NOS. 14-1418, 14-1453, 14-1505,
15-35, 15-105, 15-119, & 15-191

In the
Supreme Court of the United States

EAST TEXAS BAPTIST UNIVERSITY, ET AL., *Petitioners*
v.
SYLVIA BURWELL, ET AL., *Respondents*

LITTLE SISTERS OF THE POOR HOME FOR THE AGED,
DENVER, COLORADO, ET AL., *Petitioners*
v.
SYLVIA BURWELL, ET AL., *Respondents*

SOUTHERN NAZARENE UNIVERSITY, ET AL., *Petitioners*
v.
SYLVIA BURWELL, ET AL., *Respondents*

GENEVA COLLEGE, *Petitioner*
v.
SYLVIA BURWELL, ET AL., *Respondents*

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits

BRIEF FOR PETITIONERS IN NOS. 15-35, 15-105, 15-119, & 15-191

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QUESTIONS PRESENTED

The text of the Affordable Care Act says nothing about contraceptive coverage, but it does require employers to "provide coverage" for certain "preventive services," including "preventive care" for women. The Department of Health and Human Services ("HHS") has interpreted that statutory mandate to require employers through their healthcare plans to provide at no cost the full range of FDA-approved contraceptives, including some that cause abortions. Despite the obvious implications for many employers of deep religious conviction, HHS decided to exempt only some nonprofit religious employers from compliance. As to all other religious employers, HHS demanded compliance, either by instructing their insurers to include coverage in their plans, or via a regulatory mechanism through which the employers must execute documents that authorize, obligate and/or incentivize their insurers or plan administrators to use their plans to provide cost-free contraceptive coverage to their employees. In the government's view, either of those actions suffices to put these religious employers and their plans in compliance with the statutory "provide coverage" obligation.

This Court has already concluded that the threatened imposition of massive fines for failing to comply with this contraceptive mandate imposes a substantial burden on religious exercise, and that the original method of compliance violates the Religious Freedom Restoration Act ("RFRA"). And it is undisputed that this case involves the same mandate and the same fines, and that nonexempt religious

employers such as petitioners hold sincere religious objections to the regulatory method of compliance as well.

The questions presented are:

1. Does the availability of a regulatory method 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)?

2. Can HHS satisfy RFRA's demanding test for overriding sincerely held religious objections in circumstances where HHS itself insists that overriding the religious objection may not fulfill its regulatory objective—namely, the provision of no-cost contraceptives to the objector's employees?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

In No. 15-35, petitioners, who were plaintiffs below, are Houston Baptist University, East Texas Baptist University, and Westminster Theological Seminary. No petitioner has a parent corporation. No publicly held corporation owns any portion of any of the petitioners.

In No. 15-105, petitioners, who were plaintiffs below, are the Little Sisters of the Poor Home for the Aged, Denver, Colorado, a Colorado nonprofit corporation; Little Sisters of the Poor, Baltimore, Inc., a Maryland nonprofit nonstock corporation, by themselves and on behalf of all others similarly situated; Christian Brothers Services, an Illinois nonprofit corporation; Christian Brothers Employee Benefit Trust; Reaching Souls International, Inc., an Oklahoma not-for-profit corporation; Truett-McConnell College, Inc., a Georgia nonprofit corporation, by themselves and on behalf of all others similarly situated; and GuideStone Financial Resources of the Southern Baptist Convention, a Texas nonprofit corporation. GuideStone's sole member is the Southern Baptist Convention, a Georgia religious nonprofit corporation. No other petitioner has a parent corporation. No publicly held corporation owns any portion of any of the petitioners.

In No. 15-119, petitioners, who were plaintiffs below, are Southern Nazarene University, Oklahoma Wesleyan University, Oklahoma Baptist University, and Mid-America Christian University. No petitioner has a parent corporation. No publicly held corporation owns any portion of any of the petitioners.

In No. 15-191, petitioner, who was plaintiff below, is Geneva College. Petitioner has no parent corporation. No publicly held corporation owns any portion of the petitioner.

In all cases, 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.

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INTRODUCTION

Petitioners are nonprofit religious organizations ranging from an order of nuns, to religious colleges and universities, to a theological seminary. Each petitioner offers its employees a generous healthcare plan, but each excludes from its plan coverage for contraceptives to which it holds religious objections, and each wants to continue to do so. Yet the government insists that petitioners must comply with a mandate to include contraceptive coverage in their plans. No one questions the sincerity of petitioners' beliefs that complying with that mandate via any of the means that the government permits would violate their religion. And no one questions the severity of the penalties for non-compliance. Nonetheless, the government believes that petitioners must set aside their sincere religious beliefs and comply with the contraceptive mandate. And the government insists that petitioners must do so even though that mandate and some of its many exceptions are regulatory creations, while the protections of the Religious Freedom Restoration Act come directly from Congress.

This Court addressed a nearly identical dynamic in upholding religious exercise claims in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). Indeed, both the underlying contraceptive mandate and the accompanying penalties for non-compliance are the exact same ones that this Court considered and rejected in *Hobby Lobby*. The only difference is that petitioners have been given an alternative mechanism for complying with that mandate: Instead of writing contraceptive coverage into their plans themselves, petitioners may comply by taking government-

prescribed actions that empower their insurers or plan administrators to use their own plan infrastructure to provide the coverage.

The existence of that alternative mechanism for compliance might matter if petitioners' religious objections were confined to directing and paying for the inclusion of contraceptive coverage in their plans. But, as the government does not dispute, petitioners also sincerely object to being forced to facilitate access to contraceptives and abortifacients through their own plans. To be clear, petitioners do not object to *any* government action that provides contraceptives to their employees. But they do object to being compelled to take government-prescribed actions to facilitate that coverage. And a long line of this Court's cases—including but by no means limited to *Hobby Lobby*—confirms beyond cavil that courts have neither the authority nor the competence to second-guess the reasonableness of those sincere beliefs. That the government has given petitioners multiple options for violating their sincere religious beliefs instead of just one thus does not materially alter the substantial burden analysis—especially when the penalties for non-compliance remain the same. Just as in *Hobby Lobby*, petitioners must choose between following their religion and following the law. That is a textbook substantial burden on religious exercise.

The substantial burden here is not one that the Religious Freedom Restoration Act tolerates, as the government has not come close to proving that it furthers a compelling interest, much less is the least restrictive means of doing so. Indeed, the government cannot explain why it has exempted the employers of

tens of millions of employees from the contraceptive mandate entirely—whether for religious reasons or for simple administrative convenience—and yet refuses to do the same for petitioners. Nor can it explain why the alternative means it already has in place for the millions of individuals who do not have access to an employer-sponsored health plan that includes contraceptive coverage—whether because their employers are exempt from the mandate or because they are unemployed—are not a good enough alternative for petitioners' employees. The government has already spent *billions* of dollars creating health benefits exchanges for the express purpose of making insurance available to individuals who cannot get satisfactory coverage from an employer. If those exchanges suffice to achieve the government's goal of getting cost-free contraceptive coverage to everyone else who does not get it through an employer, then surely they would suffice for petitioners' employees as well.

At bottom, then, the government's refusal to grant petitioners a true exemption from the contraceptive mandate can be explained only by its refusal to credit their sincere religious beliefs that the role the government wants them to play would be a sin. The government is certainly free to disagree with that belief, but it is not free to disregard it. Yet that is precisely what its regulatory scheme does—and precisely what RFRA forbids.

OPINIONS BELOW

In No. 15-35, the opinion of the Fifth Circuit is reported at 793 F.3d 449 and reproduced at pages 1a-28a of the petition appendix. The opinion of the

District Court granting summary judgment to petitioners is reported at 988 F. Supp. 2d 743 and reproduced at pages 31a-88a of the petition appendix.

In No. 15-105, the opinion of the Tenth Circuit is reported at 794 F.3d 1151 and reproduced at pages 2a-149a of the petition appendix. The District of Colorado Court's opinion denying a preliminary injunction to the *Little Sisters* petitioners is reported at 6 F. Supp. 3d 1225 and reproduced at pages 152a-89a of the petition appendix. The Western District of Oklahoma Court's order granting a preliminary injunction to the *Reaching Souls* petitioners is unreported but available at 2013 WL 6804259 and reproduced at pages 190a-210a of the petition appendix.

In No. 15-119, the opinion of the Tenth Circuit is reported at 794 F.3d 1151 and reproduced at pages 1a-155a of the petition appendix. The District Court's opinion granting a preliminary injunction is unreported but available at 2013 WL 6804265 and reproduced at pages 156a-84a of the petition appendix.

In No. 15-191, the opinion of the Third Circuit is reported at 778 F.3d 442 and reproduced at pages 1a-49a of the petition appendix. The District Court's opinion granting a first preliminary injunction is reported at 960 F. Supp. 2d 588 and reproduced at pages 50a-79a of the petition appendix, and its opinion granting a second preliminary injunction is reported at 988 F. Supp. 2d 511 and reproduced at pages 83a-121a of the petition appendix.

JURISDICTION

In No. 15-35, the judgment of the Fifth Circuit was entered on June 22, 2015. A timely petition for a

writ of certiorari was filed on July 8, 2015, and was granted on November 6, 2015. This Court has jurisdiction under 28 U.S.C. §1254(1).

In No. 15-105, the judgment of the Tenth Circuit was entered on July 15, 2015. A timely petition for a writ of certiorari was filed on July 23, 2015, and was granted on November 6, 2015. This Court has jurisdiction under 28 U.S.C. §1254(1).

In No. 15-119, the judgment of the Tenth Circuit was entered on July 15, 2015. A timely petition for a writ of certiorari was filed on July 24, 2015, and was granted on November 6, 2015. This Court has jurisdiction under 28 U.S.C. §1254(1).

In No. 15-191, the judgment of the Third Circuit was entered on February 11, 2015. A petition for rehearing was denied on April 13, 2015. On June 30, 2015, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including August 11, 2015. A timely petition was filed on that date and was granted on November 6, 2015. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Religious Freedom Restoration Act of 1993, the Patient Protection and Affordable Care Act of 2010, and the relevant regulations implementing the latter are reproduced in Appendix E to Petition No. 15-105.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

A. RFRA

The Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§2000bb *et seq.*, provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." *Id.* §2000bb-1(a). RFRA constrains all federal laws and regulations unless Congress explicitly exempts them. *Id.* §2000bb-3(a)-(b). If a federal law or regulation imposes a substantial burden on a claimant's exercise of religion, then RFRA forbids imposition of the burden unless the government can prove that "application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* §2000bb-1(b).

As that "exceptionally demanding" test reflects, Congress designed RFRA to provide "very broad protection for religious liberty." *Hobby Lobby*, 134 S. Ct. at 2760, 2780. The law was enacted in direct response to this Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which held that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" *Id.* at 879. Through RFRA, Congress guaranteed application of strict scrutiny to "all cases where free exercise of religion is substantially burdened," regardless of whether that burden results from a generally applicable law. 42 U.S.C. §2000bb(b)(1). RFRA thus mandates "case-by-

case consideration of religious exemptions" under strict scrutiny. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006).

Consistent with Congress' goals of providing "very broad protection for religious liberty," *Hobby Lobby*, 134 S. Ct. at 2760, while avoiding judicially unmanageable inquiries, RFRA defines "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §2000cc-5; *see also id.* §2000bb-2(4). Congress further mandated that this definition "be construed in favor of a broad protection of religious exercise." *Id.* §2000cc-3(g); *see also Hobby Lobby*, 134 S. Ct. at 2762. RFRA thus provides "even broader protection for religious liberty than was available" under this Court's pre-*Smith* Free Exercise Clause jurisprudence. *Id.* at 2761 n.3.

