Nos. 15-105 and 15-119

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL., PETITIONERS

v.

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

SOUTHERN NAZARENE UNIVERSITY, ET AL., PETITIONERS

v.

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

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

BRIEF FOR THE RESPONDENTS

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QUESTIONS 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 or encouraging third parties to provide their employees with separate contraceptive coverage after petitioners opt out. The questions presented are:

1. 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.

2. Whether the accommodation regulations violate the Establishment Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-149a)[1] is reported at 794 F.3d 1151. The order of the district court denying a preliminary injunction to some of the petitioners in No. 15-105 (Pet. App. 152a-189a) is reported at 6 F. Supp. 3d 1225. The order of a

[1] Unless otherwise noted, citations to "Pet. App." refer to the appendix to the petition for a writ of certiorari in No. 15-105.

different district court granting a preliminary injunction to the remaining petitioners in No. 15-105 (Pet. App. 190a-210a) is not published in the *Federal Supplement* but is available at 2013 WL 6804259. The order of the district court granting a preliminary injunction in No. 15-119 (No. 15-119 Pet. App. 156a-184a) is not published in the *Federal Supplement* but is available at 2013 WL 6804265.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 2015. The petitions for writs of certiorari were filed on July 23, 2015, and July 24, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

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

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

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

One of the Act's reforms requires insurers and employer-sponsored group health plans to cover immunizations, screenings, and other preventive services without imposing copayments, deductibles, or other cost-sharing requirements. 42 U.S.C. 300gg-13. Congress determined that broader and more consistent use of preventive services is critical to improving public health and that people are more likely to obtain appropriate preventive care when they do not have to pay for it out of pocket. 78 Fed. Reg. 39,872 (July 2, 2013); see *Priests for Life* v. *HHS*, 772 F.3d 229, 259-260 (D.C. Cir. 2014) (*PFL*), petitions for cert. pending, Nos. 14-1453 and 14-1505 (filed June 9 and 19, 2015).

The Act specifies that the preventive services to be covered without cost-sharing include "preventive care and screenings" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" (HRSA), a component of the Department of Health and Human Services (HHS). 42 U.S.C. 300gg-13(a)(4); see *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (*Hobby Lobby*). Congress included a specific provision for women's health services "to remedy the problem that women were paying significantly more out of pocket for preventive care and thus often failed to seek preventive services." *PFL*, 772 F.3d at 235; see *Hobby Lobby*, 134 S. Ct. at 2785-2786 (Kennedy, J., concurring).

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 Administra-

tion (FDA), which IOM found can greatly decrease the risk of unintended pregnancies, adverse pregnancy outcomes, and other negative health consequences for women and children. IOM, *Clinical Preventive Services for Women: Closing the Gaps* 10, 109-110 (2011) (*IOM Report*). IOM also noted that "[c]ontraceptive coverage has become standard practice for most private insurance and federally funded insurance programs" and that "health care professional associations"—including the American Medical Association and the American Academy of Pediatrics—"recommend the use of family planning services as part of preventive care for women." *Id.* at 104, 108.

Consistent with IOM's recommendation, the HRSA guidelines include all FDA-approved contraceptive methods, as prescribed by a doctor or other health care provider. 77 Fed. Reg. 8725 (Feb. 15, 2012); see *Hobby Lobby*, 134 S. Ct. at 2762. Accordingly, the regulations adopted by the three Departments responsible for implementing the relevant provisions of the Affordable Care Act (HHS, Labor, and the Treasury) include those contraceptive methods among the preventive services that insurers and employer-sponsored group health plans must cover without cost-sharing. 45 C.F.R. 147.130(a)(1)(iv) (HHS); 29 C.F.R. 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. 54.9815-2713(a)(1)(iv) (Treasury).[4]

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[4] Under the Act's grandfathering provision, health plans that have not made specified changes since the Act's enactment are exempt from many of the Act's reforms, including the requirement to cover preventive services. *Hobby Lobby*, 134 S. Ct. at 2763-2764; see 42 U.S.C. 18011. The percentage of employees in grandfathered plans is "quickly phasing down," *PFL*, 772 F.3d at 266

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

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

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n.25, having dropped from 56% in 2011 to 26% in 2014. *Health Benefits Survey* 7, 210.

