingly, if an eligible organization with a self-insured church plan invokes the accommodation by submitting a self-certification, the organization has opted out but its TPA is not legally required to provide contraceptive coverage to the organization's employees (though the TPA may seek reimbursement from the government if it chooses to provide such coverage voluntarily). *Ibid.*

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 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, while still ensuring that the organizations' employees receive the full scope of preventive health coverage to which they are entitled under federal law. *Hobby Lobby*, 134 S. Ct. at 2763.

b. In August 2014, the Departments augmented the original accommodations in light of this Court's interim order in *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014) (*Wheaton*). In that case, the Court granted an injunction pending appeal to Wheaton College, a nonprofit religious college that had 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. 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* 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 expanded the original accommodations to provide *all* eligible organizations with an option equivalent to the one the Court's injunction made available to Wheaton. Under interim final regulations promulgated on August 27, 2014, an eligible organization may opt out of the contraceptive-coverage requirement by notifying HHS rather than by sending a self-certification to its insurer or TPA. 79 Fed. Reg. at 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 employees and beneficiaries who want such services. 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 original 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. Petitioners are nonprofit organizations that provide health coverage for their employees, but that object on religious grounds to providing coverage for contraceptive services. Pet. App. 91a. Several petitioners are "religious employers" exempt from the contraceptive-coverage requirement under 45 C.F.R. 147.131(a). See p. 3, *supra*.[2] The remaining petitioners are eligible to opt out under the accommodations. Pet. App. 93a. Petitioner Catholic Family Services offers its employees coverage through a self-insured church plan. *Id.* at 3a-4a. The other non-exempt petitioners, which employ more than 1600 people, purchase coverage from insurers. *Id.* at 93a; see *id.* at 220a, 227a-229a, 232a, 234a-235a, 240a.

4. In November 2013, petitioners filed two suits challenging the original accommodations, one in the Western District of Michigan and the other in the Middle District of Tennessee. Pet. App. 98a-99a. As relevant here, both suits alleged that the accommodations then in place violated RFRA. The district courts denied petitioners' motions for preliminary injunctions, holding that petitioners' RFRA claims were unlikely to succeed on the merits. *Id.* at 1a-55a.

5. Petitioners filed interlocutory appeals. The court of appeals consolidated the two cases and affirmed the denial of preliminary relief, agreeing with the district courts that petitioners' RFRA claims were unlikely to succeed on the merits. Pet. App. 89a-136a.

Under RFRA, the government may not "substantially burden a person's exercise of religion" unless that burden is "the least restrictive means of further-

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[2] Petitioners the Michigan Catholic Conference, the Catholic Diocese of Nashville, and the Dominican Sisters of St. Cecilia Congregation fall into this category. Pet. App. 93a; Pet. 8-9.

ing [a] compelling governmental interest." 42 U.S.C. 2000bb-1(a) and (b). The court of appeals held that petitioners' RFRA claims were unlikely to succeed because the accommodations do not substantially burden their exercise of religion. Pet. App. 108a-117a. The court explained that, under the accommodations, eligible organizations are relieved of any obligation to provide, pay for, or facilitate access to contraceptive coverage. *Id.* at 109a-113a. Instead, the accommodations place those obligations on third parties—the organizations' insurers and TPAs. The court noted that petitioners' "insurance issuers and [TPAs] are not parties to this suit and have not expressed any opposition to complying with the contraceptive-coverage requirement." *Id.* at 115a. And the court held that despite petitioners' sincere religious objections to the provision of contraceptive coverage, "[t]he government's imposition of an independent obligation on a third party does not impose a substantial burden on [petitioners'] exercise of religion." *Id.* at 113a (citing *Bowen* v. *Roy*, 476 U.S. 693, 699 (1986)).[3]

6. Petitioners sought rehearing en banc, arguing that the court of appeals' decision conflicted with this Court's decision in *Hobby Lobby*, which was issued after the panel's decision and which held that the contraceptive-coverage requirement violated RFRA as applied to closely held for-profit companies that were *not* eligible for the accommodations. 134 S. Ct.

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[3] The court of appeals also held that the three petitioners eligible for the exemption rather than the accommodations had not demonstrated a substantial burden on their exercise of religion because they are exempt from the contraceptive-coverage requirement and need not do anything to claim the exemption. Pet. App. 107a-108a. Petitioners do not appear to challenge that holding.

at 2785. The court of appeals denied rehearing and rehearing en banc with no member of the court requesting a vote. Pet. App. 137a-138a.