B. The Contraceptive Mandate

This case involves RFRA challenges to the same contraceptive mandate that this Court considered in *Hobby Lobby*. That mandate is a regulatory implementation of a provision of the Patient Protection and Affordable Care Act of 2010 ("ACA"), Pub. L. No. 111-148, 124 Stat. 119, amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. Under the ACA, every "large employer"—*i.e.*, employer with at least 50 full-time employees—must offer "a group health plan or group health insurance coverage" that provides "minimum essential coverage." 26 U.S.C. §§4980H, 5000A. That "minimum essential coverage" must include, among other things, coverage for "preventive

care and screenings" for women without "any cost sharing requirements." 42 U.S.C. §300gg-13(a)(4); 26 U.S.C. §9815; 29 U.S.C. §1185d.

Congress did not specify what "preventive care and screenings" a plan must cover. Instead, Congress delegated that task to the Health Resources and Services Administration ("HRSA"), a sub-agency within the Department of Health and Human Services ("HHS"). *Id.* HHS, in turn, asked the Institute of Medicine ("IOM"), an arm of the "semi-private" National Academy of Sciences, to develop recommendations to help implement these requirements. 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012). The IOM recommended that HHS define "preventive care" to include "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." JA546-47. The 20 FDA-approved contraceptive methods include both drugs and devices that operate to prevent fertilization of an egg, and four drugs and devices—two types of intrauterine devices and the drugs commonly known as Plan B and *ella*—that can prevent implantation of a fertilized egg.

HHS adopted the IOM's recommendation entirely, 77 Fed. Reg. at 8725; 45 C.F.R. §147.130(a)(1)(iv), and the Labor and Treasury Departments adopted regulations to the same effect, 29 C.F.R. §2590.715-2713(a)(1)(iv); 26 C.F.R. §54.9815-2713(a)(1)(iv). Accordingly, HHS, but not Congress itself, requires most large employers to include in their plans coverage for all FDA-approved contraceptive methods. Employers who fail to comply

with that mandate "must pay a substantial price." *Hobby Lobby*, 134 S. Ct. at 2762. If an employer excludes coverage for even one of the FDA-approved forms of contraceptives from its plan, it must pay the government $100 per day for each affected individual. 26 U.S.C. §4980D(a)-(b). If an employer fails to offer a plan at all and at least one of its full-time employees enrolls in a plan on an exchange and qualifies for a government subsidy, then the employer must pay the government $2,000 per year for each of its full-time employees. *Id.* §4980H(a), (c)(1).

C. Statutory and Regulatory Exemptions from the Contraceptive Mandate

Not all private employers are subject to the contraceptive mandate. In fact, "a great many employers" are exempt from the mandate entirely, *Hobby Lobby*, 134 S. Ct. at 2763-64, either as a statutory or as a regulatory matter.

First, nearly a third of large employers are exempt through the ACA's exception for "grandfathered health plans," *i.e.*, plans that have not made certain changes since March 2010. *See id.*; 42 U.S.C. §18011; 75 Fed. Reg. 34,538, 34,542 Tbl. 1 (June 17, 2010). While Congress required grandfathered plans to comply with other ACA requirements that HHS has described as providing "particularly significant protections," *id.* at 34,540—such as covering dependents up to age 26, covering preexisting conditions, and reducing waiting periods—the statutory requirement to cover "preventive services" (and thus the regulatory requirement to cover all FDA-approved contraceptives) "is expressly excluded from this

subset." *Hobby Lobby*, 134 S. Ct. at 2780; *see* 42 U.S.C. §18011(a)(4). At present, approximately 29% of employers with more than 200 employees (and an even larger percentage of employers with fewer employees) continue to maintain grandfathered plans, a figure that decreased only modestly from 34% in 2014. *Compare* Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits 2015 Annual Survey* 215 (2015), *with* Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits 2014 Annual Survey* 211 (2014). The employers of tens of millions of Americans thus remain exempt from the contraceptive mandate for the simple purpose of "avoiding the inconvenience of amending an existing plan." *Hobby Lobby*, 134 S. Ct. at 2780.

Second, again as a statutory matter, employers with fewer than 50 full-time employees need not provide their employees with a health plan at all. *See* 26 U.S.C. §4980H(c)(2). In 2014, 34 million Americans—more than a quarter of the private-sector workforce—worked for employers who were not obligated to provide health insurance under the small-business exemption. *Hobby Lobby*, 134 S. Ct. at 2764. For employees of small businesses that do not provide health insurance, the individual plans sold on the exchanges that the ACA created are the principal means of obtaining access to cost-free contraceptive coverage. While some small-business employees who purchase insurance on an exchange will qualify for a federal subsidy, not all will. *See* 26 U.S.C. §36B. And, of course, some employees purchase no insurance at all.

Finally, after the contraceptive mandate met with widespread protest from employers with sincere religious objections to some or all forms of contraception, HHS created an exemption for a subset of "religious employers." *See* 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). This exemption allows these employers to continue offering health plans that reflect their religious beliefs by excluding drugs and devices that contradict them.

HHS did not extend this exemption to all organizations that explicitly hold themselves out as religious. Nor did it extend this exemption to all religious employers who are permitted by congressional exemptions from federal employment discrimination laws to hire only co-religionists, or to fire employees who reject religious teachings such as those that prohibit the use of contraceptives or abortifacients. Instead, HHS provided an exemption only to nonprofit organizations that are "referred to" in certain provisions of the Internal Revenue Code. 45 C.F.R. §147.131(a). As a result, "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)(i), (iii), are exempt from the contraceptive mandate for religious reasons, but all other religious employers are not.

Notably, the exempt entities are exempt from the mandate regardless of whether they actually hold any religious objection to contraception or actually limit their hiring to co-religionists. What is more, the exemption is automatic and complete. An exempt entity need not take any action or file any form with

the government to gain an exemption, and its plan infrastructure will not be used to provide any contraceptive coverage that it does not choose to provide.

The sole contemporaneous explanation HHS offered for confining its exemption to this subset of religious employers is that it believed they are "more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. at 39,874. HHS did not provide any evidence, however, to substantiate its empirical claim that those qualifying for its exemption are more likely to employ co-religionists than the thousands of other religious employers that Congress has statutorily entitled to hire only co-religionists. Nor did HHS attempt to reconcile that claim with its removal from an earlier version of the regulation a requirement that, in order to qualify for an exemption, a house of worship or integrated auxiliary must "primarily emplo[y] persons who share the religious tenets of the organization." 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012).

All told, these statutory and regulatory exemptions relieve the employers of tens of millions of employees of any obligation to do anything to comply with the contraceptive mandate. Those employers face no penalties if they decline to provide their employees with cost-free contraceptive coverage, and their employees will not receive that coverage through or in connection with an employer-sponsored plan if their employers decline to provide it. Instead, if employees of exempt employers want to obtain cost-free contraceptive coverage, they must obtain it on

their own, either by purchasing a plan on an exchange or through some other means.

D. The Regulatory Mechanism for Complying with the Contraceptive Mandate

As a result of HHS's decision to confine its exemption to only a subset of religious employers, religious employers ranging from orders of nuns, to faith-based charities, to religious colleges and universities, to theological seminaries remain obligated to comply with the contraceptive mandate. Accordingly, even though these employers hold sincere religious objections to that regulatory mandate, and even though these employers qualify for statutory exemptions from statutory prohibitions against employment discrimination, they face substantial penalties if they adhere to their faith and refuse to comply with the contraceptive mandate.

Rather than grant these religious employers the same exemption given to the houses of worship with which many of them are affiliated (which allows those houses of worship to offer health plans that reflect their religious beliefs and to exclude products that contradict those beliefs), HHS instead offered them only an alternative mechanism for complying with the contraceptive mandate. If a nonexempt religious employer takes one or another of the actions that this regulatory mechanism prescribes, then it will be "considered to comply with" the statutory obligation to provide an employee health plan that provides cost-free coverage for "preventive services" that, by regulation, must include all FDA-approved contraceptives. 78 Fed. Reg. at 39,879; *see also* 45

C.F.R. §147.131(c)(1) ("[a] group health plan … complies" with the contraceptive mandate if the employer takes the actions that the regulatory mechanism requires); 26 C.F.R. §54.9815-2713A(b)(1) (same); 29 C.F.R. §2590.715-2713A(b)(1) (same). If a nonexempt religious employer does not comply with the mandate via one of the available avenues, then it will face the exact same penalties as any other nonexempt employer that—whether for religious reasons or otherwise—fails to provide its employees with a plan that includes contraceptive coverage.[1]

In its original form, this regulatory mechanism provided only one path for compliance: A nonexempt religious employer was required to execute and deliver to the appropriate parties an Employment Benefits Security Administration Form 700 certifying that it is an "eligible organization" under the government's definition—in other words, that it is a "nonprofit entity" that "holds itself out as a religious organization" and "opposes providing [contraceptive] coverage … on account of religious objections." 45 C.F.R. §147.131(b)(1)-(3) (2013). What the employer must do with this form and how the form operates to ensure coverage for plan participants differ slightly (but not materially) depending on what type of plan the employer offers its employees.

For a nonexempt religious employer with an insured plan—*i.e.*, a plan through a third party insurer such as BlueCross BlueShield—under the

[1] While colleges and universities are not required to provide student healthcare plans, if they choose to do so, those plans that are fully insured are governed by the same regulations. 45 C.F.R. §147.131(f) (2013).

original regulation, the employer's "plan … complies … with any requirement … to provide contraceptive coverage if the [employer] or group health plan provides a copy of [an executed Form 700] to each issuer providing coverage in connection with the plan." *Id.* §147.131(c)(1) (2013). Once the employer provides the insurer with an executed Form 700, the insurer becomes obligated to purport to "[e]xpressly exclude contraceptive coverage from" the religious employer's plan, but also to use the employer's plan infrastructure to "[p]rovide separate payments for any contraceptive services required to be covered under [the contraceptive mandate] for plan participants and beneficiaries for so long as they remain enrolled in the plan." *Id.* §147.131(c)(2)(i). Although the insurer may not impose any costs on the employer for providing this coverage to its employees through the employer's plan infrastructure, *id.* §147.131(c)(2)(ii), the government will not reimburse the insurer for these "separate payments" for contraceptive coverage. HHS instead posited that the cost of providing the coverage would be offset by "savings from reduced pregnancy-related expenses and other health care costs." 78 Fed. Reg. at 39,877.

For a nonexempt religious employer with a self-insured plan—*i.e.*, a plan under which the financial risk of claims is not borne by an insurance company—under the original regulation, the employer's "plan … complies … with any requirement … to provide contraceptive coverage if" the employer: (i) "contracts with one or more third party administrators," and (ii) "provides ... a copy of [an executed Form 700] to each third party administrator." 26 C.F.R. §54.9815-2713A(b)(1) (2013). A third party administrator

("TPA") is the entity that a self-insured plan typically uses to process claims.

A TPA is not normally designated to serve as the plan administrator; the plan administrator instead serves the entirely different role of acting as the fiduciary that administers the plan itself. But the government decided that the execution and delivery of Form 700 would "be treated as a designation of the third party administrator(s) as plan administrator and claims administrator … pursuant to section 3(16) of ERISA"—not generally, but "solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39,879; 29 C.F.R. §2510.3-16(b) (2013). Thus, Form 700 serves as "one of the instruments under which the employer's plan is operated under ERISA section 3(16)(A)(i)." 78 Fed. Reg. at 39,879; 29 C.F.R. §2510.3-16(b) (2013).[2] Indeed, the form is what "ensures that there is a party with legal authority" to make payments to plan beneficiaries for contraceptives. 78 Fed. Reg. at 39,880. And, as the government recently conceded, it ensures that "the contraceptive coverage provided by its TPA is … part of the same ERISA plan as the coverage provided by the employer." No. 15-35 Br. in Opp. 19.