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).

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

The accommodation operates differently if a self-insured organization has a "church plan" as defined in 29 U.S.C. 1002(33). Church plans are generally exempt from regulation under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* See 29 U.S.C. 1003(b)(2). The government's authority to require a TPA to provide coverage under the accommodation derives from ERISA. See 29 C.F.R. 2510.3-16(b); 80 Fed. Reg. at 41,323. Accordingly, if an eligible organization with a self-insured church plan invokes the accommodation, its TPA is not legally required to provide separate contraceptive coverage to the organization's employees, but the government will reimburse the TPA if it provides coverage voluntarily. 79 Fed. Reg. 51,095 n.8 (Aug. 27, 2014).

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

[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/

tively 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 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

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Resources/Forms-Reports-and-Other-Resources/Downloads/cms-10459-enrollee-notice.pdf (last visited Sept. 30, 2015).

so because, as the Court was aware, Wheaton had identified its insurers and TPAs in the course of the litigation. *Id.* at 2815 (Sotomayor, J., dissenting).

In light of this Court's interim order in *Wheaton*, the Departments augmented the accommodation to provide all eligible employers with an option essentially equivalent to the one made available to Wheaton. The regulations allow an eligible employer to opt out by notifying HHS of its objection rather than by sending the self-certification form to its insurer or TPA. 79 Fed. Reg. at 51,092. The employer need not use any particular form and need only indicate the basis on which it qualifies for the accommodation, as well as the type of plan it offers and contact information for the plan's insurers and TPAs. *Id.* at 51,094-51,095; see 29 C.F.R. 2590.715-2713A(b)(1)(ii)(B) and (c)(1); 45 C.F.R. 147.131(c)(1)(ii). If an employer opts out using this alternative procedure, HHS and the Department of Labor notify its issuers and TPAs of their obligation to provide separate contraceptive coverage. *Ibid.*

3. Petitioners are nonprofit religious organizations that provide or arrange health coverage for their employees and students. Petitioners object to covering some or all contraceptive services and are eligible to opt out of the contraceptive-coverage requirement under the accommodation.

a. The petitioners in No. 15-105 (collectively, the Little Sisters petitioners) are two groups of organizations. The first group consists of two nonprofit nursing homes affiliated with the Little Sisters of the Poor, an order of Catholic nuns that provides care for the elderly poor (collectively, the Little Sisters); the Christian Brothers Employee Benefit Trust (Christian Brothers Trust), an ERISA-exempt self-insured

church plan that provides health coverage to the Little Sisters' employees; and Christian Brothers Services, the plan's TPA. Pet. App. 14a, 34a. The second group consists of Reaching Souls, a nonprofit organization that trains pastors and provides care to orphans; Truett-McConnell College, a nonprofit religious college; and GuideStone Financial Resources, which maintains an ERISA-exempt self-insured church plan that provides coverage to individuals employed by Reaching Souls, Truett-McConnell, and other organizations. *Id.* at 14a-15a, 37a.

b. The petitioners in No. 15-119 are four nonprofit religious colleges and universities: Southern Nazarene University, Oklahoma Wesleyan University, Oklahoma Baptist University, and Mid-America Christian University (collectively, the Southern Nazarene petitioners). The Southern Nazarene petitioners provide or arrange health coverage for their employees and students through a variety of different coverage arrangements. Pet. App. 14a, 35a-36a.

4. Petitioners filed three separate suits challenging the accommodation under RFRA and on other grounds. RFRA 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. A district court denied a preliminary injunction in the suit brought by the Little Sisters, the Christian Brothers Trust, and Christian Brothers Services. Pet. App. 162a-189a.[6] A

[6] After the Tenth Circuit denied an injunction pending appeal, this Court granted interim injunctive relief conditioned on the provision of written notice to HHS that the Little Sisters satisfy

different district court granted preliminary injunctions in the two suits brought by the remaining petitioners. *Id.* at 190a-210a; 15-119 Pet. App. 156a-184a.

