No. _____

In the Supreme Court of the United States

HOUSTON BAPTIST UNIVERSITY,
EAST TEXAS BAPTIST UNIVERSITY, AND
WESTMINSTER THEOLOGICAL SEMINARY, PETITIONERS
v.
SYLVIA MATHEWS BURWELL,
SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The text of the Affordable Care Act says nothing about contraceptive coverage, but it does require employers to "provide coverage" for "preventive care" for women. Despite the obvious implications for many employers of deep religious conviction, HHS interpreted that statutory mandate to require all nonexempt employers to provide at no cost the full range of FDA-approved contraceptives, including some that cause abortions, under the auspices of their plans. This Court has already considered this contraception mandate and concluded that it imposes a substantial burden on religious exercise and violates the Religious Freedom Restoration Act (RFRA). However, the government offers nonprofit religious employers such as petitioners one option for complying with the contraception mandate not available to for-profit employers—namely, executing certain forms that ensure that their employees receive the full range of contraception coverage under the auspices of the employers' healthcare plans and, in the government's view, put these religious employers in compliance with the statutory "provide coverage" obligation. It is undisputed that petitioners have a sincere religious objection to complying with the mandate in this way and that non-compliance will result in draconian fines. The question presented is:

Does the availability of a regulatory option for nonprofit religious employers to comply with HHS's contraceptive mandate eliminate either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014)?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE

Petitioners, who were Plaintiffs below, are Houston Baptist University, East Texas Baptist University, and Plaintiff-Intervenor Westminster Theological Seminary. No petitioner has a parent corporation. No publicly held corporation owns any portion of any of the Petitioners.

Respondents, who were Defendants below, are Sylvia Burwell in her official capacity as Secretary of the United States Department of Health and Human Services; the United States Department of Health and Human Services; Thomas E. Perez in his official capacity as Secretary of the United States Department of Labor; the United States Department of Labor; Jacob J. Lew, in his official capacity as Secretary of the United States Department of the Treasury; and the United States Department of the Treasury.

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioners are two religious colleges and a theological seminary that provide generous healthcare plans to their employees. Those plans include free access to fourteen different kinds of contraceptives. But those plans exclude four types of contraceptives that petitioners believe constitute abortifacients. No one doubts the sincerity of petitioners' religious beliefs. Nonetheless, the Department of Health and Human Services believes that petitioners' employees must have free access to those four contraceptives under the auspices of petitioners' plans in order for petitioners to comply with the Affordable Care Act and the agency's contraceptive mandate and to avoid draconian penalties.

This Court addressed a nearly identical dynamic in upholding the religious exercise claim of two for-profit companies in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014). Although the underlying contraception mandate and the penalties for non-compliance are identical here, there is one potentially salient difference when it comes to nonprofit religious employers: The agencies offer religious nonprofits an option for complying with the contraception mandate that is not available to for-profit companies. Under this so-called "accommodation," nonprofit religious employers may comply with the contraception mandate by executing certain forms. Those forms have important legal and practical consequences. As a legal matter, they suffice to allow the government to deem the nonprofit religious employers and their plans in compliance with their statutory obligation to "provide coverage," which as a regulatory matter must include the full range of FDA-approved contra-

ceptives. The forms also allow the government to conclude that the benefits are being provided under the operation of the nonprofit religious employers' own plans. And, as a practical matter, the requisite forms are sufficient to ensure that employees of the nonprofit religious employers, in fact, will be able to receive the full range of FDA-approved contraceptives in connection with their employers' healthcare plans.

Because this regulatory option for complying with the contraception mandate has the same legal and practical consequences as complying with the mandate directly, it is not surprising that numerous religious employers find it no more compatible with their religious beliefs. They sincerely believe that fulfilling the contraceptive mandate via this regulatory option facilitates the provision of contraceptives and abortifacients and makes them complicit in actions that violate their religious beliefs. No one, it bears repeating, questions the sincerity of those religious beliefs. And a long line of this Court's cases, including but by no means limited to *Hobby Lobby*, make clear beyond cavil that courts are not free to second-guess the sincerity of those religious beliefs by suggesting that the degree of involvement deemed sufficient by the government is insufficient to violate religious scruples. Thus, especially after *Hobby Lobby*, there should be no doubt that the contraceptive mandate imposes a substantial burden on petitioners' religious exercise. The contraceptive mandate and the penalties for noncompliance are identical, and petitioners sincerely believe that the regulatory option for complying with the mandate violates their religion. That should be the end of the substantial burden inquiry.

Remarkably, however, the court of appeals here (like other circuits) concluded that there is no substantial burden on religious exercise. It did so only by yielding to the temptation to conclude that the degree of complicity demanded by the government was insufficient to constitute a substantial burden. That conclusion plainly conflicts with *Hobby Lobby* and this Court's other decisions forbidding courts from engaging in any such inquiry.

That would be reason enough for this Court's plenary review, but a number of additional considerations strongly support this Court's review at this juncture. This Court has already had to use its extraordinary authority under the All Writs Act in three different cases involving challenges to the contraception mandate by nonprofit religious employers. The felt need for that extraordinary intervention not only underscores the extraordinary importance of this issue, but also makes clear that deferring review will produce not orderly percolation, but the need for further extraordinary intervention by this Court. What is more, petitioners here are at the end of the line with respect to their RFRA claims. Unlike cases that arise in a preliminary injunction posture, petitioners prevailed on summary judgment only to have the court of appeals conclude they could not even show a substantial burden. That reasoning is plainly inconsistent with this Court's precedents. It is inevitable that this Court will need to address this issue on the merits. It should do so in time to ensure that petitioners' rights to religious exercise are not sacrificed to a fundamentally misguided decision about what constitutes a substantial burden and what con-

stitutes the proper role for an Article III court in evaluating sincere religious beliefs.

OPINIONS BELOW

The opinion of the district court is reported at 988 F. Supp. 2d 743. App.31a. The opinion of the Fifth Circuit is reported at --- F.3d ---, 2015 WL 3852811. App.1a.

JURISDICTION

The judgment of the Fifth Circuit was entered on June 22, 2015. App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * * ." U.S. Const. amend. I. The relevant statutory and regulatory provisions are in Appendix D (App.89a).