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[2] Forcing an employer to issue a new plan instrument is no small matter. Altering a plan by issuing a new "instrument" changes all of the relevant fiduciaries' duties under ERISA. *See, e.g.*, *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 612 (2013) ("once a plan is established, the administrator's duty is to see that the plan is 'maintained pursuant to [that] written instrument'" (quoting 29 U.S.C. §1102(a)(1)). An individual employee's "cause of action for benefits is likewise bound up with the written instrument." *Id.*

Upon receipt of an executed Form 700, a TPA that agrees to continue to serve the employer becomes legally obligated to either "[p]rovide payments for contraceptive services for plan participants and beneficiaries" or "[a]rrange for an issuer or other entity" to do so. 26 C.F.R. §54.9815-2713A(b)(2) (2013); 29 C.F.R. §2510.3-16(b) (2013). Although a TPA must take on this obligation only if it "agrees to … remain in a contractual relationship with the" employer, *id.*, a nonexempt religious employer with a self-insured plan is obligated to maintain a contractual relationship with a TPA to "compl[y]" with the contraceptive mandate. 26 C.F.R. §54.9815-2713A(b)(1)(i). Accordingly, if the employer's TPA is not willing to take on the obligation to ensure the provision of contraceptive coverage to the employer's employees, then the employer must find a TPA that is. A TPA may be reimbursed for the costs of providing or arranging for that coverage "through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer," as well as through an additional "allowance" of at least 10% for "administrative costs and margin." *Id.* §54.9815-2713A(b)(3) (2013); 45 C.F.R. §156.50(d)(3)(ii) (2013).

Finally, the last type of plan used by many nonexempt religious employers is known as a "church plan," which is a statutorily authorized "plan established and maintained ... for its employees (or their beneficiaries) by a church or by a convention or association of churches" that is exempt from tax under the Internal Revenue Code. 29 U.S.C. §1002(33). Unless the plan sponsor chooses otherwise, a church plan is exempt from regulation under ERISA. *Id.* §1003(b)(2). The government thus does not currently

have the power to treat an executed Form 700 as a plan instrument designating the TPA of an ERISA-exempt church plan to serve as plan administrator for purposes of providing contraceptive coverage, as the agencies that administer the regulatory mechanism claim that authority only under ERISA.

For that and other reasons, commentators urged the agencies to exempt religious employers with church plans from the contraceptive mandate. *See, e.g.*, Letter, Church Alliance to Dep't of Labor (Oct. 27, 2014), http://bit.ly/1SokeiD. The agencies refused to do so, and instead treated an employer with a church plan like an employer with any other self-insured plan, declaring that its plan "complies … with any requirement … to provide contraceptive coverage" only if the employer contracts with a TPA and provides its TPA with an executed Form 700. 26 C.F.R. §54.9815-2713A(b)(1) (2013). Upon receipt of that form, the TPA is treated by the government as empowered to provide or arrange for contraceptive coverage to beneficiaries of the employer's plan and is eligible for reimbursement for at least 110% of the costs of providing that coverage should it choose to do so. *See* 45 C.F.R. §156.50(d)(1)-(3). The government will not offer or provide that reimbursement, however, unless the employer has executed a Form 700.

In sum, although the details may be complex, the ultimate objective is not: The regulatory mechanism for compliance with the mandate is designed to effectuate contraceptive coverage from inside the employer's "insurance coverage network," taking advantage of the employer's existing "coverage administration infrastructure" to make the coverage

flow. 80 Fed. Reg. 41,328 (July 14, 2015). As the government has explained, the "plan participants and beneficiaries (and their health care providers) do not have to have two separate health insurance policies (that is, the group health insurance policy and the individual contraceptive coverage policy)." 78 Fed. Reg. at 39,876. Instead, they have only one policy, provided through a single plan infrastructure. And the regulatory mechanism is designed to force the religious employer to take action to facilitate the use of that infrastructure—infrastructure that the employer regularly maintains and must maintain—to provide the very contraceptive coverage that the employer finds religiously objectionable.

In this respect, the differential treatment of exempt religious employers and those who must comply with the mandate is telling. Exempt employers need not file Form 700 or any other form with the government because they are truly exempt. The government does not require their plans to include contraceptive coverage and therefore does not need any form to enable the provision of such coverage through their plans. Instead, the employers are free to provide or not provide contraceptive coverage through their plans as they choose. By contrast, the government demands the form from petitioners not solely to learn of their religious objections, but as a necessary condition for ensuring that cost-free contraceptive coverage is provided via their own plan infrastructure.

E. The Modified Regulatory Method for Complying with the Contraceptive Mandate

Unsurprisingly, nonexempt religious employers who hold sincere religious objections to contraception found little solace in this so-called "accommodation" of their religious beliefs. After all, these organizations do not merely object to directing or paying for the inclusion of contraceptive coverage in their plans; they object to being forced to facilitate the provision of contraceptive coverage through their own plan infrastructure as well. Being forced to comply with the contraceptive mandate via a scheme that requires them to do so is thus no more compatible with their religious beliefs than being forced to comply by writing the coverage into their plans themselves. Accordingly, hundreds of religious employers implored the government to fashion a genuine exemption to the mandate for all nonprofit religious organizations. And when the government refused to do so, numerous nonprofit religious employers brought lawsuits challenging application of the contraceptive mandate to them as, among other things, a violation of RFRA.

The first of those lawsuits to reach this Court was brought by, among others, the Little Sisters of the Poor, on behalf of themselves and a class of all similarly situated employers who use the same church plan as the Little Sisters. Although the Little Sisters indisputably hold sincere religious objections to complying with the contraceptive mandate—including complying via the regulatory mechanism—both the District Court and the Tenth Circuit refused to grant them a preliminary injunction mere days before

massive fines were set to start accruing if they did not comply. The Little Sisters thus turned to this Court for relief, and the Court responded by issuing a rare injunction under the All Writs Act, 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 appeal.... To meet the condition for injunction pending appeal, applicants need not use the form prescribed by the Government and need not send copies to third-party administrators.

Little Sisters of the Poor Home for the Aged v. Sebelius, 134 S. Ct. 1022 (2014).

The Court subsequently ordered similar relief in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), again requiring the nonexempt religious employer to do nothing more to avoid the threat of penalties than inform HHS "in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services." *Id.* at 2807. While the order states that it does not "preclude[] the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act," *id.*, it does not

say anything about whether the government may use the employer's own plan infrastructure to accomplish that goal.

In the wake of these two orders, HHS issued new interim regulations tweaking the regulatory mechanism for how to achieve compliance with the contraceptive mandate. *See* 79 Fed. Reg. 51,092 (Aug. 27, 2014). These revisions do not exempt any additional religious employers from the contraceptive mandate; they instead just provide yet another avenue via which nonexempt religious employers can comply with the mandate by enabling the use of their own plan infrastructure to provide contraceptive coverage to their employees. *See, e.g.*, 45 C.F.R. §147.131(c)(1) (2014) ("[a] group health plan established or maintained by an eligible organization … complies … with any requirement … to provide contraceptive coverage if …").[3]

While this additional avenue is purportedly designed to render the regulatory mechanism "consistent with" this Court's orders, 79 Fed. Reg. at 51,094, it in fact requires a nonexempt religious employer to do more than either of those orders required to avoid penalties for non-compliance with the contraceptive mandate. Specifically, whereas this Court's orders required the employers to inform HHS

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[3] On July 14, 2015, the three implementing agencies reissued these revised regulations as final rules, and also redrafted the regulation defining "eligible organization" to include certain for-profit employers with religious objections. 80 Fed. Reg. 41,318 (July 14, 2015). The current regulations are codified at 26 C.F.R. §54.9815-2713A (2015) (Treasury), 29 C.F.R. §2590.715-2713A (2015) (Labor), and 45 C.F.R. §147.131 (2015) (HHS).

in writing only that they "are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services," *Little Sisters*, 134 S. Ct. at 1022; *see also Wheaton College*, 134 S. Ct. at 2815 (Sotomayor, J., dissenting) (noting that order does not "require the religious nonprofit to identify its [TPA]"), under the modified regulation, an employer that declines to execute Form 700 must inform HHS in writing not only of its religious objection, but also of the "name and type" of its plan and "the name and contact information for any of the plan's third party administrators and health insurance issuers," 45 C.F.R. §147.131(c)(1)(ii) (2014). The employer also "must provide updated information" to HHS "[i]f there is a change in any of th[at] information." *Id.*

Once the employer provides that information, the government "will send a separate notification" to the employer's insurer or TPA informing it that it is now obligated to provide the employer's plan beneficiaries with contraceptive coverage. *Id*; *see also* 26 C.F.R. §54.9815-2713A(b) (2014); 29 C.F.R. §2590.715-2713A(b) (2014). For a self-insured plan, just like an executed Form 700, that notification serves to "designate the relevant [TPA] as plan administrator" of the employer's plan under ERISA only for contraceptive coverage purposes and becomes "an instrument under which the plan is operated." 79 Fed. Reg. at 51,095.

According to HHS, the additional information it requires employers to provide on top of what this Court's orders contemplated is essential to achieving its goal of getting contraceptive coverage to flow

through the objecting employer's plan infrastructure. In HHS's view, "[t]he content required for the notice" is "necessary for the Departments to determine which entities are covered by the accommodation, to administer the accommodation, and to implement the policies in the July 2013 final regulations." *Id.* Accordingly, under the revised regulations, a nonexempt religious employer "complies … with [the] requirement … to provide contraceptive coverage" only if it either sends an executed Form 700 to its insurer(s) or TPA(s) or provides HHS with the information that it maintains it needs to identify and contact the employer's insurer(s) and/or TPA(s) and obligate or incentivize them to use the employer's plan infrastructure to provide contraceptive coverage to its employees. 45 C.F.R. §147.131(c) (2014). If an employer does one of those two things, the revised regulatory mechanism operates just like the original one.

Once again, the contrast with exempt religious employers is telling. They need not file a written objection at all—because HHS is not looking for a written document that it deems necessary to ensure that contraceptive coverage will be provided through the religious employer's plan infrastructure. HHS instead allows exempt religious employers—but not petitioners—to continue offering health plans in a manner consistent with their religious beliefs.

II. Proceedings Below

This case involves RFRA challenges to the contraceptive mandate brought by a wide range of nonexempt religious employers, every one of which qualifies for the statutory exemptions from

employment discrimination laws that Congress has created for religious employers. Although the details of each employer's health plans may differ, two things do not: Each employer concededly holds sincere religious objections to offering a health plan that comes with some or all forms of contraceptive coverage. Yet each employer indisputably must comply with the contraceptive mandate through one of the various available options and will face devastating penalties if it fails to do so.

A. The Fifth Circuit Proceedings

Petition No. 15-35 arises out of proceedings in the Fifth Circuit involving East Texas Baptist University, Houston Baptist University, and Westminster Theological Seminary. East Texas Baptist University and Houston Baptist University are Christian liberal arts universities affiliated with the Baptist General Convention of Texas. JA641, 731. Their Christian faith permeates everything they do. Both schools are governed by trustees who must, in accordance with their bylaws, share the schools' understanding of the Christian faith. JA642, 732. Both schools hire only faculty and staff who likewise share their faith. JA643, 732. The schools admit students of all faiths, but they ask their students, regardless of religious identity, to live according to a set of Christian principles while enrolled. JA643, 732.