5. The court of appeals consolidated appeals from the three orders and held that petitioners are not entitled to preliminary injunctive relief because their claims are unlikely to succeed on the merits. Pet. App. 2a-149a.

a. As relevant here, the court of appeals first held that the accommodation does not substantially burden the exercise of religion under RFRA. Pet. App. 42a-95a. The court began by highlighting the unusual nature of petitioners' claim, "which attacks the Government's attempt to accommodate religious exercise by providing a means to opt out of compliance with a generally applicable law." *Id.* at 42a-43a. The court emphasized that, under the accommodation, "the act of opting out * * * excuses [objecting employers] from participating in the provision of contraceptive coverage" and ensures that they do not "provide, pay for, or otherwise facilitate that coverage." *Id.* at 60a. Instead, the accommodation transfers those obligations to third parties—an approach that is "typical of religious objection accommodations that shift responsibility to non-objecting entities * * * after an objector declines to perform a task on religious grounds." *Id.* at 68a-69a; see *id.* at 69a n.31 (collecting examples).

The court of appeals emphasized that it was not questioning the sincerity or the "theological merit" of petitioners' religious objections to the accommodation. Pet. App. 55a (citation omitted); see *id.* at 86a-87a &

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the eligibility requirements for the accommodation. Pet. App. 150a-151a.

n.46. But it explained that the question whether a regulation imposes a substantial burden cognizable under RFRA is a question of law that must be resolved by the court, not a question of fact controlled by the challenger's sincere religious beliefs. *Id.* at 43a-56a. After carefully analyzing petitioners' challenges to the accommodation, the court concluded that petitioners had failed to establish the existence of a substantial burden because their challenges either rested on errors about how the accommodation operates or focused on the government's arrangements with third parties rather than any burdens imposed on petitioners themselves. *Id.* at 63a-95a. The court explained that although petitioners "sincerely oppose contraception, * * * their religious objection cannot hamstring government efforts to ensure that plan participants and beneficiaries receive the coverage to which they are entitled" under federal law. *Id.* at 91a.

b. The court of appeals next rejected the Little Sisters petitioners' contention that the contraceptive-coverage regulations violate the Establishment Clause by providing an automatic exemption for houses of worship and an opt-out accommodation for other religious nonprofit organizations. Pet. App. 104a-111a. The court explained that the regulations incorporate a "longstanding and familiar" distinction that applies in a variety of contexts in the Internal Revenue Code. *Id.* at 104a (quoting *PFL*, 772 F.3d at 238). The court emphasized that the regulations rely on "'neutral, objective criteria,'" and it noted that the Little Sisters petitioners had "cite[d] no case holding that [such] organizational distinctions, as opposed to those based on denomination or religiosity, run afoul of the Establishment Clause." *Id.* at 108a-109a (citation omitted).

c. Judge Baldock dissented in part. Pet. App. 122a-149a. He agreed with the majority that the accommodation does not impose a substantial burden on employers with insured plans. *Id.* at 122a. He reasoned that insurers are already required by the Affordable Care Act to provide contraceptive coverage, and that when an employer with an insured plan opts out under the accommodation the only result is to absolve the employer of any role in providing the required coverage. *Id.* at 127a-128a. With respect to self-insured employers, however, Judge Baldock concluded that the accommodation imposes a substantial burden because the government responds to the employer's opt-out by requiring (or, in the case of an ERISA-exempt church plan, encouraging) the relevant TPA to provide coverage in the employer's stead. *Id.* at 128a-146a.

Judge Baldock concluded that the Little Sisters, which have a self-insured church plan, were not entitled to preliminary injunctive relief because of an unusual factual circumstance: The primary TPA for the Little Sisters' health plan, Christian Brothers Services, had "promised not to provide contraceptive coverage even if [the] Little Sisters opt[] out" under the accommodation (indeed, Christian Brothers Services joined the Little Sisters' RFRA challenge). Pet. App. 145a; see *id.* at 14a. Judge Baldock therefore concluded that the Little Sisters had not established a substantial burden because it appeared that their employees would not receive contraceptive coverage even if they opted out. *Id.* at 145a.