STATEMENT

The Contraceptive Mandate

The Affordable Care Act mandates that any "group health plan" must "provide coverage" for certain "preventive care" for women without "any cost sharing." 42 U.S.C. § 300gg-13(a), (a)(4). Congress itself did not define "preventive care" but instead allowed HHS to do so. 42 U.S.C. § 300gg-13(a)(4). HHS in turn outsourced that task to the Institute of Medicine, a private organization. *Hobby Lobby*, 134 S.Ct. at 2762. The Institute's definition, which HHS adopt-

ed wholesale, includes all FDA-approved contraceptive methods and sterilization procedures, including four methods that can prevent the implementation of a fertilized egg: Plan B (the "morning-after" pill), Ella (the "week-after" pill), and two types of intrauterine devices (IUDs). *Id.* at 2762-63. Failure to "provide coverage" for all FDA-approved methods and procedures triggers severe penalties. See, *e.g.*, 26 U.S.C. § 4980D ($100 per day per affected individual); 26 U.S.C. § 4980H ($2000 per year per full-time employee).

The mandate to cover all FDA-approved forms of contraception is not universal; instead, it is subject to both statutory and regulatory exemptions. First, as a statutory matter, employers with "grandfathered" healthcare plans—plans that existed before March 30, 2010, and have not made certain changes after that date—need not comply with the "provide coverage" mandate at all. See 42 U.S.C. § 18011; *Hobby Lobby*, 134 S.Ct. at 2764. Although these plans cover tens of millions of individuals and must comply with a subset of ACA reforms that "HHS has described as 'particularly significant protections,'" the statutory mandate to cover preventative care, which has been administratively interpreted to mandate contraceptive coverage, "is expressly excluded from this subset." *Id.* at 2780 (quoting 75 Fed. Reg. 34540 (June 17, 2010)); see also 42 U.S.C. § 18011(a)(4). That exclusion exists "simply [to serve] the interest of employers in avoiding the inconvenience of amending an existing plan." *Hobby Lobby*, 134 S.Ct. at 2764. Although HHS has suggested that it intends to phase grandfathered plans out over time, it has not actually done so; instead, "[g]randfathered plans may remain

so indefinitely." *Hobby Lobby* v. *Sebelius*, 723 F.3d 1114, 1124 (10th Cir. 2013) (en banc).

Second, the statute provides that employers with fewer than fifty employees are not required to offer insurance at all. See 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d). Accordingly, these small employers—who collectively employ an estimated 34 million Americans—can avoid the contraceptive mandate by declining to offer their employees insurance. *Hobby Lobby*, 134 S.Ct. at 2764.

Third, after an initial outcry, HHS recognized that its contraceptive mandate implicated sincere religious objections and thus created a regulatory exemption for certain "religious employers." 78 Fed. Reg. 39870, 39874 (July 2, 2013); 45 C.F.R. 147.131(a). This exemption is available to tens of thousands of churches and associations of churches, as well as to "integrated auxiliaries" of churches—a category defined by how closely an organization is affiliated with or controlled by a church. 26 C.F.R. 1.6033-2(h). A "religious employer" need not do anything to avail itself of this exemption; it need not certify its religious beliefs, execute or deliver any forms, provide notice to HHS or any other government authority, or do anything that would result in its employees receiving contraceptive coverage in connection with its healthcare plan.

Nonprofit Religious Organizations and the Mandate

Although HHS was well aware that religious objections to the contraceptive mandate were by no means limited to houses of worship, their associa-

tions, or their "integrated auxiliaries," it nonetheless refused to exempt other nonprofit religious organizations from the statutory requirement to provide preventative coverage, which by regulation extends to providing all FDA-approved contraceptives free of cost.[1] Accordingly, countless religious colleges and seminaries, faith-based charities, orders of nuns, and other religious organizations remain subject to the contraceptive mandate. Instead of exempting these nonprofit employers, HHS offered them an additional means, unavailable to objecting for-profit employers, through which they can "comply" with the mandate to provide contraceptive coverage. 78 Fed. Reg. at 39879 ("an eligible organization is considered to comply with section 2713 of the PHS Act"). To be clear, this so-called "accommodation" is a means by which the nonprofit can fulfill its statutory obligation to provide coverage, not an exemption from that obligation.

More specifically, this regulatory option requires a nonexempt religious employer to "self-certify" that it is a religious employer and has religious objections to providing some or all FDA-approved contraceptive methods. 26 C.F.R. 54.9815-2713AT(b)(ii)(A), (c)(1). By doing so, the employer triggers a regulation that

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[1] The government's criterion for distinguishing between government-recognized "religious employers" and merely "eligible organizations" like petitioners is based entirely on its assumption that houses of worship "are more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. 39870, 39874 (July 2, 2013).

requires either its insurer or, in the case of a self-insured employer (which many religious employers are), its third party administrator ("TPA") to make "separate payments for contraceptive services directly for plan participants and beneficiaries." 78 Fed. Reg. at 39876; see 26 C.F.R. 54.9815–2713AT(b)(2), (c)(2). In other words, unlike the exemption provided to grandfathered plans and religious employers, the "accommodation" does not excuse the employer from ensuring that participants in its plan receive contraceptive coverage in connection with that plan. It instead provides a regulatory mechanism that enables the employer to satisfy both the statutory obligation to provide preventative care and the regulatory obligation to provide contraception coverage, and thereby "assur[e] that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage." 77 Fed. Reg. 16501, 16503 (Mar. 21, 2012).

Originally, objecting nonprofits had only one option for "self-certifying": executing and delivering to its insurer or TPA Employment Benefits Security Administration ("EBSA") Form 700. App.140a. The execution of this document is critical not only to discharging the employer's statutory/regulatory obligation, but also to the actual provision of the objected-to coverage. As the form states on its face, upon execution and delivery, it becomes "an instrument under which the plan is operated." *Ibid.* In particular, it designates the TPA as "plan administrator and claims administrator," not generally, but "solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39879; 29 C.F.R. 2510.3–16(b), (c).