ARGUMENT

Petitioners principally contend (Pet. 15-35) that this Court should grant review to resolve their claim that the accommodations violate RFRA. The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of this Court or another court of appeals. To the contrary, this Court's decision in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and its interim order in *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014), reinforce the validity of the accommodations, and identical RFRA challenges have been rejected by every court of appeals to consider them. Further review by this Court is not warranted.

In the alternative, petitioners contend (Pet. 15) that the Court should grant the petition, vacate the decision below, and remand for further consideration (GVR) in light of *Hobby Lobby*. The Court followed that course in *University of Notre Dame* v. *Burwell*, No. 14-392 (Mar. 9, 2015), another RFRA challenge to the accommodations in which a court of appeals had issued its decision before *Hobby Lobby*. In light of its disposition of the petition for a writ of certiorari in *Notre Dame*, the Court may wish to GVR in this case as well.

1. The court of appeals correctly held that the accommodations do not substantially burden petitioners' exercise of religion. Petitioners' RFRA claim also fails for the independent reason that the accommodations are the least restrictive means of furthering compelling governmental interests in ensuring that

women have full and equal access to preventive health services. And contrary to petitioners' contentions, *Hobby Lobby* and *Wheaton* support the conclusion that the accommodations are consistent with RFRA.

a. The accommodations do not substantially burden petitioners' exercise of religion. To opt out of the contraceptive-coverage requirement, petitioners need only notify their insurers and TPAs (or HHS) that they object to providing contraceptive coverage on religious grounds. They would then be relieved of any obligation to provide, arrange, or pay for such coverage. *Hobby Lobby*, 134 S. Ct. at 2763. For the petitioners that purchase coverage from insurance issuers, the obligation to provide separate contraceptive coverage would instead fall on their insurers, who have no objection to providing such coverage. Pet. App. 115a. And for petitioner Catholic Family Services, whose employees are covered through a self-insured church plan not subject to regulation under ERISA, *id.* at 3a-4a, *no* entity would be required to provide contraceptive coverage.[4] The availability of the accommodations thus renders petitioners "effectively exempt[]" from the contraceptive-coverage requirement. *Hobby Lobby*, 134 S. Ct. at 2763.

Petitioners do not object to informing their insurers and TPAs (or HHS) that they have religious objections to providing contraceptive coverage—indeed, petitioners would presumably need to provide such notice in any event. Instead, petitioners' objection "is to what happens after the form is provided—that is, to the actions of the insurance issuers and [TPAs], re-

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[4] Catholic Family Services' TPA could provide the contraceptive coverage voluntarily and then seek compensation from the federal government. See 79 Fed. Reg. at 51,095 n.8.

quired by law, once [petitioners] give notice of their objection." *Geneva College* v. *Secretary HHS*, No. 13-3536, 2015 WL 543067, at *10 (3d Cir. Feb. 11, 2015). As the court of appeals explained, however, "the inability to restrain the behavior of a third party that conflicts with [petitioners'] religious beliefs does not impose a burden on [petitioners'] exercise of religion." Pet. App. 112a-113a (citation and internal quotation marks omitted).

Petitioners contend (Pet. 16-18) that in making that determination, the court of appeals erroneously second-guessed their "*religious* judgment" that the accommodations would make them complicit in the provision of contraceptive coverage. But the court made clear that it was not questioning that religious view. Pet. App. 107a. Instead, the court held that, notwithstanding petitioners' sincere religious objections to the accommodation mechanism, as a *legal* matter, "[t]he government's imposition of an independent obligation on a third party does not impose a substantial burden on [petitioners'] exercise of religion." *Id.* at 113a. In other words, "[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* v. *HHS*, 772 F.3d 229, 246 (D.C. Cir. 2014).

That holding follows directly from decisions establishing that a religious adherent "may not use a religious objection to dictate the conduct of the government or of third parties." *Priests for Life*, 772 F.3d at 246. This Court has made clear, for example, that the right to 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, 450-451 (1988). For the same reason, "RFRA does not grant [petitioners] a religious veto" against the actions of third parties, nor does it allow petitioners "to control their employees' relationships with other entities willing to provide health insurance coverage to which the employees are legally entitled." *Priests for Life*, 772 F.3d at 251, 256.