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. JA644-46, 733-36. The student handbook for East Texas Baptist 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. JA694-95. The Student Code for Houston Baptist 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." JA758-59.

Westminster Theological Seminary is a non-denominational seminary in the Presbyterian tradition. JA796. Westminster's entire curriculum is biblical and theological, and it exists to train adults for Christian ministry. JA796-99. Consistent with this mission, Westminster is governed by trustees, all of whom must be elders in a Presbyterian church. JA798. All its faculty and staff must be practicing Christians, and all faculty must assent to the Westminster Confession of Faith and Larger Catechism, which exhort Westminster's community to "protect[] and defend[] the innocent," including unborn children. JA798-99. For historical and theological reasons, however, Westminster is independent of any one church or denomination and therefore does not qualify as an "integrated auxiliar[y]" under the special IRS rule for seminaries. 26 C.F.R. §1.6033-2(h)(5). JA796-98, 803.

All three institutions provide healthcare plans to their employees that are both generous and consistent with their religious commitment to the sanctity of life and the well-being of their campus communities. JA647-48, 736-38, 802. Those plans include free

access to several different kinds of contraceptives. JA647, 737. But because these parties oppose abortion, their plans exclude four types of contraceptives that petitioners consider abortifacients. JA647, 737. East Texas Baptist offers its employees health coverage through a self-insured plan. JA647. Houston Baptist has adopted for its employees the ERISA-exempt church plan operated by GuideStone Financial Resources, an agency of the Southern Baptist Convention. JA736-37. Westminster formerly contracted with a third party insurance carrier, JA802, but during the course of this lawsuit it switched to the ERISA-exempt church plan operated by GuideStone. Each organization wants to continue to offer generous conscience-compliant health benefits to its employees, including coverage for many forms of contraception, but because of the contraceptive mandate, they cannot. They will face enormous penalties—collectively, more than $23 million in annual fines—if they do not comply with the contraceptive mandate in one way or another. JA655, 744-45, 808. Accordingly, they brought suit seeking to enjoin enforcement of the mandate against them under, among other things, RFRA.

The District Court agreed that forcing them to comply with the mandate via the regulatory mechanism violates RFRA. Judge Rosenthal first concluded that by forcing petitioners to perform "an affirmative act" "that they find … to be religiously offensive" or face millions of dollars in fines, the government has substantially burdened their exercise of religion. No. 15-35 Pet.App.76a. She then went on to conclude that the regulatory mechanism for compliance is not "the least restrictive means of

furthering [a] compelling governmental interest," 42 U.S.C. §2000bb-1(b), as 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." No. 15-35 Pet.App.84a.

The government appealed, and the Fifth Circuit reversed. According to the Fifth Circuit, even though there is no dispute that petitioners sincerely believe that complying with the contraceptive mandate via the regulatory mechanism would violate their religious beliefs, and even though there is no dispute that petitioners will face "draconian" fines if they fail to do so, the requirement to comply nonetheless imposes no "substantial burden" on petitioners' exercise of religion. No. 15-35 Pet.App.5a, 18a. The court reached that conclusion by reasoning that petitioners are simply wrong to believe that the regulatory mechanism for compliance forces them to "facilitat[e] access to contraceptives." No. 15-35 Pet.App.18a. Accordingly, the court never reached the question of whether that mechanism is the least restrictive means of furthering a compelling government interest.[4]

B. The Tenth Circuit Proceedings

Petitions No. 15-105 and No. 15-119 arise out of proceedings in the Tenth Circuit involving three District Court cases initiated by several different nonexempt religious employers, and also by the

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[4] The Fifth Circuit subsequently stayed its mandate pending this Court's resolution of any petitions out of its decision.

religiously affiliated entities that have created the church plans that those employers use to provide health benefits to their employees in a manner that is consistent with their religious beliefs.

1. The Little Sisters of the Poor Home for the Aged, Denver, Colorado, and the Little Sisters of the Poor, Baltimore, are religious nonprofit corporations operated by an order of Catholic nuns whose faith inspires them to spend their lives serving the sick and elderly poor. JA976-78. Each Little Sister takes a vow of obedience to God and of hospitality "to care for the aged as if they were Christ himself." JA979. The Little Sisters treat each "individual with the dignity they are due as a person loved and created by God," and they strive to "convey a public witness of respect for life, in the hope that [they] can build a Culture of Life in our society." JA980. The Little Sisters oppose, based on Catholic doctrine, sterilization, contraception, and abortion, and they believe that it is religiously wrong for them to facilitate the provision of contraceptive procedures and devices. JA981-85.

The Little Sisters offer their employees an ERISA-exempt church plan through the Christian Brothers Employee Benefit Trust, which filed suit alongside the Little Sisters. JA979. The church plan that the Trust provides is open only to nonprofits in good standing with the Roman Catholic Church and listed or approved for listing in *The Official Catholic Directory*. JA993-94. The Trust uses Christian Brothers Services, another Catholic organization that joined the Little Sisters and the Trust in bringing suit, as its principal TPA. JA992-93. Christian Brothers serves other Catholic organizations by helping them to

"remain faithful to [their] mission and the universal mission of the Catholic Church." JA995. Consistent with the sincerely held religious beliefs of the Catholic Church, the Trust does not provide contraceptive coverage. JA998-99. And because it shares the religious objections both of the Little Sisters and of the Trust, Christian Brothers Services has made clear that it does not intend to provide contraceptive coverage to the Little Sisters' employees even if the Little Sisters were to execute Form 700 or provide HHS with the paperwork that its modified regulatory scheme requires, and the government currently disclaims any authority to compel them to do so. JA1092-98.

Nonetheless, the government still insists that the Little Sisters must comply with the contraceptive mandate via the alternative method. According to the government, execution of the required paperwork may still result in the provision of contraceptive coverage through the Little Sisters' plan—even though neither the Trust itself nor the Little Sisters' TPA is willing to provide it. This is because HHS will consider that paperwork sufficient to empower it to try to convince the company that processes pharmaceutical claims under the Little Sisters' plan, which does not share the objections of the Little Sisters, the Trust, and their TPA, to take on the obligation to provide contraceptive coverage to the plan's beneficiaries. Only if the Little Sisters execute the required paperwork, however, will HHS consider itself empowered to take that step. And only if the Little Sisters do so can they avoid the more than $4.4 million in fines that they would face for failure to comply with the contraceptive mandate. JA987-88.

The District Court in which the Little Sisters, the Trust, and Christian Brothers Services brought suit, on behalf of themselves and all employers who use the Trust's church plan, denied a preliminary injunction, concluding that neither forcing the Little Sisters to comply with the contraceptive mandate via the regulatory mechanism nor forcing the Trust to allow its plan infrastructure to be used to provide coverage to which both the Little Sisters and the Trust object imposes a substantial burden on religious exercise under RFRA. No. 15-105 Pet.App.39a-40a. The Tenth Circuit denied an injunction pending appeal, but, as explained above, this Court granted the parties relief pending resolution of their appeal.

2. Reaching Souls International is a religious nonprofit corporation that both trains pastors and provides care for orphans in Africa, India, and Cuba. JA1191. Truett-McConnell College is a liberal arts college affiliated with the Baptist Convention of Georgia. JA1203. Based on their Baptist faith and their sincerely held belief in the sanctity of human life, Reaching Souls and Truett-McConnell object to four of the 20 forms of contraceptive coverage covered by the mandate as abortifacients. JA1192, 1204-05.

Reaching Souls and Truett-McConnell offer health coverage through the same ERISA-exempt church plan provided by GuideStone, which, as noted above, is an agency of the Southern Baptist Convention. JA1192, 1204. GuideStone, which joined Reaching Souls and Truett-McConnell in bringing suit, sponsors a self-insured medical plan and contracts with TPAs to provide medical networks, certain administrative services, and pharmaceutical

benefits. JA1172-74. The largest TPA with which GuideStone contracts has stated that, should any of the organizations that use GuideStone's church plan comply with the contraceptive mandate via the regulatory mechanism, it will communicate to that organization's plan beneficiaries (and their female beneficiaries, starting at age 10) that coverage for the abortifacients to which the organization objects is available through the GuideStone plan. JA1218-22. And the TPA would facilitate that coverage by using GuideStone's plan infrastructure to contact all participants, identify participants by "payroll location," and perform "[o]ngoing, nightly feeds" of information. JA1220-21. Reaching Souls and Truett-McConnell will face, collectively, more than $3.2 million in annual fines if they do not comply with the contraceptive mandate in some way. JA1194, 1206.

The District Court in which these parties brought suit preliminarily enjoined application of the contraceptive mandate to them as a violation of RFRA. Like Judge Rosenthal, Judge DeGiusti held that forcing petitioners to comply with the contraceptive mandate via the regulatory mechanism imposes a substantial burden on their religious exercise because it would require them to take "affirmative steps" that they sincerely believe are "the moral equivalent of directly complying with the contraceptive mandate." No. 15-105 Pet.App.206a-07a. He also concluded that the regulatory mechanism does not satisfy RFRA's strict scrutiny test. No. 15-105 Pet.App.203a.

3. Southern Nazarene University, Oklahoma Wesleyan University, Oklahoma Baptist University, and Mid-America Christian University are religious

universities. JA1314. They require anyone seeking entry into and participation in their communities to hold certain Christian beliefs, including respect for the dignity and worth of human life from the moment of conception. Their mission includes promoting their members' spiritual maturity by fostering obedience to, and love for, their understanding of God's laws, including condemnation of the taking of innocent human life. JA1314-15. The institutions believe that it is sinful and immoral for them to participate in, facilitate, enable, or otherwise support access to abortion-inducing drugs and devices and related counseling. JA1314.

These institutions all believe that they have a religious obligation to provide their employees with generous health benefits, and they do so through a variety of different plans. JA1315. Southern Nazarene primarily offers health coverage to its employees through a self-insured plan and offers coverage to its students through a traditional insured plan. JA1315-16. Oklahoma Wesleyan contracts with a health-insurance company for an insured plan for its employees. JA1316. Oklahoma Baptist utilizes a traditional insured plan for both its employees and its students. JA1317. Mid-America Christian offers an ERISA-exempt church plan through GuideStone. JA1317. The institutions object only to four forms of contraception covered by the mandate that they view as abortifacients. JA1318-19. If the institutions do not comply with the contraceptive mandate in one way or another, they will face, collectively, more than $30 million in annual fines. JA1315-17, 1322-23.

The District Court in which these petitioners brought suit preliminarily enjoined application of the contraceptive mandate to them as a violation of RFRA. Like Judge Rosenthal and Judge DeGiusti, Judge Friot concluded that forcing religious employers to comply with the mandate via the regulatory mechanism substantially burdens their exercise of religion, as the paperwork they must execute "is, in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects." No. 15-119 Pet.App.177a. By putting religious employers to the "choice of either acquiescing in a government-enforced betrayal of sincerely held religious beliefs, or incurring potentially ruinous financial penalties, or electing other equally ruinous courses of action," Judge Friot concluded, the government has imposed a substantial burden on religious exercise. No. 15-119 Pet.App.178a. He also concluded that the regulatory mechanism does not satisfy RFRA's strict scrutiny test. No. 15-119 Pet.App.178a-81a.