That designation is essential because without it, a TPA would have no contractual authority to pay *any* claims (let alone claims for contraceptive coverage excluded from the employer's plan), as a self-insured employer pays claims itself. And under ERISA, self-funded plans can be modified only by a written document. 29 U.S.C. § 1102(a)(1). Accordingly, execution of Form 700 is necessary not only to trigger the regulatory obligation of the TPA to provide contraceptive coverage to the religious organization's employees, but also to "ensure[] that there is a party with legal authority"—both as a contractual matter and for purposes of ERISA liability—to make payments to plan beneficiaries for contraceptive services. 78 Fed. Reg. at 39879. Only if an employer executes an instrument that amends its plan in that manner does a TPA become both obligated and authorized to provide the objected-to coverage, and eligible for 115% reimbursement for the costs of doing so. See 45 C.F.R. 156.50(d)(1)-(3).

The "Augmented" Regulatory Option for Compliance with the Contraceptive Mandate

Unsurprisingly, religious organizations found little solace in a so-called "accommodation" that continues to require them to satisfy their statutory/regulatory obligation to provide the objected-to contraceptive coverage, but allows them to do so by effectively amending their own plans to authorize their own issuers or administrators to provide that coverage, and simply excuses them only from paying for the coverage directly. After all, these organizations do not merely object to paying for or being the direct provider of contraceptive coverage; they object

to taking actions that make them complicit in, or facilitate, access to abortifacients. Filing a form that the government itself deems sufficient to treat the religious employers as providing the coverage required by the statute and regulations certainly supplies a reasonable basis for religious employers to believe that they are at least facilitating the coverage to which they object. Accordingly, several nonprofit religious organizations (including petitioners) brought lawsuits challenging the contraception mandate as applied to nonprofit religious organizations as, among other things, a violation of the Religious Freedom Restoration Act.

When one of those lawsuits reached this Court in the form of an application for an injunction pending appeal, the Court responded by issuing a rare injunction under the All Writs Act excusing the employers from executing Form 700 and instead ordering:

> If the employer applicants inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicants the challenged provisions of the [ACA] and related regulations pending final disposition of the[ir] appeal.

Little Sisters of the Poor Home for the Aged v. *Sebelius*, 134 S.Ct. 1022 (2014). Because the applicants in that case were self-insured through a church plan, this relief not only prevented them from being forced to execute Form 700, but also has the practical effect

of ensuring that their TPAs would have no legal authority to begin providing the objected-to coverage until their legal challenges were resolved. The Court then proceeded to order extraordinary injunctive relief in *Wheaton College* v. *Burwell*, 134 S.Ct. 2806 (2014).

HHS responded to these orders by revising its regulation in form but not substance, and continuing to require objecting nonprofits to file forms that HHS deems sufficient to put them in compliance with the statutory/regulatory obligation to provide the objected-to contraceptives. Specifically, HHS "augmented" the regulation by allowing an objecting employer to notify HHS of its religious objections instead of executing and delivering Form 700 to its insurer or TPA. Just as with Form 700, however, this notification avenue does not exempt the nonprofit from the contraceptive mandate. Nor does it consist solely of informing HHS of a religious objection. Instead, like Form 700, it serves as "an instrument under which the plan is operated." App.143a.

To that end, the notice must inform HHS of the name and type of the employer's health plan, as well as "the name and contact information for any of the plan's [TPAs]." 79 Fed. Reg. 51092, 51094-95 (Aug. 27, 2014). "If" the religious organization submits this "necessary" information, the government "will send a separate notification to" its insurer or TPA informing of its new "obligations" to provide contraceptive coverage to participants in the organization's plan and its designation as a plan and claims administrator for that purpose only. *Id.* at 51095; 29 C.F.R. 2510.3-16(b). And if the employer takes these steps, it will

ensure that its employees receive no-cost access to the full range of FDA-approved contraceptives under the auspices of its plan, and HHS will deem the employer in compliance with its statutory/regulatory obligation to do just that.

In sum, then, whether an employer executes Form 700 or provides notice to HHS, "[t]he result is the same." App.8a. The religious organization is deemed to comply with the requirement to provide coverage for abortifacients to which it objects; its own healthcare plan becomes the vehicle for facilitating that coverage; and its own certification or notice serves as the legal "instrument" that triggers and authorizes provision of that coverage. Only by taking the affirmative act of executing a legal "instrument" that puts itself in that position can a religious organization avoid massive financial penalties for excluding any FDA-approved forms of contraception from its healthcare plan.

Proceedings Below

1. Petitioners are three nonprofit religious organizations that object to providing certain forms of FDA-approved contraception on religious grounds.

Houston Baptist University ("HBU") and East Texas Baptist University ("ETBU") are Christian liberal arts universities affiliated with the Baptist General Convention of Texas. Dist. Ct. Doc. No. 70-2, Sloan Decl. 2; Dist. Ct. Doc. No. 70-1, Oliver Decl. 2. Their Christian faith permeates everything they do. Both schools are governed by trustees who must, by law, share the schools' understanding of the Christian faith. Sloan Decl. 2-3; Oliver Decl. 3. Both

schools hire only faculty and staff who likewise share their faith. Sloan Decl. 2-3; Oliver Decl. 3; 42 U.S.C. § 2000e-1(a). And while they admit students of all faiths or none, both schools ask their students to live according to a set of Christian principles while enrolled. Sloan Decl. 3; Oliver Decl. 3.

One of those principles is respect for human life. The schools hold traditional Christian beliefs about the sanctity of human life from conception to natural death. Sloan Dec. 3-5; Oliver Decl. 4-6. ETBU's student handbook tells students that the school "supports a culture of life" and seeks to support not only unborn children but also parents facing a crisis pregnancy. Oliver Decl. 5. HBU's Student Code states that the school "cannot support actions which encourage or result in the termination of human life through suicide, euthanasia, or abortion-on-demand," but that "the campus community is prepared to stand with both the father and mother of the unborn child" and help them deal with the unplanned pregnancy in a way that is "supportive and redemptive." Sloan Decl. 4. The schools expect all their faculty to affirm and teach these beliefs, and they expect all their students to live in a way that reflects these beliefs while enrolled. Sloan Decl. 3-4; Oliver Decl. 3, 5.

Westminster Theological Seminary is a non-denominational graduate school in the Presbyterian tradition. Dist. Ct. Doc. No. 75-2, Jue Decl. 2. Westminster's entire curriculum is biblical and theological, and it exists to train adults for Christian ministry. Jue Decl. 2-4. Consistent with this mission, Westminster is governed by trustees, all of whom must be elders in a Presbyterian church. Jue Decl. 3.