Petitioners' description of the asserted burden imposed by the accommodations confirms that their objections are based on obligations imposed on third parties. Petitioners object (Pet. 20, 23-24) to "maintain[ing] a contractual relationship with a third party that will provide contraceptive coverage." But petitioners already contract with insurers and TPAs, and those entities do not object to providing contraceptive coverage under the accommodations—coverage that would be entirely separate from the coverage sponsored by petitioners, see *Hobby Lobby*, 134 S. Ct. at 2763. The accommodations thus would not require petitioners to change their conduct at all.

Petitioners also contend (Pet. 24-25) that the very act of invoking the accommodations would constitute a substantial burden because third parties would step in and separately provide the required coverage once petitioners opt out. But petitioners' claim that the "exemption process itself imposes a substantial burden" is "paradoxical and virtually unprecedented." *Priests for Life*, 772 F.3d at 246 (citation omitted). Our Nation has a long history of allowing religious

objectors to opt out and then requiring others to fill the objectors' shoes. The accommodations "work[] in the way such mechanisms ordinarily do: the objector completes the written equivalent of raising a hand," and the government then "arranges for other entities to step in and fill the gap as required to serve the legislatively mandated regime." *Id.* at 250.

Under petitioners' view of RFRA, all such accommodations could be recast as substantial burdens on the objectors' exercise of religion. For example, "a religious conscientious objector to a military draft" could claim that the act of claiming 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." *Priests for Life*, 772 F.3d at 246 (citation omitted). Similarly, the claimant in *Thomas* v. *Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), could have demanded not only that he not make weapons but also that he not be required to *opt out* of doing so, because opting out would cause someone else to take his place on the assembly line. Petitioners point to no authority endorsing such a sweeping understanding of RFRA.

b. In any event, even if petitioners could establish a substantial burden on their exercise of religion, their RFRA claims would still fail because the accommodations are "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1(b)(2).

Although the Court was not required to decide the issue in *Hobby Lobby*, see 134 S. Ct. at 2780, five Justices recognized that the contraceptive-coverage re-

quirement "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 petitioners press 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.

The accommodations are also the least restrictive means of furthering the interests at stake. By allowing petitioners 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, "[t]he 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.

Petitioners contend (Pet. 32-33) that the government could instead provide their employees with contraceptive coverage through other programs. But petitioners' suggested alternatives are not legally viable.[5] And even if they were, "[t]hose alternatives

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[5] For example, petitioners assert (Pet. 33) that "nothing prevents the Government from allowing employees of religious objectors to purchase subsidized coverage (either for contraceptives alone, or full plans)" on the Affordable Care Act's health insurance Exchanges. But those Exchanges may only make available "qualified health plans" providing comprehensive coverage, and could not offer contraception-only policies. 42 U.S.C. 18031(d)(2)(B)(i);

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. *American Civil Liberties Union*, 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 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 them a right to prevent their employees and students from obtaining coverage from non-objecting third parties, petitioners disregard 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).

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see 42 U.S.C. 18021(a)(1)(B); 78 Fed. Reg. at 39,882. And HHS could not allow petitioners' 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).

c. This Court's decision in *Hobby Lobby* and its interim order in *Wheaton* confirm that the accommodations are consistent with RFRA.

In *Hobby Lobby*, 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. Although the Court did not decide whether the accommodations "compl[y] with RFRA for purposes of all religious claims," *id.* at 2782, it 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. The Court emphasized that the accommodations are a "less restrictive" alternative 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 companies whose owners have no religious objections to providing such coverage." *Id.* at 2759, 2782; see *id.* at 2786-2787 (Kennedy, J., concurring).

Hobby Lobby did not suggest that employers could prevent their employees from obtaining contraceptive coverage from third parties. To the contrary, the Court stressed that its decision "need not result in any detrimental effect on any third party," 134 S. Ct. at 2781 n.37, and repeatedly emphasized that "[t]he effect of the HHS-created accommodation[s] on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero," *id.* at 2760; see *id.* at 2759, 2782-2783.[6]

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[6] Consistent with *Hobby Lobby*, the Departments are currently engaged in notice-and-comment rulemaking on a proposal to ex-

This Court's interim order in *Wheaton* also supports the validity of the accommodations. Petitioners note (Pet. 35) 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 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*, 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 cannot be reconciled with petitioners' asserted right to prevent their issuers and TPAs from providing contraceptive coverage for their employees. Moreover, the Departments have now augmented the accommodations to afford petitioners and all other eligible organizations an option essentially equivalent to the one this Court's interim order provided for Wheaton. Like Wheaton, each 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*, 134 S. Ct. at 2807. And like Wheaton, petitioners "need not use [a] form prescribed by the Government" and "need not send copies to health insurance issuers or [TPAs]." *Ibid.*; see

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tend the accommodations to "closely held for-profit entities." 79 Fed. Reg. at 51,121.