4. The Tenth Circuit aligned all these cases on appeal and concluded, in a single consolidated opinion, that forcing religious employers to comply with the contraceptive mandate via the regulatory mechanism does not substantially burden their religious exercise. The court did not dispute that all the petitioners before it sincerely believe that complying via the regulatory mechanism would make them "complicit in providing contraceptive coverage" in violation of their religion. No. 15-105 Pet.App.48a n.20. But the court nonetheless found no substantial burden because it

"assesse[d] and ultimately reject[ed] the merits of" those sincere religious beliefs. It held that, as a matter of law, complying via the regulatory mechanism would *not* render the religious employers morally complicit in providing contraceptive coverage; instead, in the court's eyes, doing so would "reliev[e] them from complicity." No. 15-105 Pet.App.48a.

Judge Baldock dissented in part. He expressed considerable doubt that courts may "question[] a religious adherent's understanding of the significance of a compelled action," and even if courts could so question, he concluded that forcing employers with self-insured plans to comply via the regulatory mechanism would violate RFRA. No. 15-105 Pet.App.124a. But because he accepted "for argument's sake" that a plaintiff must show that the actions forbidden by its religion would "necessarily cause" contraceptive coverage in order to demonstrate a substantial burden, he concluded that the Little Sisters' RFRA claim fails because Christian Brothers does not intend to provide contraceptive coverage should the Little Sisters comply via the regulatory mechanism.[5]

C. The Third Circuit Proceedings

Petition No. 15-191, filed by Geneva College, arises out of proceedings in the Third Circuit. Geneva College is a nonprofit institution of higher education established by the Reformed Presbyterian Church of North America. JA1381-82. Its mission is "to glorify God by educating and ministering to a diverse

[5] The Tenth Circuit also subsequently stayed its mandate pending this Court's resolution of any petitions out of its decision.

community of students in order to develop servant-leaders who will transform society for the kingdom of Christ." JA1381-82. Geneva's employees must profess the Christian faith and agree with the college's beliefs, and its students must abide by Christian standards of morality. JA1382-83. Geneva holds to the Reformed Presbyterian Church of North America Testimony, valuing human life from the moment of conception. JA1384-88. Geneva believes that it is sinful and immoral to facilitate, enable, or support access to abortion, including through emergency contraceptives that it views, under religious teachings, as abortifacients. JA1386-87.

Geneva believes that it has a religious duty to care for the physical well-being of its employees and students by providing generous health benefits. JA1388. It contracts with a third party insurance provider for both its employee and student plans. JA1388-89. Geneva does not object to covering 16 of the 20 drugs and devices covered by the contraceptive mandate, but its healthcare plans exclude coverage for four contraceptive methods that Geneva views for religious reasons as tantamount to murder. JA1389. Geneva will face more than $10 million in annual fines if it does not comply with the contraceptive mandate in some manner. JA1384.

Like three of the four other District Courts below, the District Court in which Geneva brought suit preliminarily enjoined application of the contraceptive mandate to either Geneva's employee or student plans as a violation of RFRA. Judge Conti concluded that forcing Geneva to choose between acting as the "necessary stimulus" enabling the provision of

services that it finds morally abhorrent or paying onerous fines constitutes a "quintessential substantial burden." No. 15-191 Pet.App.71a, 115a. Judge Conti also concluded that the regulatory mechanism does not satisfy RFRA's strict scrutiny test. No. 15-191 Pet.App.75a, 117a-18a.

The Third Circuit reversed, holding that compliance with the contraceptive mandate via the regulatory mechanism does not impose a substantial burden on Geneva's religious exercise because it does not have the "effect" of "mak[ing] [Geneva] complicit in the provision of objected-to services." No. 15-191 Pet.App.34a. According to the Third Circuit, "participating" in the regulatory mechanism for compliance results in "no role whatsoever in the provision of the objected-to contraceptive services." No. 15-191 Pet.App.36a. The court thus concluded not only that the regulatory mechanism imposes no substantial burden on religion, but that it imposes no burden at all. After the Third Circuit issued its mandate without waiting the ordinary seven days, a group of plaintiffs whose cases had been consolidated with Geneva's filed an emergency application seeking and receiving relief similar to that provided by this Court in its *Wheaton College* order. *See Zubik v. Burwell*, 135 S. Ct. 1544 (2015) (recalling and staying the mandate); *Zubik v. Burwell*, 135 S. Ct. 2924 (2015) (issuing order similar to *Wheaton College* order).

SUMMARY OF ARGUMENT

This case is not nearly as complicated as the government would like it to be. Indeed, once the deceptive labels and diversionary tactics are cleared away, the only things that matter are beyond dispute.

The government is threatening petitioners with crippling penalties unless they take affirmative acts that the government itself deems sufficient to put them into compliance with a mandate that violates their concededly sincere religious beliefs. The government has *truly* exempted—not merely "accommodated"—countless other employers from that same mandate, some for reasons as trifling as administrative convenience, and others because even HHS recognizes that its mandate violates sincerely held religious beliefs. Yet the government refuses to do the same for petitioners, notwithstanding their concededly sincere religious objections. If that does not violate RFRA, then it is hard to see what does.

The government's contrary argument collapses under its own weight. The government claims that it has "exempted" petitioners from the contraceptive mandate, but that is demonstrably false. The government has granted true exemptions from the mandate, and they look nothing like what it demands of petitioners. Truly exempt organizations do not need to comply with the mandate *at all*; they need not execute or deliver paperwork empowering anyone to use their plan infrastructure to provide contraceptive coverage, nor even notify the government of their desire for an exemption. They do not face any penalties, and the government is not trying to use their plan infrastructure to provide contraceptive coverage. These organizations are truly exempt; petitioners plainly are not.

Nor can HHS accurately label its regulatory mechanism for compliance a simple "opt out." If all the government wanted from petitioners were to know

that they want to opt out of the contraceptive mandate, then this litigation would have ended the day it began. The problem is that the government wants something more, and always has: It wants petitioners to take affirmative steps and file the paperwork necessary to get contraceptive coverage to their employees through the plan infrastructure that petitioners created and maintain. If, and only if, they do so will petitioners be deemed in compliance with the contraceptive mandate. In other words, the government wants petitioners to do precisely what their sincere religious beliefs forbid—and it is threatening them with draconian penalties unless they do so. It is the same mandate enforced by the same penalties as in *Hobby Lobby*, and it is a classic substantial burden on religious exercise.

The government's refusal to acknowledge as much is nothing more than a forbidden attempt to second-guess petitioners' sincere religious beliefs that the actions the government has demanded of them would constitute sin. Indeed, if the government were really correct that its regulatory scheme imposes no burden on religious employers *at all*, then the true exemption for houses of worship could be eliminated tomorrow. That the government itself seems to recognize that such a result would be untenable utterly defeats its efforts to resist the conclusion that its regulatory scheme substantially burdens religious exercise.

The government fares no better with its efforts to demonstrate that forcing petitioners to comply with the contraceptive mandate furthers a compelling interest and is the least restrictive means of doing so. Indeed, the government cannot satisfy either prong of

RFRA's strict scrutiny test. If its interests were truly compelling, the government would not exempt the employers of tens of millions of employees from the mandate for mere administrative convenience. Moreover, there is simply no excuse for granting a true exemption to houses of worship and their integrated auxiliaries, yet denying one to religious organizations that share the exact same religious objections. HHS claims that this discrimination is intended to reflect a religious employer's propensity to hire co-religionists. But there is no coherent justification for HHS to exempt one group but not the other when Congress has permitted *both* groups to limit their hiring to co-religionists through statutory exemptions to Title VII and other laws.

Nor is there any excuse for insisting that the only way to get contraceptive coverage to *petitioners*' employees is through petitioners' own plan infrastructure when the government already has in place alternative means for getting coverage to countless other individuals that require no involvement whatsoever from employers or their plans. Indeed, the government has invested *billions* of dollars in creating exchanges for the express purpose of making it easy to obtain qualifying insurance when it is not available through an employer. The government cannot explain why those exchanges suffice to advance its goal of getting contraceptive coverage to the tens of millions of people who may not get it from their exempt employers or are not employed at all, yet are not good enough when it comes to the few thousand employees who work for petitioners.

In short, the government has at its fingertips ready means of advancing its goals without enlisting petitioners in its efforts to get free contraceptives to their employees, and so, under RFRA, it must use them.

ARGUMENT

I. The Challenged Regulations Substantially Burden Petitioners' Religious Exercise.

A. The Regulations Place Substantial Pressure on Petitioners To Violate Their Sincerely Held Religious Beliefs.

Notwithstanding the complexities of HHS's convoluted regulatory scheme, the substantial burden analysis in this case is straightforward, especially in light of this Court's decision in *Hobby Lobby*. Indeed, whatever differences there may be in the application of strict scrutiny in the two contexts, *Hobby Lobby* all but controls the substantial burden analysis here. There is no dispute that petitioners hold sincere religious objections to providing health plans that come with contraceptive coverage that contradicts their religious beliefs. Yet unlike houses of worship and their integrated auxiliaries—who can continue to offer health plans that reflect their views about the sanctity of life—petitioners must comply with the exact same contraceptive mandate that this Court had "little trouble" recognizing is inconsistent with sincerely held religious beliefs in *Hobby Lobby*. *Hobby Lobby*, 134 S. Ct. at 2775. And if petitioners do not comply with that mandate through one of the avenues HHS has provided, they face the exact same "severe" economic consequences that this Court held constituted a substantial burden under RFRA in

Hobby Lobby. *Id.* In short, just as in *Hobby Lobby*, petitioners must choose between "engag[ing] in conduct that seriously violates their religious beliefs" and facing "substantial economic consequences." *Id.* at 2775-76. That is a quintessential substantial burden on religious exercise.

That conclusion does not cease to follow just because petitioners have been given an alternative path for complying with the contraceptive mandate. Notwithstanding the various euphemistic labels the government has attached to that regulatory mechanism, there is no escaping the reality that it is a mechanism for petitioners to *comply with*, not avoid, the mandate to which they object. Indeed, HHS's own regulations make clear that this mechanism is an alternative means through which a nonexempt religious employer "complies" with the statutory obligation to provide an insurance plan that includes cost-free coverage for preventive services that, by regulation, must include all FDA-approved contraceptives. 45 C.F.R. §147.131(c)(1); *see also* 26 C.F.R. §54.9815-2713A(b)(1); 29 C.F.R. §2590.715-2713A(b)(1).

That is not just a matter of labeling—let alone mislabeling. HHS deems this mechanism sufficient to achieve compliance with that mandate for an obvious reason: because by taking the acts that it requires, an employer would enable the use of its own plan infrastructure to provide "seamless" coverage to which it holds sincere religious objections. In other words, HHS deems the regulatory mechanism a means of compliance because that mechanism still requires petitioners to do the very thing that they find

religiously objectionable: They must affirmatively assist HHS in its efforts to get contraceptive coverage to their own employees.

The government has gone to great lengths to confuse this relatively straightforward analysis and to obfuscate the true nature of its regulatory scheme. Even though its own regulations explicitly declare the so-called "accommodation" a means of compliance with the contraceptive mandate, the government still insists on describing it as an "exemption" or "opt-out." But the government knows how to grant an exemption; indeed, HHS *has* granted an exemption, and it looks nothing like its regulatory mechanism for compliance. The exemption for houses of worship and their integrated auxiliaries instead operates just like one would expect an exemption to operate: It declares "a group health plan established or maintained by a religious employer" who fits the government's administratively chosen definition exempt from the contraceptive mandate, period. 45 C.F.R. §147.131(a). These employers face no penalties for failure to ensure that their employees receive contraceptive coverage through their plans or plan infrastructure; instead, they are entirely free to provide their employees with health plans in a manner consistent with their consciences. And they need not file any paperwork with HHS to take advantage of the exemption; indeed, they do not even need to notify HHS of their intent to claim the exemption.