6. The court of appeals sua sponte called a poll to consider rehearing en banc, which was denied. Judge Hartz, joined by Judges Kelly, Tymkovich, Gorsuch,

and Holmes, dissented from the denial of rehearing en banc. 2015 WL 5166807. In Judge Hartz's view, the court should have treated petitioners' sincere religious objection to opting out under the accommodation as dispositive of the substantial-burden inquiry. *Id.* at *1. But he emphasized that "[r]esolution of the substantial-burden question does not * * * resolve this litigation," and he would have returned the case to the panel to allow it to determine whether the accommodation qualifies as the least restrictive means of furthering a compelling government interest. *Id.* at *2.

ARGUMENT

Petitioners principally contend that RFRA entitles objecting employers not only to opt out of providing contraceptive coverage themselves, but also to prevent the government from eliminating the resulting harm to their female employees and beneficiaries by arranging for third parties to provide those women with separate coverage. The court of appeals correctly rejected that argument, joining six of its sister circuits in holding that the accommodation is consistent with RFRA and with this Court's decision in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). But the Eighth Circuit recently reached the opposite conclusion, creating a circuit conflict on an important question of federal law that should be resolved by this Court. That question is presented in a total of seven pending petitions for writs of certiorari. In the government's view, the most suitable vehicle for resolving it is *Roman Catholic Archbishop of Washington* v. *Burwell*, No. 14-1505 (filed June 19,

2015) (*RCAW*).[7] These petitions should therefore be held pending the disposition of the petition in *RCAW* and, if that petition is granted, the Court's decision in that case. The Little Sisters petitioners' separate contention that the accommodation regulations violate the Establishment Clause is without merit and has been uniformly rejected by the courts of appeals. Further review of that question is thus unwarranted regardless of the disposition of the *RCAW* petition.

1. This Court should resolve the circuit conflict over the viability of RFRA challenges to the accommodation, but the pending petition in *RCAW* is a more suitable vehicle in which to do so.

a. The accommodation exempts religious objectors from the generally applicable requirement to provide contraceptive coverage, while also seeking to ensure that third parties separately provide the affected women with the coverage to which those women are legally entitled. In our pluralistic society, that sort of substitution of obligations is an appropriate means of accommodating religious objectors while also protecting other important interests, such as women's interest in full and equal health coverage. The court of appeals correctly held that notwithstanding petitioners' sincere religious objections to contraceptive coverage, such an accommodation does not impose a substantial burden cognizable under RFRA. As the court explained, "RFRA does not prevent the Government from reassigning obligations after an objector opts out

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[7] The other petitions presenting the question are *Geneva College* v. *Burwell*, No. 15-191 (filed Aug. 11, 2015); *East Texas Baptist University* v. *Burwell*, No. 15-35 (filed July 8, 2015); *Priests for Life* v. *HHS*, No. 14-1453 (filed June 9, 2015); and *Zubik* v. *Burwell*, No. 14-1418 (filed May 29, 2015).

simply because the objector strongly opposes the ultimate goal of the generally applicable law" from which it has been exempted. Pet. App. 91a.

For the reasons set forth in the government's briefs in opposition to the other pending petitions presenting materially identical arguments, petitioners' challenges to the court of appeals' substantial-burden analysis lack merit. As those briefs further demonstrate, the accommodation would in any event survive RFRA scrutiny because it is the least restrictive means of furthering compelling government interests, including "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." *Hobby Lobby*, 134 S. Ct. at 2785-2786 (Kennedy, J., concurring); see *id.* at 2799-2800 & n.23 (Ginsburg, J., dissenting).[8]

b. The government previously argued that RFRA challenges to the accommodation did not warrant this Court's review because those challenges had been rejected by every court of appeals to consider them—seven courts in all. See Pet. App. 95a; *Grace Schools* v. *Burwell*, No. 14-1430, 2015 WL 5167841, at *17 (7th Cir. Sept. 4, 2015); *Michigan Catholic Conference & Catholic Family Servs.* v. *Burwell*, No. 13-2723, 2015 WL 4979692, at *12 (6th Cir. Aug. 21, 2015); *Catholic Health Care Sys.* v. *Burwell*, 796 F.3d 207, 226 (2d

[8] See Br. in Opp. at 10-27, *East Texas Baptist Univ.* v. *Burwell*, No. 15-35 (Sept. 9, 2015); Br. in Opp. at 13-31, *Zubik* v. *Burwell* and *Geneva College* v. *Burwell*, Nos. 14-1418 & 15-191 (Aug. 20, 2015); Br. in Opp. at 13-29, *Priests for Life* v. *HHS* and *Roman Catholic Archbishop of Wash.* v. *Burwell*, Nos. 14-1453 & 14-1505 (Aug. 12, 2015).