All of its faculty and staff must be practicing Christians, and all faculty must assent to the Westminster Larger Catechism, which exhorts Westminster's community to "protect[] and defend[] the innocent," including unborn children. Jue Decl. 4-5. Westminster serves 625 graduate students who have come from around the world to learn about Westminster's Presbyterian faith. Jue Decl. 3-4. For historical and theological reasons, Westminster is independent of any one church or denomination. Dist. Ct. Doc. No. 95-1, Supp. Jue Decl. 1-2.[2]

All three petitioners provide their employees with healthcare plans that reflect their religious commitment to the sanctity of life and the well-being of their campus communities. ETBU is both the sponsor and administrator of its own self-insured plan. Oliver Decl. 7. HBU provides an ERISA-exempt self-insured church plan through GuideStone, which is operated by the Southern Baptist Convention.[3] Sloan Decl. 6.

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[2] Because Westminster is not "operated, supervised, or controlled by" a particular church it does not qualify as an "integrated auxiliary" under a special IRS rule for seminaries. 26 C.F.R. 1.6033-2(h)(5).

[3] A "church plan" is a benefit plan established by a church or association of churches for its employees and employees of organizations that share "common religious bonds and convictions." See 29 U.S.C. § 1002(33). Unless they choose otherwise, church plans are exempt from regulation under ERISA. 29 U.S.C. § 1003(b)(2). Although church plans are a form of self-insurance, "self-insured plan" refers here to a self-insured plan that is not a church plan.

Westminster had an insured plan through Independent Blue Cross of Pennsylvania, but switched to GuideStone during the course of this lawsuit. Jue Decl. 7; Westminster C.A. Br. at 15. None of these plans is grandfathered. Because of the schools' religious commitment to the sanctity of life, their plans do not cover surgical abortions or the drugs and devices at issue here. Sloan Decl. 7; Oliver Decl. 7; see Westminster C.A. Br. 15. But all three schools provide no-cost coverage for all other preventive services required under the ACA, including all other FDA-approved contraceptives. *Ibid.*

Petitioners want to continue to offer generous, conscience-compliant health benefits to their employees, but because of the contraceptive mandate, they cannot. Under the contraception mandate, providing the vast majority of FDA-approved contraceptives is not enough. An employer must take steps to make all FDA-approved contraceptives, including those petitioners object to as abortifacients, available to those who obtain healthcare under the plan. As nonprofits, petitioners have an option not available to objecting for-profit corporations, but petitioners view that option (in both its original and "augmented" form) as facilitating access to abortifacients in violation of their religious beliefs. And the government, for its part, views that option as fulfilling petitioners' statutory/regulatory obligation to provide preventative care/contraceptive coverage.

GuideStone is currently a plaintiff in a separate mandate challenge. See *Burwell* v. *Reaching Souls Int'l, Inc.*, No. 14-6028 (10th Cir. argued Dec. 8, 2014).

Although petitioners sincerely believe that this regulatory option for fulfilling the contraceptive mandate is inconsistent with their religious beliefs, their only options are to compromise those beliefs or pay enormous fines. Indeed, since the underlying contraception mandate is the same one that was before this Court in *Hobby Lobby*, the prohibitive fines for non-compliance are also the same. If petitioners fail to comply with the contraceptive mandate, they could face as much as $23.1 million in annual fines, along with potential penalties and lawsuits. Sloan Decl. 13; Oliver Decl. 13-14; Jue Decl. 12.

2. To avoid being put to the impermissible choice of violating their religious beliefs or violating the law, the Universities filed suit on October 9, 2012. Westminster intervened in March 2013. After a lengthy stay to allow the government to change the mandate regulations, the parties filed cross motions for summary judgment. In December 2013, the district court granted petitioners permanent injunctive relief on their RFRA claim. In doing so, Judge Rosenthal rejected the government's argument that complying with the contraception mandate via the regulatory option imposes no burden on petitioners' exercise of religion because, "once the self-certification is completed, the plaintiffs' involvement ends." App.78a. As she instead recognized, it is the very act of self-certifying—"an affirmative act" that petitioners must undertake to achieve compliance with the contraceptive mandate—"that they find * * * to be religiously offensive." App.76a.

Although Judge Rosenthal correctly concluded that "the court cannot second-guess" this "sincerely

held religious belief," App.74a, she also recognized and explained its source: By self-certifying, petitioners ensure that their "employees can obtain [the objectionable] coverage and payment only as long as they are the plaintiffs' employees and on the plaintiffs' group health plan." App.80a. And the government's system relies on "the insurance plan that the religious-organization employer put into place, the issuer or TPA the employer contracted with, and the self-certification form the employer completes and provides the issuer or TPA, that enable the employees to obtain the free access to the contraceptive devices that the plaintiffs find religiously offensive." *Ibid*. It is in these respects that the "affirmative act" of self-certification (or notice) forces petitioners to facilitate contraceptive coverage in violation of their sincerely held religious beliefs. And by forcing religious objectors to perform that "affirmative act" or face millions of dollars in fines, the government has imposed a substantial burden on petitioners' exercise of their religious beliefs. See App.81.

Having concluded as much, Judge Rosenthal turned to whether the regulatory option available to nonprofits is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb–1(b). Finding that the government could achieve the same end by, among other things, "provid[ing] the contraceptive services or coverage directly to those who want them but cannot get them from their religious-organization employers," she concluded that it is not. App.84a.

3. The government appealed, and the Fifth Circuit reversed.[4] According to the Fifth Circuit, even though there is no dispute that petitioners sincerely believe that complying with the contraceptive mandate via the regulatory option would violate their religious beliefs, and even though there is no dispute that petitioners would face enormous fines if they refuse to do so, the requirement to comply nonetheless imposes no "substantial burden" on petitioners' exercise of religion. App.18a. The court reached that conclusion by reasoning that petitioners are simply wrong to believe that the regulatory option for complying with the contraceptive mandate forces them to "facilitat[e] access to contraceptives." App.18a-23a. Accordingly, the court never reached the question of whether that option is the least restrictive means of achieving a compelling government interest.