That absence of paperwork is telling. It makes crystal clear that the government seeks paperwork from petitioners not to learn of their religious objections, but because it deems that paperwork

necessary to ensure that petitioners' own plan infrastructure can be used to "provide coverage" for contraceptives to which they hold religious objections. And that, in turn, makes crystal clear that petitioners are not exempt from the contraceptive mandate or able to "opt out."f The government instead demands more—and it enforces its demands with draconian penalties. Indeed, petitioners face the exact same crippling penalties as any other employer who fails to provide its employees with a plan that includes coverage for all FDA-approved contraceptives. And they can escape those penalties only if they either instruct their insurance providers to include the objectionable coverage or execute paperwork enabling the use of their own plan infrastructure to provide it.

That compelled participation in the government's efforts to get contraceptive coverage to their own employees is no accident. By HHS's own telling, petitioners' execution and delivery of the requisite paperwork is "necessary" to enable the provision of coverage through their own plan infrastructure. 79 Fed. Reg. at 51,095. That is clear enough from the reality that the coverage is *not* flowing through petitioners' plan infrastructure right now. If the paperwork petitioners have refused to execute were nothing more than a means of notifying HHS of their objections, then the very filing of these lawsuits would have given HHS all the notice it needed. But HHS seeks far more than notification of an intent to "opt out." It seeks petitioners' affirmative assistance in ensuring (or at least trying to ensure) that their employees will receive contraceptive coverage through their own plan infrastructure.

It is thus no mystery why those with sincere religious objections to facilitating such coverage object to this regulatory mechanism for compliance and are not satisfied with the government's misleading labels. The government would like to portray petitioners as objecting to the very process of opting out, like the impossible-to-satisfy conscientious objector who objects to even having to object. But that ignores what the government actually demands and why. HHS wants—indeed, insists it needs—something more than a mere objection: It wants petitioners to forfeit their ability to provide health plans to their employees (and, in some cases, their students) in a manner consistent with their religious beliefs, and instead supply the paperwork and the plan infrastructure that the government needs to get contraceptive coverage to their employees through its preferred mechanism for achieving that goal.

Thus, the better analogy is not to a conscientious objector who objects to objecting, but to a conscientious objector who (quite reasonably) objects to a government policy that allows him to avoid military service only by providing a form that both identifies and obligates a family member or friend to serve in his stead. Such a requirement could not accurately be labeled an exemption or opt-out. And such a requirement would obviously impose a substantial burden on someone who objects not just to serving in the military, but also to facilitating the military service of another. After all, the substantial burden inquiry asks whether the government "has substantially burdened religious exercise …, not whether the … claimant is able to engage in other

forms of religious exercise." *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015).

That HHS has supplied petitioners with more than one way to violate their religious beliefs thus does not eliminate the substantial burden on their religious exercise. If HHS really thought it did, then it would not exempt houses of worship or their integrated auxiliaries, but instead would require them, too, to supply the paperwork necessary to use their plan infrastructure to get contraceptive coverage to their employees. Indeed, if the government's view were correct, then HHS could eliminate that exemption tomorrow and threaten churches with multi-million dollar fines unless they, too, forfeit their ability to provide health plans in a manner consistent with their religious beliefs. And HHS would not have to stop at contraceptives, but could, by its logic, require every house of worship in the Nation to enable "seamless" coverage for elective abortions through its own plan infrastructure. That even HHS seems to recognize such results would be untenable just confirms that, at the end of the day, petitioners still face the same impossible dilemma that this Court confronted in *Hobby Lobby*: They must either take actions that violate their undisputedly sincere religious beliefs or face ruinous penalties. That is a textbook substantial burden on religious exercise.

B. Petitioners' Sincere Beliefs that the Actions the Regulatory Mechanism Demands of Them Violate Their Religion May Not Be Second-Guessed.

The government does not dispute that petitioners sincerely believe that complying with the

contraceptive mandate via the regulatory mechanism would violate their religious beliefs. Yet it nonetheless insists that petitioners are wrong to think that forcing them to do so on pain of massive fines substantially burdens their religious exercise. But the government cannot seriously mean to suggest that petitioners are *factually* wrong in their understanding that the regulatory mechanism requires them to take affirmative acts that help achieve the provision of coverage. Again, HHS itself has stated that the paperwork it requires petitioners to execute on pain of massive penalties is "necessary" to get (or, in some instances, attempt to get) contraceptive coverage to flow through their own plan infrastructure. 79 Fed. Reg. at 51,095; *see also, e.g.*, No. 15-35 Br. in Opp. 27 (describing "[f]urnishing" of required "information" as "necessary" to operation of regulatory scheme). And HHS itself deems these actions sufficient to ensure that an employer's plan "complies ... with" the statutory and regulatory "requirement ... to provide contraceptive coverage." 45 C.F.R. §147.131(c)(1).

Nor can the government seriously mean to suggest that the regulatory mechanism does not substantially burden petitioners' exercise of religion because the objected-to acts it compels are not physically onerous or time-consuming. *But see* No. 15-105 Pet.App.89a (describing regulatory compliance as "a routine, brief administrative task"); No. 14-1505 Pet.App.7a, 34a (describing regulatory compliance as "a bit of paperwork" and "a single sheet of paper"). The substantial burden analysis turns on the substantiality of the pressure the government applies to compel the objected-to actions, not the physical or financial burdens of undertaking those actions. It

could hardly be otherwise. "Thomas More went to the scaffold rather than sign a little paper for the King," and plainly it was the scaffold, not the toil of signing, that substantially burdened his religious beliefs. *E. Tex. Baptist Univ. v. Burwell*, 807 F.3d 630, 2015 WL 5773560, at *3 (5th Cir. 2015) (Jones, J., dissenting from denial of rehearing en banc); *see also Holt*, 135 S. Ct. at 862 (threatening prisoner with "serious disciplinary action" unless he "shave[d] his beard" "easily" qualified as a substantial burden).

What the government really means, then, is that petitioners are not wrong *legally* in identifying the relevant burden, or wrong *factually* in their understanding of how compliance with the mandate via the regulatory mechanism enables the provision of contraceptive coverage, but wrong *theologically* in construing their compelled role as meaningfully facilitating contraceptive coverage. Indeed, the courts below were quite candid about their views that petitioners fail to state a RFRA claim because they are "mistaken," *Hobby Lobby*, 134 S. Ct. at 2779, in their understanding of what constitutes facilitation or complicity. *See, e.g.*, No. 15-191 Pet.App.31a (engaging in an "objective evaluation of the nature of the claimed burden and the substantiality of that burden on the [nonprofits'] religious exercise"); No. 15-35 Pet.App.28a (insisting that "the acts the *plaintiffs* are required to perform do not involve providing or facilitating access to contraceptives"); No. 15-105 Pet.App.62a-63a (insisting that the regulatory option does not "mak[e] [petitioners] complicit in the larger delivery scheme"). But while the government and the courts below may perceive a significant moral difference between being forced to direct and pay for

the inclusion of coverage in one's health plan and being forced to facilitate efforts to provide coverage through one's own plan infrastructure, their moral calculus is not the relevant one.

Indeed, this Court long ago concluded that "[t]he 'truth' of a belief is not open to question," whether by the government or by the courts. *Gillette v. United States*, 401 U.S. 437, 457 (1971). Article III tribunals are not ecclesiastical courts. They have neither the authority nor the "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 Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981). That is just as true of beliefs about facilitation or complicity as it is of any other religious belief. *See, e.g.*, *United States v. Lee*, 455 U.S. 252, 261 n.12 (1982) (courts cannot "speculate whether" the peculiarities of a legal scheme "ease or mitigate the perceived sin of participation"). Instead, the only questions courts may resolve are "whether the objector's beliefs are 'truly held,'" *Gillette*, 401 U.S. at 457, and whether the "pressure" the government has "put[] … on an adherent … to violate his beliefs" is "substantial," *Thomas*, 450 U.S. at 718. Here, the former is undisputed and (at least after *Hobby Lobby*) the latter is indisputable. That is the end of the substantial burden inquiry.

The government's insistence otherwise is just a variation on the same flawed "attenuation" argument that this Court rejected in *Hobby Lobby*. In the government's view, so long as petitioners are "washing *their* hands" of "providing insurance coverage for contraceptive services," No. 14-1505 Pet.App.28a

(emphasis added), they should not be heard to complain about being forced to facilitate the provision of that coverage through their own plan infrastructure. But the circumstances under which someone (say, Pilate) has sufficiently distanced himself from an action to avoid moral culpability is a prototypical example of a religious question that courts may not purport to answer. The best that can be said for the government's argument is that it once again "dodges the question that *RFRA* presents," which is whether the challenged regulation "imposes a substantial burden ... in accordance with [*petitioners'*] *religious beliefs*." *Hobby Lobby*, 134 S. Ct. at 2778. The government's argument "instead addresses a very different question that the federal courts have no business addressing"—namely, "the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Id.* The government's efforts to "[a]rrogat[e] the authority to provide a binding national answer to this religious and philosophical question" is just another forbidden effort to question whether "the religious belief asserted … is reasonable." *Id.*

In all events, the government is particularly poorly positioned to question the reasonableness of petitioners' religious beliefs given HHS's conclusion that its regulatory mechanism suffices as a matter of administrative law to put petitioners in compliance with the contraceptive mandate. It takes real chutzpah for the government to deem the actions it demands of petitioners sufficient for compliance under the Code of Federal Regulations, yet then turn around

and claim that those same actions are somehow incapable of constituting facilitation or complicity under the Bible. It is all well and good for HHS to think it has threaded the needle and found a way for petitioners to comply with the contraceptive mandate without violating their religious beliefs, but ultimately it is for petitioners to determine how much facilitation or complicity is too much. The government cannot second-guess their determinations under the guise of second-guessing their competence to grasp how its regulatory scheme actually works. And it certainly cannot do so when the government itself concedes that the actions it demands of petitioners are "necessary" to provide contraceptive coverage through their plan infrastructure (and also appears to recognize that those some actions are too much to demand of churches and other truly exempt religious employers).

C. Petitioners Are Not Challenging the Independent Actions of Third Parties.

Nor can the government avoid the strictures of RFRA by attempting to recharacterize petitioners' religious objections as objections to the actions of third parties. Petitioners are not asking this Court to enjoin the government or third parties from providing contraceptive coverage to their employees. They are only asking this Court to enjoin the government from enforcing the contraceptive mandate against *them*—in other words, from threatening *them* with crippling penalties unless *they* take actions that enable *their* plan infrastructure to be used to provide coverage that violates *their* sincere religious beliefs. It is the obligation that HHS has imposed on *petitioners*, not

the actions of third parties, that is the source of petitioners' RFRA claims.

To be sure, petitioners object to complying with the contraceptive mandate via the regulatory mechanism because of the consequences that their forced compliance is intended to produce. But there is nothing remotely unusual—let alone legally problematic—about that. That was precisely the situation in *Thomas*. Thomas did not object to fabricating turrets because he had a religious objection to the fabrication of turrets as such. He objected because those turrets were going to be used to construct tanks that third parties would use to engage in warfare, something to which he did hold a religious objection. *Thomas*, 450 U.S. at 710. That his religious objection to his own act of making turrets stemmed from an objection to the acts of third parties that would result from his actions did not deprive him of the right to object to what *he himself* was being compelled to do. And that result cannot be circumvented by labeling the third party actions "independent" or "intervening," as that label just disguises an impermissible inquiry into how much facilitation is enough. RFRA and this Court's precedents quite plainly leave that question to the adherent, not the government or courts.

