No. 15-834

In the Supreme Court of the United States

UNIVERSITY OF DALLAS, 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 FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

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

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 31a-59a) is reported at 793 F.3d 449. An order of one of the district courts granting a preliminary injunction to some of the petitioners (Pet. App. 8a-28a) is reported at 10 F. Supp. 3d 725. The remaining district court orders (Pet. App. 1a-5a, 29a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2015. A petition for rehearing was denied on September 30, 2015 (Pet. App. 60a-72a). The petition for a writ of certiorari was filed on December 29, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

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

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*), cert. granted, Nos. 14-1453 and 14-1505 (Nov. 6, 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 com-

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

[2] See Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits 2015 Annual Survey* 58 (2015), http://files.kff.org/attachment/report-2015-employer-health-benefits-survey (*Health Benefits Survey*).

prehensive 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*). 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).

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).[3]

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-coverage requirement under a regulation that incorporates a longstanding definition from the Internal Revenue Code. *Hobby Lobby*, 134 S. Ct. at 2763 (quoting 26 U.S.C. 6033(a)(3)(A) and citing 45 C.F.R. 147.131(a)). In addition, recognizing that some other employers have religious objections to providing contraceptive coverage, the Departments developed "a system that seeks to respect the religious liberty" of such employers "while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives" as other women. *Id.* at 2759; see 77 Fed. Reg. 16,503 (Mar. 21, 2012). That

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[3] 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 has dropped from 56% in 2011 to 25% in 2015. *Health Benefits Survey* 8, 217.

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. 41,323-41,330, 41,346 (July 14, 2015) (to be codified at 45 C.F.R. 147.131(b)(2)(ii)).

a. The accommodation allows objecting employers to opt out of any obligation to provide contraceptive coverage and instead requires third parties to make separate payments for contraceptive services on behalf of 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).[4]

Rather than purchasing coverage from an insurer, some employers "self-insure" by assuming the financial risk of paying employee health claims themselves.

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

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

The accommodation operates differently if a self-insured organization has a "church plan" as defined in 29 U.S.C. 1002(33). Church plans are generally exempt from regulation under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* See 29 U.S.C. 1003(b)(2). The government's authority to require a TPA to provide coverage under the accommodation derives from ERISA. See 29 C.F.R. 2510.3-16(b); 80 Fed. Reg. at 41,323. Accordingly, if an eligible organization with a self-insured 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); 80 Fed. Reg. at 41,323 n.22.

In all cases, an employer that opts out under the accommodation has no obligation "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874. The employer also need not inform plan participants of the separate coverage provided by third parties. Instead, insurers and TPAs must provide such notice themselves, must do so "separate from" materials distributed in connection with the employer's group health coverage, and must make clear that the objecting employer plays no role in covering contraceptive services. 29 C.F.R. 2590.715-2713A(d); 45 C.F.R. 147.131(d).[5] 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-certify[ing]" 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

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[5] 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 Jan. 27, 2016).

Departments have also made available an alternative procedure for invoking the accommodation.

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

In light of this Court's interim order 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; 80 Fed. Reg. at 41,323. 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. 79 Fed. Reg. 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 or the Department of Labor will notify its issuers or TPAs of their obligation to provide separate contraceptive coverage. *Ibid.*

3. Petitioners are two Catholic dioceses and several Catholic nonprofit organizations. Pet. App. 41a. They provide or arrange health coverage for their employees and students through a combination of insured plans, self-insured plans subject to ERISA, and ERISA-exempt self-insured church plans. *Ibid.* The two dioceses are automatically exempt from the contraceptive-coverage requirement, and the remaining petitioners are eligible to opt out under the accommodation. *Id.* at 41a-42a & nn. 23 and 25.

Petitioners filed two 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 governmental interest." 42 U.S.C. 2000bb-1. Petitioners asserted that the accommodation substantially burdens their religious exercise because the government would arrange for their insurers and TPAs to provide employees and students with separate contraceptive coverage if petitioners themselves opted out. A district court granted preliminary injunctive relief to some of the petitioners. Pet. App. 1a-5a, 29a-30a. A different district court granted a permanent injunction to the remaining petitioners. *Id.* at 8a-28a.

4. The court of appeals consolidated this case with another RFRA challenge to the accommodation and reversed, unanimously holding that the accommoda-

tion does not substantially burden the exercise of religion. Pet. App. 31a-59a. The court explained that in determining whether a regulation imposes a substantial burden, a court may not question a claimant's characterization of its sincere religious beliefs. *Id.* at 44a. But the court held that a reviewing court must determine, as a matter of law, whether the challenged regulation imposes a substantial burden on the claimant's religious exercise that is cognizable under RFRA. *Ibid.*; see *id.* at 43a-49a.

In this case, the court of appeals emphasized that the accommodation allows petitioners to opt out of any obligation to provide, pay for, or facilitate access to contraceptives. Pet. App. 49a. Instead, the accommodation requires or encourages petitioners' insurers and TPAs to provide coverage and to do so entirely separately from the coverage provided by petitioners. *Id.* at 49a-54a. The court concluded that petitioners' sincere objections to the actions of those third parties do not constitute a substantial burden on petitioners' exercise of religion cognizable under RFRA: "The acts that violate [petitioners'] faith are the acts of the government, insurers, and [TPAs], but RFRA does not entitle [petitioners] to block third parties from engaging in conduct with which they disagree." *Id.* at 54a.

5. The court of appeals denied rehearing and rehearing en banc. Pet. App. 60a-72a. Judge Jones, joined by Judges Clement and Owen, dissented from the denial of rehearing en banc. *Id.* at 64a-72a. Judge Jones would have held that the accommodation imposes a substantial burden on petitioners' exercise of religion, but she expressed no view on whether the accommodation qualifies as the least restrictive means

of furthering a compelling governmental interest. *Id.* at 69a-70a.

DISCUSSION

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 female employees, students, and beneficiaries by arranging for third parties to provide those women with separate coverage under the accommodation. Parallel RFRA challenges to the accommodation are currently pending before this Court in *Zubik* v. *Burwell*, cert. granted, No. 14-1418 (Nov. 6, 2015), and six consolidated cases, including one arising from the decision below. See *East Tex. Baptist Univ.* v. *Burwell*, cert. granted, No. 15-35 (Nov. 6, 2015); see also *Priests for Life* v. *HHS*, cert. granted, No. 14-1453 (Nov. 6, 2015); *Roman Catholic Archbishop of Washington* v. *Burwell*, cert. granted, No. 14-1505 (Nov. 6, 2015); *Little Sisters of the Poor Home for the Aged* v. *Burwell*, cert. granted, No. 15-105 (Nov. 6, 2015); *Southern Nazarene Univ.* v. *Burwell*, cert. granted, No. 15-119 (Nov. 6, 2015); *Geneva College* v. *Burwell*, cert. granted, No. 15-191 (Nov. 6, 2015). The government therefore agrees with petitioners (Pet. 15-16) that the Court should hold this petition for a writ of certiorari pending the Court's decision in *Zubik* and the consolidated cases, and then dispose of the petition as appropriate in light of the Court's decision in those cases.

CONCLUSION

This Court should hold the petition for a writ of certiorari in this case pending the Court's decision in *Zubik* v. *Burwell*, cert. granted, No. 14-1418 (Nov. 6, 2015), and the consolidated cases, and then dispose of the petition as appropriate in light of the Court's decision in those cases.

Respectfully submitted.

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