Cir. 2015); *East Texas Baptist Univ.* v. *Burwell*, 793 F.3d 449, 463 (5th Cir. 2015), petition for cert. pending, No. 15-35 (filed July 8, 2015); *Wheaton College* v. *Burwell*, 791 F.3d 792, 799-801 (7th Cir. 2015); *University of Notre Dame* v. *Burwell*, 786 F.3d 606, 618-619 (7th Cir. 2015); *Geneva College* v. *Secretary HHS*, 778 F.3d 422, 439-440 (3d Cir. 2015), petitions for cert. pending, Nos. 14-1418 and 15-191 (filed May 29 and Aug. 11, 2015); *Priests for Life* v. *HHS*, 772 F.3d 229, 246 (D.C. Cir. 2014), petitions for cert. pending, Nos. 14-1453 and 14-1505 (filed June 9 and 19, 2015).

Recently, however, the Eighth Circuit held that objecting employers' religious opposition to the accommodation is sufficient to establish a substantial burden under RFRA even though that opposition is based on actions that the government and third parties would take in response to the employers' opt-out. *Sharpe Holdings, Inc.* v. *HHS*, No. 14-1507, 2015 WL 5449491, at *8-*9 (Sept. 17, 2015); see *Dordt College* v. *Burwell*, No. 14-2726, 2015 WL 5449504, at *2 (Sept. 17, 2015) (applying *Sharpe Holdings* in a parallel case). The Eighth Circuit further held that—at least on the preliminary-injunction record before it—the accommodation does not qualify as the least restrictive means of furthering a compelling government interest because, in the court's view, the government could provide contraceptive coverage to the affected women by other means. *Sharpe Holdings*, 2015 WL 5449491, at *10-*12.

The Eighth Circuit recognized that its substantial-burden holding conflicted with the decisions of every other court of appeals to consider the issue. *Sharpe Holdings*, 2015 WL 5449491, at *7 & n.11. Its least-restrictive-means holding likewise conflicted with the

D.C. Circuit's conclusion that the accommodation satisfies RFRA scrutiny because it "requires as little as it can from the objectors while still serving the government's compelling interests." *PFL*, 772 F.3d at 237; see *id.* 256-267; see also *University of Notre Dame*, 786 F.3d at 616-618.

The Eighth Circuit's decision thus creates a square circuit conflict on the viability of RFRA challenges to the accommodation—a vital component of Congress's effort to ensure that all Americans have full and equal access to preventive health services. In so doing, moreover, the Eighth Circuit relied on a sweeping and erroneous interpretation of RFRA under which an objection by an employer would effectively dictate the government's independent arrangements with third parties and prevent its female employees and beneficiaries from receiving the full and equal health coverage to which they are entitled under federal law. This Court should therefore grant review in an appropriate vehicle to resolve the circuit conflict and correct the Eighth Circuit's error.

c. As the government has previously explained, the pending petition in *RCAW* appears to be the best available vehicle in which to consider RFRA challenges to the accommodation. See Br. in Opp. at 30-31, *Priests for Life* v. *HHS* and *RCAW* v. *Burwell*, Nos. 14-1453 & 14-1505 (Aug. 12, 2015) (*RCAW* Opp.).