REASONS FOR GRANTING THE PETITION

I. This case presents an exceptionally important question.

This case presents a question of profound and nationwide importance. There is no dispute that thousands of religious organizations throughout the country sincerely believe that complying with the mandate that they provide healthcare coverage that includes abortifacients and contraceptives, either di-

[4] The Fifth Circuit consolidated petitioners' appeals with three other government appeals of district court decisions holding the "accommodation" inconsistent with RFRA; the plaintiffs in those appeals are not parties to this petition. App.3a.

rectly or via the "accommodation" HHS has offered them, violates their religious beliefs. And there is no dispute that unless these religious employers comply with that mandate, they will face massive financial penalties. In short, there is no dispute that employers ranging from religious schools to faith-based charities to orders of nuns are being forced to choose between violating their sincere religious beliefs or violating federal law.

Understandably, this unprecedented situation has generated a nearly unprecedented volume of litigation. Indeed, hundreds of religious institutions representing a wide cross-section of organizations and faiths have brought lawsuits, some on behalf of entire classes of affected religious employers, seeking relief from the untenable position in which HHS has put them.[5] None of this should be surprising. Traditionally, the government has steered clear of mandating coverage as religiously sensitive as contraception and abortifacients, and has provided generous conscience clauses when mandates threaten to intrude upon religious beliefs. As a result, religious organizations were free to decide for themselves how to provide their employees with healthcare plans that comply with their religious beliefs.

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[5] See Becket Fund for Religious Liberty, *HHS Mandate Information Central*, http://www.becketfund.org/hhsinformationcentral/; National Women's Law Center, *Status of the Lawsuits Challenging the Affordable Care Act's Birth Control Coverage Benefit*, http://www.nwlc.org/sites/default/files/pdfs/contraceptive_coverage_litigation_status_6-24-15_finalv2.pdf.

The promulgation of a regulatory mandate that a wide swath of employers including religious orders and colleges must provide healthcare coverage that includes contraception and abortifacients changed all that. Religious employers made it perfectly clear to HHS that compliance with this unprecedented regulatory mandate would violate their sincerely held beliefs. Yet HHS nonetheless refused to exempt them, even though thousands of other employers have been exempted for reasons ranging from religious conscience to administrative convenience. Instead, HHS offered only an alternative avenue for those employers to *comply* with the mandate to provide the coverage that HHS desires and that the employers' religions forbid. Religious employers once again made perfectly clear that providing such coverage, whether directly or via this so-called "accommodation," would violate their religious principles. It thus should not come as a surprise that HHS's unprecedented mandate generated unprecedented litigation seeking to vindicate the free exercise of religion.

Many of these lawsuits, including this one, met with success in the district courts and the government appealed. But in contrast to the district courts that found a RFRA violation based on a straightforward application of *Hobby Lobby*, the Third, Fifth, Seventh, and D.C. Circuits concluded that forcing religious employers to comply with the contraception mandate via the nonprofit regulatory option does not violate RFRA. And to make matters worse, they have done so by employing a form of substantial burden analysis that is virtually identical to the reasoning that this Court squarely rejected in *Hobby Lobby* and a long line of cases before it. See *infra* Part II. Those

circuit decisions are profoundly flawed, but what matters at this juncture is not who is correct about the ultimate merits of this important and recurring nationwide controversy. Instead, what matters now is that, as a consequence of final decisions like the one below, religious employers throughout the nation face the imminent prospect of being forced to choose between taking an action that they sincerely believe will violate their religious beliefs or violating the ACA.

That is reason enough for this Court to intervene now, rather than allowing this exceptionally important question to "percolate" while employers face the abandonment of the free exercise rights that RFRA guarantees. Indeed, this Court has already recognized—repeatedly—that this extraordinary situation demands extraordinary action. Three times, the Court has been asked to provide extraordinary relief under the All Writs Act to prevent an employer from being forced to comply with contraceptive mandate through HHS's "accommodation" before exhausting all avenues of judicial review. And three times, this Court has complied, first by granting an injunction pending appeal in *Little Sisters*, then by doing the same in *Wheaton College*, and most recently by granting an injunction pending resolution of a petition for certiorari challenging HHS's "augmented" "accommodation" in *Zubik* v. *Burwell*, 576 U.S. ---, 2015 WL 3947586 (June 29, 2015). As the Court has thus recognized, the stakes are simply too high to allow the government to begin enforcing its novel regu-

latory scheme before the legality of that scheme has been fully and finally litigated.[6]

And as this case confirms, the time for this Court to play its essential role in that process is now. The arguments for each side have been exhaustively briefed, and petitioners' RFRA claims have been finally resolved by the courts below, with the District Court granting them a permanent injunction and the Fifth Circuit reversing. Accordingly, unless petitioners receive relief from this Court, they are out of options; they will be forced to choose between compliance with the contraceptive mandate via one of the avenues HHS has offered or compliance with their religious beliefs. And that situation is not unique to petitioners; several religious organizations have now litigated their claims to final judgment without receiving relief from the courts of appeals. Unless this Court intervenes now, a decision on the merits will come too late to save these organizations from making the very choice that RFRA is supposed to protect them from in all but the narrowest of circumstances. This Court should not let that extraordinary result come to pass without deciding for itself whether HHS's unprecedented effort to force religious organi-

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[6] This Court has also twice granted, vacated, and remanded pre-*Hobby Lobby* decisions rejecting challenges to the nonprofit regulation, indicating a "reasonable probability that th[ose] decision[s] * * * rest[] upon a premise" that should be "reject[ed]" in light of subsequent authority, *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996). See *Univ. of Notre Dame* v. *Burwell*, 135 S.Ct. 1528 (2015); *Michigan Catholic Conference* v. *Burwell*, 135 S.Ct. 1914 (2015).

zations to take actions that HHS itself considers sufficient to comply with a mandate to provide contraceptive coverage that they find objectionable on religious grounds can be reconciled with Congress' stringent protection of the free exercise of religion.

II. The court of appeals' failure to find a substantial burden on religious exercise is exceptionally wrong.

This Court's immediate intervention is all the more essential because the decision below is profoundly wrong. Indeed, the reasoning the Fifth Circuit employed in concluding that the government has not imposed a substantial burden on petitioners' exercise of religion is impossible to reconcile with the reasoning this Court employed in *Hobby Lobby* and decades of substantial burden cases before it.