The government's contrary argument is, once again, just a variation on the same argument that this Court rejected in *Hobby Lobby*. There, too, the government insisted that the employers could not raise a RFRA claim because their "real" objection was to the potential actions of third parties—namely, the prospect that an employee would decide "to take

advantage of the coverage" and "to use one of the four methods" of contraception at issue. *Hobby Lobby*, 134 S. Ct. at 2777. This Court had no trouble recognizing that argument for what it was: another doomed effort to question the validity of a religious adherent's beliefs. As the Court explained, the employers "sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial." *Id.* at 2779. So too here. Petitioners sincerely believe that taking the actions the government demands of them and enabling their own plan infrastructure to be used to provide contraceptive coverage would put *their own* immortal souls in danger, and it is not for the government to say that their beliefs are wrong.

The cases on which the government has relied in making its contrary argument do not suggest otherwise. Indeed, if anything, those cases only underscore the commonsense distinction between objecting to *facilitating* third party actions and objecting to the third party actions themselves. *Bowen v. Roy*, 476 U.S. 693 (1986), involved a father who sincerely believed that the use of a social security number for his daughter violated his Native American religious beliefs. *Id.* at 695-96. In addition to challenging a requirement that he furnish his daughter's social security number to the government as a condition of receiving state welfare benefits, however, Roy also challenged the government's *use* of that number. *Id.* The Court rejected Roy's attempt to prohibit the government from using the number, *id.* at 699-701, but a majority of the Court agreed that

requiring Roy to *furnish* the number burdened his religious exercise, *id.* at 702; *see also id.* at 716 (Blackmun, J., concurring in part); *id.* at 726 (O'Connor, J., concurring in part and dissenting in part); *id.* at 733 (White, J., dissenting). In doing so, the Court emphasized the obvious difference between trying "to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development," *id.* at 699, and trying to get out from under a government-imposed obligation "to engage in conduct that [one finds] objectionable for religious reasons," *id.* at 703 (Burger, C.J.).[6]

The Court drew precisely the same distinction in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). *Lyng* involved a free exercise challenge to the government's decision to build a road and harvest timber on its own land, on grounds that those activities would interfere with the

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[6] Although Chief Justice Burger concluded, in a part of his opinion joined only by Justices Powell and Rehnquist, that this burden was not an unconstitutional one, he did so by applying reasoning nearly identical to the reasoning Congress later rejected in RFRA. *See, e.g.*, 476 U.S. at 707 ("In the enforcement of a facially neutral and uniformly applicable requirement …, the Government is entitled to wide latitude."). Notably, more members of the Court rejected that reasoning than adopted it; indeed, five Justices would have ruled for Roy on the merits of his challenge to furnishing the social security number. *See id.* at 726-33 (O'Connor, J., concurring in part and dissenting in part, joined by Brennan, Marshall, JJ.); *id.* at 733 (White, J., dissenting); *id.* at 715-16 (Blackmun, J.) (opining that Court should not reach the claim but that, if it did, Roy should prevail). The only remaining Justice declined to consider that claim at all on the ground that it was moot or unripe. *Id.* at 717 (Stevens, J., concurring).

religious exercise of Native Americans. *Id.* at 443-44. Relying heavily on *Roy*, the Court concluded that the religious adherents had failed to demonstrate that they "would … be coerced by the Government's action into violating their religious beliefs," or "den[ied] … an equal share of the rights, benefits, and privileges enjoyed by other citizens" on account of their religious exercise. *Id.* at 449. In doing so, however, the Court once again carefully distinguished between trying to control the *government's* conduct and challenging laws or regulations that control a *religious adherent*'s conduct. *See id.* at 453.

That same distinction defeats the government's argument here. Petitioners are not trying to force the government or third parties to refrain from providing petitioners' employees with access to contraceptive coverage. Petitioners are merely trying to prevent the government from "affirmatively compel[ling] [them], by threat of sanctions, … to engage in conduct that they find objectionable for religious reasons." *Roy*, 476 U.S. at 703 (Burger, C.J.). That is precisely what RFRA entitles them to do. The government may not deprive petitioners of the free exercise rights that Congress has afforded them by attempting to convert their RFRA claims into something they are not.

* * *

At bottom, the government's resistance to the straightforward conclusion that the challenged regulations substantially burden petitioners' religious exercise inevitably reduces to another forbidden effort to question the validity of petitioners' religious beliefs. When the government insists that petitioners are not being asked to facilitate the provision of contraceptive

coverage, what it really means is that petitioners' sincere religious belief that the actions they must take amount to forbidden facilitation is wrong. And when the government insists that petitioners' "real" objection is to the actions of third parties, what it really means is that their sincere religious belief that facilitation of sin by another is itself a sin is wrong. The government has neither the authority nor the competency to question those beliefs. This Court's cases could not be more emphatic about that. Simply put, "it is not for" the government or the courts "to say that [petitioners'] religious beliefs are mistaken or insubstantial." *Hobby Lobby*, 134 S. Ct. at 2779. This Court should reject the government's thinly veiled invitation to cast aside that bedrock principle.

II. Applying The Challenged Regulations To Petitioners Does Not Satisfy RFRA's Strict Scrutiny Test.

Because the challenged regulations substantially burden petitioners' exercise of religion, the government bears the burden of proving that requiring petitioners to comply with them is the "least restrictive means" of furthering a "compelling governmental interest." 42 U.S.C. §2000bb-1; *see also Holt*, 135 S. Ct. at 863. It has utterly failed to do so. The government has exempted employers from the mandate entirely for reasons both religious and non-religious. That reality demonstrates both that its interests are not truly compelling and that it can achieve those interests—whether compelling or not—while honoring sincere religious objections. Having exempted many religious employers, the government cannot persuasively deny similar treatment to other

religious employers that Congress has treated identically for relevant purposes. And having spent billions of dollars to establish an alternative avenue for individuals to obtain qualifying coverage that includes contraceptives, the government falls well short of meeting its burden of showing the absence of less restrictive alternatives.

A. The Government Has Not Established that Requiring Petitioners To Comply with the Contraceptive Mandate Furthers a Compelling Interest.

To satisfy the first prong of RFRA's strict scrutiny affirmative defense, the government must prove that requiring petitioners to comply with the contraceptive mandate furthers an interest "of the highest order." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Critically, this "'focused' inquiry" turns not on whether the government has a compelling interest in enforcing the contraceptive mandate in the abstract, but on whether its "marginal interest in enforcing the contraceptive mandate *in these cases*" is compelling. *Hobby Lobby*, 134 S. Ct. at 2779 (emphasis added). The Court thus must "look[] beyond broadly formulated interests justifying the general applicability" of the mandate and "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S. at 431-32. As RFRA itself states, the government must "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 430-31 (quoting 42 U.S.C. §2000bb-1(b)).

Moreover, the compelling interest test turns not only on whether the interest the government has identified is compelling, but also on whether the manner in which it has crafted its regulatory scheme is consistent with that interest. For instance, if the government claims a compelling interest in uniform application of a law, then it must demonstrate that it does not grant exemptions that undermine that interest. After all, the government cannot claim that granting a religious exemption "would seriously compromise its ability to administer the program," *id.* at 435, if it is willing to grant widespread exemptions for non-religious reasons. At that point, the government must instead identify some other compelling interest that explains why it can grant some exemptions but not others. *See Holt*, 135 S. Ct. at 865 (if a regulatory scheme is "substantially underinclusive" when measured against proffered interests, then the government must "adequately demonstrate[] why"). Otherwise, the government fails to "demonstrate[] that application of the burden to the person … is in *furtherance* of" the interest the government invokes, 42 U.S.C. §2000bb-1(b)(1) (emphasis added), as the government "cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi*, 508 U.S. at 547 (quotation and alteration marks omitted); *id.* at 546-47 ("Where government … fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.").

Taken together, these principles doom the government's effort to justify its refusal to exempt petitioners from the contraceptive mandate. Indeed, the government has not even tried to develop any evidence that forcing *petitioners* to comply with the contraceptive mandate would actually further the various interests that it invokes, let alone explained how those interests can be deemed compelling in the face of the pervasive exemptions that already exist.

1. The government's compelling interest arguments are defeated by the pervasive non-religious exemptions to the mandate.

In the most recent iteration of its ever-shifting compelling interest argument, the government claims that forcing petitioners to comply with the mandate via the regulatory mechanism furthers its "'compelling interest in providing women full and equal benefits of preventive health coverage' … and in filling the gaps in the [ACA's] comprehensive regulatory scheme created when religious objectors opt out." No. 15-35 Br. in Opp. 20 (quoting No. 14-1505 Pet.App.66a). Relatedly, the government latches onto the D.C. Circuit's formulation that "[p]roviding contraceptive services seamlessly together with other health services … is necessary to serve the government's interest." No. 15-35 Br. in Opp. 24 (quoting No. 14-1505 Pet.App.68a).

At the outset, this "seamlessness" claim not only is found nowhere in HHS's contemporaneous explanation of its refusal to grant all religious employers an exemption—something that heightened scrutiny requires, *see, e.g.*, *Shaw v. Hunt*, 517 U.S.

899, 908 n.4 (1996)—but also seriously undermines the government's efforts to insist that its mechanism for getting contraceptive coverage to petitioners' employees is entirely divorced from petitioners and their plans.[7] But even setting aside those considerable problems, the government's proffered interests are defeated by the myriad exemptions from the contraceptive mandate that already exist. The government simply cannot explain how it can exempt so many other employers from the mandate notwithstanding its professed interest in preserving a "comprehensive regulatory scheme," and yet must absolutely insist that petitioners sacrifice their religious objections.

For instance, grandfathered plans are exempt from the contraceptive mandate entirely by virtue of their statutory exemption from the requirement to "provide coverage" for women's "preventive care." *See* 42 U.S.C. §18011; 75 Fed. Reg. at 34,542 Tbl. 1. The roughly 30% of large employers who still provide grandfathered plans thus need not include contraceptive coverage in those plans at all. Nor are they required to do anything to help "fill the gaps" that

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[7] This made-for-litigation theory also would neatly relieve the government of any obligation to demonstrate that the contraceptive mandate furthers the interest identified by *the IOM*—namely, the interest in reducing the adverse health effects allegedly associated with unintended pregnancies. As studies have noted, there is considerable debate about whether that is actually the case. *See, e.g.*, Michael J. New, *Analyzing the Impact of State Level Contraception Mandates on Public Health Outcomes*, 13 Ave Maria L. Rev. 345, 368 (2015) (finding "little evidence that contraception mandates lower ... the incidence of ... unintended pregnancy").

result should their plans exclude that coverage. They need not execute or submit any paperwork to their insurers or TPAs empowering them to use their plan infrastructure to provide that coverage themselves, and they need not hand over anything empowering the government to achieve that same end. Nor does the government threaten them with massive penalties unless they facilitate the "seamless" provision of contraceptive coverage through their own plan infrastructure. In short, under the government's own regulations, if these large employers do not want to include contraceptive coverage in these plans, then their employees must obtain it elsewhere.