First, the *RCAW* petition presents all of the health coverage arrangements that have given rise to RFRA challenges to the accommodation. *RCAW* Opp. 30. The accommodation operates somewhat differently with respect to insured plans, self-insured plans subject to ERISA, and ERISA-exempt self-insured church plans. See pp. 5-8, *supra*. As Judge Baldock's

partial dissent in this case illustrates, some judges have concluded that those differences are material to the RFRA analysis. Pet. App. 122a; see also, *e.g.*, *Roman Catholic Archbishop of Wash.* v. *Sebelius*, 19 F. Supp. 3d 48, 72-85 (D.D.C. 2013). Accordingly, the Court should grant review in a case that would allow it to resolve the validity of the accommodation as applied to all three plan types. Here, the *Little Sisters* petition (No. 15-105) is not an appropriate vehicle because it includes only parties with ERISA-exempt church plans. Pet. App. 14a-15a, 34a, 37a. In *Southern Nazarene* (No. 15-119), petitioners now state (Pet. 33-34) that they include organizations with insured plans, a self-insured plan, and an ERISA-exempt self-insured church plan.[9] The government has no reason to doubt that statement, but it notes that some of the relevant information is not found in the preliminary-injunction record and was instead provided by the Southern Nazarene petitioners in their appellate briefs.[10] *RCAW*, in contrast, arises from a decision on cross-motions for summary judgment and contains no similar gaps in the record. *PFL*, 772 F.3d at 239-242.

Second, the court of appeals' opinion in *RCAW* not only addressed the substantial-burden issue but also

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[9] The Southern Nazarene petitioners also note (Pet. 34) that they include organizations with student health plans. Courts considering RFRA challenges to the accommodation have not distinguished between student health plans and insured employee health plans, but in any event the *RCAW* petition also includes a student health plan. *PFL*, 772 F.3d at 240.

[10] See Pet. App. 35a n.14 ("The descriptions of Mid-America Christian's insurance arrangements in the record before us are inconsistent."); 14-6026 Gov't C.A. Br. 9 n.3 ("It is not entirely clear from the Joint Stipulation of Facts how Southern Nazarene University's health plan operates.").

held, in the alternative, that the accommodation qualifies as the least-restrictive means of furthering compelling government interests. *RCAW* Opp. 31; see *PFL*, 772 F.3d at 256-267. That would make *RCAW* a more suitable vehicle than this case, where some of the potentially dispositive issues were not addressed by either the panel or the dissenters from the denial of rehearing en banc, who would have returned the case to the panel to consider the application of RFRA scrutiny. 2015 WL 5166807, at *2.

Finally, the *Little Sisters* petition would be an especially unsuitable vehicle because of the unusual and uncertain circumstances of the lead petitioners in that case. The Little Sisters provide coverage to their employees through an ERISA-exempt church plan, and the plan's principal TPA (a co-petitioner in this case) has made clear that it would not provide contraceptive coverage even if the Little Sisters invoked the accommodation. Pet. App. 14a; see *id.* at 145a (Baldock, J., dissenting in part). The Little Sisters petitioners therefore assert (Pet. ii, 2-3, 12, 20-21) that the Court should grant their petition to determine whether the accommodation is consistent with RFRA if the circumstances of a particular employer make clear that its employees and beneficiaries would not receive contraceptive coverage if the employer invoked the accommodation.

Such a circumstance would, if anything, *weaken* any claim that the accommodation imposes a substantial burden. Cf. Pet. App. 145a (Baldock, J., dissenting in part). But the more important point for present purposes is that, as the Little Sisters petitioners acknowledge in a footnote, the factual predicate for their argument is uncertain: In addition to Christian

Brothers Services, the Little Sisters' self-insured church plan apparently also relies on an entity called Express Scripts to administer prescription drug claims. Pet. 12 n.2. It appears that Express Scripts may qualify as a TPA for purposes of the accommodation regulations, and the Little Sisters petitioners state that Express Scripts may be willing to provide contraceptive coverage under the accommodation. *Ibid.* But the preliminary-injunction record contains no information about Express Scripts, and the consequences that would follow if the Little Sisters invoked the accommodation are thus unclear.[11] The Court should decline to take up the question presented in a case in which the petitioners' legal arguments focus in substantial part on such uncertain extra-record facts, and which in any event presents an idiosyncratic fact pattern.

2. The Little Sisters petitioners also briefly renew their contention (Pet. 33-37) that the accommodation regulations violate the Establishment Clause. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. No further review of that issue is warranted.