As noted, there is no dispute that petitioners sincerely believe that complying with the contraceptive mandate via the regulatory option requires them to facilitate access to contraceptive coverage in violation of their religious beliefs. And there is no dispute that failure to comply with the contraceptive mandate through one of the avenues HHS has offered will result in massive financial penalties. As the District Court correctly recognized, that should have been the end of the substantial burden analysis, as forcing petitioners to choose between taking an action that they sincerely believe would violate their religion or "pay[ing] an enormous sum of money" "clearly imposes a substantial burden on" their exercise of religion. *Hobby Lobby*, 134 S.Ct. at 2779. That is so whether or not courts *agree* with petitioners that the action in question would violate their religious beliefs, as

courts simply do not have the authority to "second-guess" a sincerely held religious belief. App.74a.

Yet that is precisely what the Fifth Circuit did in concluding that the government has not imposed a substantial burden on petitioners' exercise of religion. The court did not dispute that petitioners sincerely believe that each of the avenues through which HHS allows them to comply with the contraceptive mandate would force them to facilitate contraceptive coverage in violation of their religious beliefs, or that the consequences of non-compliance—namely, massive penalties—are "draconian." App.5a. Instead, the court of appeals insisted that the substantial burden analysis turns not on whether petitioners are being pressured to *comply* with a law that they find objectionable on religious grounds, but rather on whether petitioners are correct in their belief that by being pressured to comply with that law, they are really being "pressured * * * to facilitate the use of contraceptives." App.17a. The court rejected petitioners' RFRA claims by reasoning that petitioners are simply wrong to believe that "the acts *they* are required to perform" under the regulatory option are tantamount to "providing or facilitating access to contraceptives." App.18a.

That reasoning is impossible to reconcile with this Court's substantial burden jurisprudence. This Court admonished decades ago that "it is not within the judicial function and judicial competence to inquire whether" someone who sincerely objects to a law on religious grounds has "correctly perceived the commands of [his] faith." *Thomas* v. *Review Board*, 450 U.S. 707, 716 (1981). After all, "[c]ourts are not arbi-

ters of scriptural interpretation," and they are "singularly ill equipped" to make sensitive decisions about what does or does not interfere with religious beliefs—*e.g.*, whether the degree of complicity required is religiously problematic. *Ibid.* Instead, the only questions for the courts to resolve in the substantial burden analysis are whether a religious belief is sincerely held and, if so, whether the "pressure" the government has "put[] * * * on an adherent to modify his behavior and to violate his beliefs" is "substantial." *Id.* at 718; see also *United States* v. *Lee*, 455 U.S. 252, 257 (1982).

To the extent there was any doubt on that score, *Hobby Lobby* eliminated it. Just as in this case, "HHS's main argument" concerning the substantial burden inquiry in *Hobby Lobby* "[wa]s basically that the connection between what the objecting parties must do * * * and the end that they find to be morally objectionable * * * [wa]s simply too attenuated." 134 S.Ct. at 2777. Rather than resolve that argument as part of its substantial burden analysis, the Court made clear that it was entirely misplaced, as it "addresses a very different question that the federal courts have no business addressing," and that the Court itself has "repeatedly refused" to answer. *Id.* at 2778 (collecting cases). The "difficult and important question" of whether "the line" someone draws in determining what actions are "consistent with his religious beliefs"—including how much facilitation or complicity is too much—is instead a line for the religious adherent alone to draw. *Ibid.* The only questions the Court found relevant to its substantial burden analysis were whether "the line drawn" by the challengers "reflect[ed] an honest conviction" and, if

so, whether the government had substantially pressured them to cross that line. *Ibid.* And as the Court went on to conclude, putting employers to the choice of crossing that line or "pay[ing] an enormous sum of money" unquestionably does substantially pressure them to cross that line. *Id.* at 2779.

As several judges—including Judge Rosenthal below—have recognized, that same reasoning compels the conclusion that the nonprofit regulation imposes a substantial burden on religious exercise. As Judge Pryor has explained, "[s]o long as the [religious organization's] belief is sincerely held and undisputed—as it is here—we have no choice but to decide that compelling the participation of the [religious organization] is a substantial burden on its religious exercise." *Eternal Word Television Network, Inc.* v. *Sec'y, Dep't of Health & Human Servs.*, 756 F.3d 1339, 1348 (11th Cir. 2014) (Pryor, J., specially concurring). Judges Kavanaugh and Brown likewise recently emphasized the "bedrock principle" of *Thomas* and *Hobby Lobby* "that we may not question the wisdom or reasonableness (as opposed to the sincerity) of plaintiffs' religious beliefs—including about complicity in wrongdoing." *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, No. 13-5368, slip op. 10 (D.C. Cir. May 20, 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc); see also *id.* at 6-7 (Brown, J., dissenting from denial of rehearing en banc). And as Judge Flaum aptly put it, whether the regulatory option available to nonprofits forces them to facilitate access to contraceptive coverage "is not a question of legal causation but of religious faith. Notre Dame tells us that Catholic doctrine prohibits the action that the government requires it to take. So

long as that belief is sincerely held, I believe we should defer to Notre Dame's understanding." *Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting), vacated and remanded, 135 S.Ct. 1528 (2015).

Unfortunately, when it comes to challenges to the contraceptive mandate by nonprofit religious employers, adherence to the clear teachings of *Hobby Lobby* and *Thomas* has become a feature more common to dissenting opinions than majorities. Indeed, each of the four courts of appeals that have resolved such challenges (including the Fifth Circuit here) has employed a substantial burden analysis more reminiscent of the approach advanced by the dissenters in *Hobby Lobby*. See *Hobby Lobby*, 134 S.Ct. at 2799 (Ginsburg, J., dissenting) (finding no substantial burden because there were "independent decisionmakers * * * standing between the challenged government action and the religious exercise claimed to be infringed").

For instance, in *Geneva College* v. *Secretary of United States Department of Health & Human Services*, 778 F.3d 422 (3d Cir. 2015), the Third Circuit first erroneously concluded that RFRA requires courts to "objectively assess whether the appellees' compliance with the self-certification procedure does, in fact * * * make them complicit" in facilitating religion, then drew its own conclusion that the procedure does not. *Id.* at 435. Likewise, the Seventh Circuit has adamantly insisted both that it "is for the courts to determine whether the law actually forces [employers] to act in a way that would violate [their] beliefs," *Univ. of Notre Dame* v. *Burwell*, 786 F.3d 606,

611-12 (7th Cir. 2015) (Posner, J.) *("Notre Dame II")*, and that religious employers are wrong to believe that it does, see *Wheaton College* v. *Burwell*, --- F.3d ---, No. 14-2396, 2015 WL 3988356, at *7 (7th Cir. 2015) (Posner, J.) ("No one is asking Wheaton to violate its religious beliefs."). And the D.C. Circuit dismissed the employers' RFRA objections by reasoning that the nonprofit regulation requires them to do nothing more than complete "a bit of paperwork" that "wash[es] their hands of any involvement in providing insurance coverage for contraceptive services." *PFL*, 772 F.3d 229, 237, 247 (D.C. Cir. 2014).