29 C.F.R. 2950.715-2713A(b)(1)(ii)(B) and (c)(1); 45 C.F.R. 147.131(c)(1).[7]

2. Petitioners contend (Pet. 13) that this Court's review is warranted to resolve a disagreement in the courts of appeals. In fact, no such disagreement exists. Every court of appeals that has addressed the question—both before and after *Hobby Lobby* and *Wheaton*—has held that the accommodations are consistent with RFRA. See *Geneva College*, 2015 WL 543067, at *13; *Priests for Life*, 772 F.3d at 246; Pet. App. 117a; see also *University of Notre Dame* v. *Sebelius*, 743 F.3d 547, 559 (7th Cir. 2014), vacated, No. 14-392 (Mar. 9, 2015).

In asserting (Pet. 13) that the validity of the accommodations has "split the courts of appeals," petitioners rely on two nonprecedential orders granting injunctions pending appellate review. See *Eternal Word Television Network, Inc.* v. *Secretary, HHS*, 756 F.3d 1339 (11th Cir. 2014) (*EWTN*); *Diocese of Cheyenne* v. *Burwell*, 14-8040 Docket entry (10th Cir. June 30, 2014). Those interim orders neither establish circuit precedent nor predict the final disposition of the appeals. To the contrary, the Eleventh Circuit emphasized that the order on which petitioners rely "express[ed] no views on the ultimate merits," *EWTN*, 756 F.3d at 1340, and the Sixth and D.C. Circuits had granted similar interim relief before ultimately reject-

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[7] Petitioners note (Pet. 25) 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 petitioners do not suggest that the notice required under the accommodations is materially different from the one required by *Wheaton*.

ing RFRA challenges to the accommodations, see *Priests for Life* v. *HHS*, 13-5368 Docket entry (D.C. Cir. Dec. 31, 2013); Pet. App. 59a-88a. There is thus no circuit conflict warranting this Court's review.

3. Even if the question presented otherwise warranted certiorari, this case would be a poor vehicle in which to address the validity of the accommodations for at least two reasons.

First, the court of appeals issued its decision before *Hobby Lobby*, *Wheaton*, and the Departments' subsequent augmentation of the accommodations. A case in which the court of appeals had the opportunity to address those developments would be a more appropriate vehicle for this Court's consideration of the issue. Cf. *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992) ("Prudence * * * dictates awaiting a case in which the issue was fully litigated below.").

Second, this case does not present the validity of the accommodations as applied to self-insured organizations subject to regulation under ERISA. While the courts of appeals have uniformly held that the accommodations satisfy RFRA as applied to both insured and self-insured employers, some challengers (including petitioners) have made arguments specific to the self-insured accommodations. Pet. C.A. Br. 27; see, *e.g.*, *Priests for Life*, 772 F.3d at 254-255. In this case, however, only petitioner Catholic Family Services offers coverage through a self-insured plan, and that plan is a church plan not subject to regulation under ERISA—which means that if Catholic Family Services invoked the accommodations, its TPA would not be legally required to provide contraceptive coverage. 79 Fed. Reg. at 51,095 n.8; see p. 5, *supra*.

4. In the alternative, petitioners contend (Pet. 15) that the Court should GVR in light of *Hobby Lobby* and *Wheaton*. The Court recently issued a GVR in another RFRA challenge to the accommodations that had been decided by a court of appeals before this Court's decision in *Hobby Lobby*. See *Notre Dame*, *supra* (No. 14-392). In light of its disposition of the petition for a writ of certiorari in *Notre Dame*, the Court may wish to GVR in this case as well.[8]

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the Court may wish to grant the petition, vacate the decision below, and remand for further consideration in light of *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

Respectfully submitted.

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[8] In this case, unlike *Notre Dame*, the court of appeals denied a petition for rehearing en banc based on *Hobby Lobby*. Pet. App. 137a-138a. But this Court has issued GVR orders in similar circumstances. See, *e.g.*, *Smith* v. *Delta Air Lines, Inc.*, No. 14-696 (Feb. 23, 2015).