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[11] See Pet. App. 145a (Baldock, J., dissenting in part) (declining to address the Little Sisters petitioners' arguments based on Express Scripts because "they have not sufficiently developed this theory"); see also Mem. for Resp. in Opp. at 28-29 & n.7, No. 13A691 (describing the lack of record information regarding Express Scripts in opposing the Little Sisters petitioners' application for an injunction pending appeal); 13-1540 Gov't C.A. Br. 19 n.3 (explaining that the Little Sisters petitioners "made no reference to Express Scripts in their complaint or in their preliminary injunction filings").

Incorporating a definition from a longstanding provision of the Internal Revenue Code, the contraceptive-coverage regulations provide an automatic exemption for "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order." 26 U.S.C. 6033(a)(3)(A); see 45 C.F.R. 147.131(a). That automatic exemption was intended to "respect[] the unique relationship between a house of worship and its employees in ministerial positions," 76 Fed. Reg. 46,623 (Aug. 3, 2011), and it was "provided against the backdrop of the longstanding governmental recognition of a particular sphere of autonomy for houses of worship, such as the special treatment given to those organizations in the Code," 80 Fed. Reg. at 41,325.[12]

The Little Sisters petitioners assert that the Departments violated the Establishment Clause by providing an automatic exemption to houses of worship and an opt-out accommodation to other religious organizations. But houses of worship as defined in the exemption regulation "have long enjoyed advantages (notably tax advantages) over other entities, without these advantages being thought to violate the establishment clause." *PFL*, 772 F.3d at 272 (citation omitted); see Pet. App. 105a (citing examples). The view advanced by the Little Sisters petitioners would call into question other provisions of federal law incorpo-

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[12] Contrary to the Little Sisters petitioners' characterization (Pet. 35-36), therefore, the automatic exemption was "not a mere product of the likelihood that [exempted organizations] hire coreligionists," but rather reflects the "special status" of houses of worship "under longstanding tradition in our society and under federal law." 80 Fed. Reg. at 41,325.

rating that "familiar regulatory distinction between houses of worship and religiously affiliated organizations." *PFL*, 772 F.3d at 272-273.

The Little Sisters petitioners cite no authority supporting their assertion that the Establishment Clause prohibits such neutral, nondiscriminatory distinctions based on organizational form. Their reliance on cases such as *Larson* v. *Valente*, 456 U.S. 228 (1982), is entirely misplaced. See Pet. 34-36. The statute held unconstitutional in *Larson* was "drafted with the explicit intention" of requiring "particular religious denominations" to comply with registration and reporting requirements while excluding other religious denominations. 456 U.S. at 254. *Larson* and similar decisions thus firmly establish that "one religious denomination cannot be officially preferred over another." *Id.* at 244. But they cast no doubt on the validity of the regulations at issue here, which "draw distinctions based on organizational form and purpose, and not religious belief or denomination." *PFL*, 772 F.3d at 273.

The Little Sisters petitioners do not contend that the court of appeals' rejection of their Establishment Clause challenge implicates any circuit conflict. Indeed, every other court of appeals to consider the question has reached the same result, and no judge has dissented on that issue. See *PFL*, 772 F.3d at 272-273; *Michigan Catholic Conference & Catholic Family Servs.* v. *Burwell*, 755 F.3d 372, 394-395 (6th Cir. 2014), vacated on other grounds, 135 S. Ct. 1914 (2015), reissued in relevant part, 2015 WL 4979692 (Aug. 21, 2015); *University of Notre Dame* v. *Sebelius*, 743 F.3d 547, 560 (7th Cir. 2014), vacated on other grounds, 135 S. Ct. 1528 (2015); see also *Geneva Col-*

lege, 778 F.3d at 443 (rejecting analogous arguments presented under RFRA). The Establishment Clause question thus does not warrant this Court's review.

CONCLUSION

The Court should hold the petitions for writs of certiorari pending the disposition of the petition in *Roman Catholic Archbishop of Washington* v. *Burwell*, No. 14-1505 (filed June 19, 2015), and then dispose of these petitions as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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