Like the decision below, those cases simply cannot be reconciled with this Court's repeated admonishment that "it is not within 'the judicial function and judicial competence'" to decide whether a religious adherent has "correctly perceived the commands of [his] faith." *Lee*, 455 U.S. at 257 (quoting *Thomas*, 450 U.S. at 716). Indeed, just this past Term, applying RLUIPA's identical substantial burden test, this Court found it sufficient that an inmate demonstrated that he would "face serious disciplinary action" if forced to shave a beard that he sincerely believed his religion required him to maintain. *Holt* v. *Hobbs*, 135 S.Ct. 853, 862 (2015). In doing so, the Court spent no time evaluating whether maintaining a half-inch beard was really necessary or sufficient to comply with a "dictate of [petitioner's] religious faith." *Ibid.* Nor did it focus on the fact that shaving takes only a few minutes. Instead, it was enough that petitioner's belief was sincere, and that the government had placed substantial pressure on him to violate it.

So, too, here. Thousands of religious employers throughout the nation sincerely believe that complying with the nonprofit regulations involves a degree of facilitation or complicity that would violate their religious beliefs, and there is no question that the consequences of declining to pursue the "accommodation" route for fulfilling the contraceptive mandate are "draconian." App.5a. Indeed, the ultimate regulatory mandate at issue here—the contraceptive mandate—is the exact same one that was at issue in *Hobby Lobby*, and the fines for noncompliance are identical as well. The only difference is that HHS has given petitioners an option for fulfilling the mandate that was not offered to for-profit corporations like Hobby Lobby.

But as long as the proffered means of fulfilling the contraceptive mandate violate sincerely held religious beliefs, then the existence of a substantial burden follows ineluctably from *Hobby Lobby*. Just as in *Hobby Lobby*, the government has "demand[ed] that [employers] engage in conduct that seriously violates their religious belief[s]" on pain of "substantial economic consequences." *Hobby Lobby*, 134 S.Ct. at 2776. And just as in *Hobby Lobby*, that economic pressure "clearly imposes a substantial burden on those beliefs." *Id.* at 2779. In fact, the substantial economic consequences are exactly the same, because the ultimate mandate is exactly the same. Perhaps courts could conclude that the existence of additional regulatory means of compliance with the contraceptive mandate alters the least restrictive means analysis. But if the additional regulatory means violate sincerely held religious beliefs, then *Hobby Lobby* controls the substantial burden inquiry. That the

Fifth Circuit (and others) failed to recognize as much is proof enough of the need for this Court's intervention.

And to make matters worse, courts not only have impermissibly arrogated to themselves the authority to answer "a difficult and important question of religion and moral philosophy," *id.* at 2778, but have failed to grasp the true nature of the religious objections that employers are raising. These cases are not about whether the government can force religious employers to execute a "bit of paperwork." *PFL*, 772 F.3d at 237. Nor are they about whether religious employers have a right to prevent their employees from receiving access to coverage for the objected-to contraceptives. Rather, they are about whether the government may force religious employers, contrary to their religious convictions, to comply with a mandate to provide contraception coverage to their employees in a way that is "seamless" and ultimately involves the provision of contraceptive coverage via the religious employers' own plans.

The government would seem to be poorly positioned to question that its regulatory option involves a meaningful degree of complicity or facilitation. After all, HHS does not view its "accommodation" as an exemption from the requirement that petitioners provide a qualifying healthcare plan that includes the mandated contraceptives and abortifacients. Instead, the required paperwork is viewed as a means of complying with the contraceptive mandate, which ultimately flows from a statutory requirement. Having concluded that its accommodation is good enough (as a matter of administrative law) to put petitioners

in compliance with their regulatory and statutory obligations to provide no-cost contraceptive coverage, it takes real chutzpah for the government to then insist that this same accommodation involves no meaningful facilitation or complicity in the provision of those contraceptives and abortifacients. It is all well and good for the government to think *it* has threaded the needle and found a way for religious nonprofits to comply with the contraceptive mandate without violating their religious beliefs, but ultimately it is for the religious adherent to determine how much facilitation or complicity is too much.

Just like its need to ensure that its "accommodation" complies with the ACA, the government's need to ensure that its "accommodation" complies with ERISA (as well as the APA) likewise ensures that the degree of complicity and facilitation is substantial. That much is clear from the fact that the form or notice HHS requires employers to execute serves as "an instrument under which [its healthcare] plan is operated." App.143a. That instrument is essential to "ensure[] that there is a party with legal authority" to make payments for contraceptive services, 78 Fed. Reg. at 39880, as a TPA would have no contractual authority to pay claims without it. It is the "affirmative act" of executing that instrument—not the independent actions of any third parties—that petitioners sincerely believe would violate their religious beliefs. App.76a. The situation thus is not meaningfully different from one in which the government mandates that all hospitals perform abortions, but purports to "accommodate" religious hospitals by requiring them to sign a form authorizing doctors supplied and paid by the government to perform abortions on their

premises. It is not hard to see why a hospital would find little solace in the government's assurances that it is not "facilitating" abortion because its own doctors are not the ones that the hospital has authorized to use its facility to perform abortions.

As the foregoing confirms, the Fifth Circuit was simply wrong to insist that availing themselves of HHS's regulatory option for compliance with the contraceptive mandate would not require petitioners to "facilitat[e] access to contraceptives." App.18a. Indeed, as Judge Kavanaugh pointedly asked, "if the form were meaningless, why would the government require it?" *PFL*, slip op. 12, (Kavanaugh, J., dissenting). The answer is obvious: because it is not meaningless at all, but rather is essential to the operation of HHS's scheme for ensuring that nonexempt employers comply with the contraceptive mandate.

But ultimately, who has the better of the complicity and facilitation arguments is beside the point. What matters under RFRA and this Court's cases is that petitioners *sincerely believe* that complying with the contraceptive mandate via the nonprofit regulation would violate their religious beliefs, and that the government nonetheless is exerting substantial economic pressure—the exact same pressure as in *Hobby Lobby*—on petitioners to do so. The substantial burden analysis requires nothing more.

III. Under a correct application of well-established precedent, the "accommodation" option for satisfying the contraceptive mandate clearly fails RFRA's least restrictive means test.

In employing a fundamentally flawed substantial burden analysis, the Fifth Circuit avoided the only substantial question left open by *Hobby Lobby*—whether the regulatory "accommodation" available to nonprofits for satisfying the contraceptive mandate satisfies RFRA's least restrictive means analysis. In reality, that regulatory option cannot possibly withstand scrutiny under that "exceptionally demanding" standard. *Hobby Lobby*, 134 S.Ct at 2780. Indeed, many of the judges who have actually reached the question of whether the regulation is "the least restrictive means of furthering [a] compelling governmental interest," 42 U.S.C. § 2000bb-1, have had little trouble concluding that it is not. See, *e.g.*, *EWTN*, 756 F.3d at 1349 (Pryor, J., concurring); *PFL*, slip op. 17 (Brown, J., dissenting); *id.* at 23 (Kavanaugh, J., dissenting), *Notre Dame II*, 786 F.3d at 629-30 (Flaum, J., dissenting).

And with good reason, as the government has "many ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors," *Korte* v. *Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013), including by, among other things, "provid[ing] the contraceptive services or coverage directly to those who want them but cannot get them from their religious-organization employers." App.84a. Most obviously, the government could simply "treat employees [of religious objectors]

* * * the same as it does employees whose employers provide no coverage" by "providing for subsidized * * * contraceptive coverage * * * on [the] exchanges." *PFL*, slip op. 17 (Brown, J., dissenting). The government has barely even attempted to show that it gave the requisite "serious, good faith consideration," *Fisher* v. *Univ. of Tex. at Austin*, 133 S.Ct. 2411, 2420 (2013), to these alternatives before proceeding with its preferred course of enlisting petitioners in its efforts to provide their employees with contraceptive coverage.

Moreover, as several courts recognized when considering challenges to the contraceptive mandate by for-profit corporations before *Hobby Lobby*, it is hard to see how the government can claim a "compelling interest" in enforcing a mandate that, as a consequence of its own actions, "does not apply to tens of millions of people * * * includ[ing] those working for private employers with grandfathered plans, for employers with fewer than fifty employees," and for certain religious employers. *Hobby Lobby*, 723 F.3d at 1143-44; see also *Korte*, 735 F.3d at 686; *Gilardi* v. *U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1222 (D.C. Cir. 2013) vacated and remanded, 134 S.Ct. 2902 (2014); *EWTN*, 756 F.3d at 1351 (Pryor, J., concurring). Although this Court found no need to resolve the question in *Hobby Lobby*, it, too, noted that "it is arguable that there are features of the ACA that support th[e] view" that the contraceptive mandate does not serve a compelling government interest. 134 S.Ct. at 2780; see *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 547 (1993) ("'[A] law cannot be regarded as protecting an interest "of the highest order" * * * when it leaves

appreciable damage to that supposedly vital interest unprohibited.'").

To the extent courts have concluded otherwise, once again they have done so only by employing reasoning that this Court affirmatively rejected in *Hobby Lobby*. In *Priests for Life*, for instance, the D.C. Circuit concluded that forcing religious employers to comply with the contraceptive mandate via the "accommodation" furthers the government's compelling interests in "improving public health" and "assuring women equal benefit[s]." 772 F.3d at 259, 262; accord *Notre Dame II*, 786 F.3d at 624 (Hamilton, J., concurring); *Korte*, 735 F.3d at 724 (Rovner, J., dissenting). But as this Court admonished in rejecting those same generic interests in *Hobby Lobby*, RFRA "contemplates a 'more focused' inquiry" that "requires" courts "to 'loo[k] beyond broadly formulated interests' and to 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants'—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases." 134 S.Ct. at 2779 (quoting *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006)); accord *Holt*, 135 S.Ct. at 863; *Korte*, 735 F.3d at 686 (articulating a compelling interest as general as "public health" or "gender equality" "seriously misunderstands strict scrutiny").

Once again, the government has barely even tried to satisfy the compelling interest test at the level of specificity that this Court's precedents demand. Instead, it has been content to rely on little more than "data" showing that women "generally" benefit from access to contraceptives and sheer speculation that

the female employees of nonexempt religious employers are more likely than "church[] employees" to do so. *PFL*, 772 F.3d at 265-66. Surely "the most demanding test known to constitutional law," *City of Boerne* v. *Flores,* 521 U.S. 507, 534 (1997), demands more than that. Indeed, the government's arguments do not even speak to whether it has a compelling interest in forcing an employer that, like petitioners, already covers most contraceptives to also facilitate access to the narrow category of contraceptives that it objects to on religious grounds.

Moreover, the government has admitted that it has *no interest* in enforcing the mandate against organizations that, like petitioners, hire only persons of the same faith. According to the government, it "does not undermine the governmental interests furthered by the contraceptive coverage requirement" to exempt houses of worship because they "are more likely" to hire coreligionists that share their objections. 78 Fed. Reg. at 39874. But that is exactly what petitioners do: They hire people of the same faith who share the same objection. App.37a-38a. Thus, by the government's own logic, exempting petitioners from the contraceptive mandate would "not undermine the governmental interests." 78 Fed. Reg. at 39874.[7]

In short, the government simply cannot bear its burden of proving that forcing religious employers to

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[7] Even if it did, moreover, the government has no legitimate interest here in discriminating between houses of worship and other religious organizations. See *Larson* v. *Valente*, 456 U.S. 228, 246-47 & n.23 (1982).

comply with the contraceptive mandate via the "accommodation" is the least restrictive means of furthering a compelling government interest. That makes this Court's review all the more essential, as the Fifth Circuit effectively dodged this issue by failing to employ the substantial burden test that this Court's precedents demand. It is bad enough that the government's unprecedented effort to force religious employers to take actions that violate their sincerely held religious beliefs escaped meaningful RFRA review in the Fifth Circuit. Petitioners should not be denied meaningful review in this Court as well before being forced to make the untenable choice that HHS has thrust upon them.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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