The government can hardly claim that its interest in enforcing HHS's regulatory definition of "preventive services" is so compelling as to preclude religious exemptions when Congress not only "contemplate[d]," but actually created, such a broad exemption to the statutory mandate pursuant to which that definition was adopted. *O Centro*, 546 U.S. at 432. As HHS itself has pointed out, Congress did not exempt grandfathered plans from the new statutory requirements that it considered "particularly significant." 75 Fed. Reg. at 34,540. Yet Congress exempted them from the requirement to provide coverage for preventive services—and did so for no reason other than "avoiding the inconvenience of amending an existing plan." *Hobby Lobby*, 134 S. Ct. at 2780. If Congress considered administrative convenience a good enough reason to excuse *any* compliance with the statutory "preventive services" mandate, then surely sincere religious objections are a good enough reason to excuse compliance with a

narrow agency-created subset of that statutory mandate.

Moreover, Congress did not require small businesses to provide their employees with health coverage *at all*. Thus, if these employers object to contraceptive coverage, they can decline to provide a plan and face no prospect of government fines for that decision. To be sure, if their employees want to obtain "seamless" access to free contraceptives through an insurance plan, they can purchase a plan on an exchange (although they will not necessarily qualify for a subsidy). But so, too, could any of petitioners' employees who would prefer to have "seamless" contraceptive coverage through a single insurance plan. If the exchanges are a good enough "gap-filling" measure for more than a quarter of the private-sector workforce—not to mention the employees of employers with grandfathered plans, employees of exempt religious employers, or people who are not employed at all—then it is hard to see why they would not suffice to "fill the gaps" were petitioners permitted an exemption from the contraceptive mandate. *See infra* pp. 72-75.

The government elsewhere has recognized that "when it 'provides an exception to a general rule for secular reasons (or for only certain religious reasons), [it] must explain why extending a comparable exception to a specific plaintiff for religious reasons would undermine its compelling interests.'" *Hobby Lobby*, 134 S. Ct. at 2782 n.41 (quoting Br. for the United States as *Amicus Curiae* at 10, *Holt v. Hobbs*, 135 S. Ct. 853 (No.13-6827)). Yet the government has utterly failed to do that in this litigation. It has never

offered *any* plausible explanation consistent with the interests it invokes that would justify exempting employers with grandfathered plans while demanding compliance from petitioners. The best it can do is claim that grandfathered plans are on the decline. But there is no statutory or regulatory expiration date on grandfathered plans, and roughly a third of the nation's large employers continue to use them. *See Hobby Lobby*, 134 S. Ct. at 2764 n.10.

Moreover, the widespread existence of grandfathered plans, however long they last, conclusively demonstrates that the interests purportedly furthered by Congress' "preventive services" mandate and HHS's regulatory contraceptive mandate are not the kind of interests that demand categorical and comprehensive treatment and cannot admit of exceptions. The allegedly temporary nature of grandfathered plans did not stop Congress from demanding their immediate compliance with other coverage mandates deemed more compelling. It is no insult to the "preventive services" mandate to recognize the undeniable fact that Congress deemed immediate and comprehensive compliance with it unnecessary.

The government does not even have its "someday" argument as to small businesses, as it certainly cannot explain away their statutory exemption on the theory that Congress viewed small businesses as on the decline. To the contrary, their exemption from the requirement to provide insurance at all is plainly an effort to encourage the *growth* of small businesses by making them less costly to operate. Congress' willingness to prioritize the growth of small

businesses over the universal provision of employer-sponsored health insurance—with or without contraceptive coverage—defeats any argument that the government's interest in ensuring that contraceptive coverage will be provided *through or in connection with an employer-sponsored plan* is so compelling as to admit of no exceptions for employers with sincere religious objections.

2. The government's arguments are independently undermined by the religious exemptions that it *has* granted.

Of course, the government cannot really claim that its interests are so compelling as to admit of no exceptions for religious objections, as it has exempted *some* religious employers from any obligation to comply with the mandate precisely because of their potential religious objections. This exemption applies both to "houses of worship" and to "integrated auxiliaries," which include many organizations that look and act just like petitioners, only with a different connection to a particular church. Just like employers with grandfathered plans, these religious employers need not provide contraceptive coverage to their employees at all; nor are they required to facilitate the "seamless" provision of such coverage through their own plan infrastructure by their own insurers or TPAs, or to take any other steps to help "fill the gaps" that will result should they exercise their exemption.

That exemption applies, moreover, whether or not the exempt employer actually holds any religious objection to contraceptive coverage; they are all automatically exempt by virtue of the mere fact that

they are houses of worship or integrated auxiliaries. So, for example, a Unitarian Universalist church can decline to provide contraceptive coverage even if it has no religious objection and instead excludes the coverage purely for reasons of cost or convenience. The government is thus in the odd position of denying an exemption to some religious employers with sincere religious objections to the mandate, while exempting other religious employers who have no religious-based objection to the mandate. If the government's asserted interests do not preclude it from granting exemptions to "thousands of [religious nonprofits] practicing their faith" without regard to whether their faith even leads them to object, "it is difficult to see how those same [interests] can preclude any consideration of a similar exception for [other religious nonprofits] who want to practice theirs." *O Centro*, 546 U.S. at 433.

The government's only proffered explanation for its discrimination among religious employers is to claim that houses of worship and integrated auxiliaries are "more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. at 39,874. That explanation does nothing to explain why those employers enjoy the exemption without regard to whether they actually have a religious objection. The government presumably lumps all the favored religious employers together out of administrative convenience. But even putting aside that not inconsiderable defect, the government's rank speculation does not begin to justify the arbitrary line it has drawn. The government *eliminated* from its initial regulations a requirement that houses of worship or their integrated auxiliaries "primarily" employ only people

who share their faith in order to avail themselves of the exemption. *Id.* at 39,873. The government explained that this change was "intended to ensure" that a religious employer would *not* be "disqualified" from exemption "because the employer hires or serves people of different religious faiths." *Id.* at 39,874. Having deliberately altered the exemption to *include* employers who hire "people of different religious faiths," *id.*, the government cannot now deny an exemption on the basis of that same discarded criterion.

Moreover, if the government really did want to confine its exemption to religious employers who are more likely to employ people of the same faith, then there was an obvious, congressionally sanctioned way to do so: It could have drawn the line where Congress drew it in crafting religious exemptions from Title VII and other employment discrimination laws. Indeed, the most natural—and factually sustainable—proxy for whether an employer is likely to hire people of the same faith is whether Congress allows the employer to do so, notwithstanding the government's interest in eliminating employment discrimination. For those purposes, Congress did not irrationally cut off *its* exemptions at houses of worship or their integrated auxiliaries, but rather extended them to *any* "religious corporation, association, educational institution, or society." 42 U.S.C. §2000e-1(a).

Petitioners universally qualify for this congressional exemption and nonetheless cannot qualify for HHS's regulatory exemption. Petitioners thus find themselves in the anomalous position of being permitted to hire only people who share their

faith—which many of them do—yet being denied an exemption from the contraceptive mandate on the theory that they are insufficiently likely to do just that. Indeed, the government would allow petitioners to hire only people who share their religious objections to contraception, and yet still will not grant them an exemption from a mandate to facilitate the provision of cost-free contraceptives to those same employees. The government cannot explain how that illogical approach even furthers its objective of getting free contraceptives to people who will actually use them.

That is not to say that ability or propensity to hire co-religionists is necessarily the proper line for the government to draw, whether in this context or any other. But if the government wants to justify the line that *an agency* has drawn by the propensity of the exempted employers to hire co-religionists, it has to confront the reality that *Congress* drew the relevant line for employment practices in a different place. And, here, it also has to confront the reality that the agency affirmatively eliminated a regulatory requirement that would have tailored the exemption to its asserted rationale. Having failed to confront either problem, the government is left with an exemption that is both overinclusive and "wildly underinclusive when judged against its asserted justification." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2740 (2011). It has exempted some religious nonprofits from the contraceptive mandate even if they do *not* hire only (or even primarily) co-religionists and have no religious objection to the mandate, yet demanded compliance from thousands of other religious employers who hire only co-religionists and object on religious grounds. Having excused

compliance with the mandate for some on religious grounds, the government cannot deny exemptions to other similarly situated religious employers without a coherent rationale.

3. The government's arguments fare even worse as to employers in the Little Sisters' situation.

Finally, whatever else may be said of the government's proffered interests, they certainly do not suffice to justify demanding compliance from nonexempt religious employers when that compliance may not even get contraceptive coverage to their employees. Yet by demanding compliance from nonexempt religious employers with ERISA-exempt church plans—plans that Congress itself has exempted from other federal requirements in an effort to accommodate religious exercise—that is precisely what the government has done. As to many of these employers, the government is threatening them with millions of dollars in fines unless they agree to facilitate its efforts to get someone to use their own plan infrastructure to get contraceptive coverage to their employees, even though the government *concedes* that there is a very good chance that its efforts will come to naught.

The Little Sisters are a case in point. The Little Sisters use both a church plan (the Christian Brothers Benefits Trust) and a TPA (Christian Brothers Services) that share their religious objections to contraception. Both the Trust and the TPA have informed the government in no uncertain terms that they do not intend to provide contraceptive coverage to the Little Sisters' employees even if the Little

Sisters execute the paperwork empowering and incentivizing them to do so, and the government expressly disclaims any authority to force them to do so. Yet the government still insists that the Little Sisters must compromise their religious beliefs and execute the paperwork empowering their plan infrastructure to be utilized to provide contraceptive coverage.

According to the government, the Little Sisters' religious scruples must give way so that HHS is empowered to use the lure of at least 110% reimbursement to try to convince someone else to use the Little Sisters' plan infrastructure to provide the coverage. That argument is, to put it mildly, in considerable tension with the government's insistence that it is not requiring the Little Sisters to facilitate its efforts to achieve the provision of contraceptive coverage to their employees. But even setting aside that internal inconsistency in its broader position, the government concedes that it has no more authority to force anyone else affiliated with the Little Sisters' plan to provide their employees with contraceptive coverage than it has to force Christian Brothers Services to do so. Nonetheless, in the government's view, it is enough that requiring the Little Sisters to give it the authority to *try* to convince someone else to take on that role might—but just as well might not—lead to the provision of contraceptive coverage.

That cannot possibly suffice to satisfy the compelling interest test. If the government is going to assert the extraordinary power to override concededly sincere religious beliefs, then at the very least it should be required to demonstrate that doing so will

actually—not just hypothetically—"further[]" its purportedly "compelling interest." 42 U.S.C. §2000bb-1. RFRA's expansive protection of religious exercise demands nothing less. Yet when it comes to many of the nonexempt religious employers with ERISA-exempt church plans, the government cannot even do that.

Moreover, the Little Sisters' situation reveals how the government's regulatory scheme overrides not just the religious objections of employers, but also those of the church plan providers themselves. The Trust is itself a religious entity that provides its church plan *only* to Catholic organizations that object to contraceptives. By demanding that those organizations surrender the plan infrastructure that the Trust supplies to be used to provide contraceptive coverage, the government would force the Trust to violate both the religious beliefs of the organizations that utilize its plan and also the Trust's *own* religious beliefs. The situation is the same for GuideStone, an agency of the Southern Baptist Convention that sponsors a plan specifically designed to reflect the religious beliefs of both GuideStone and the organizations that its plan serves. The government's regulatory scheme not only deprives the organizations that use GuideStone's plan of the ability to provide health benefits in a manner consistent with their beliefs, but also denies GuideStone the ability to supply those organizations with a plan that allows them to do so.

The government's regulatory scheme thus fundamentally undermines the very solicitude for religious organizations that Congress sought to

achieve when it exempted from ERISA's reach a "plan established and maintained … by a church or by a convention or association of churches" "for its employees (or their beneficiaries)." 29 U.S.C. §1002(33). Congress itself has concluded that religious organizations should be able to offer health plans consistent with their sincerely held beliefs. The government has not come close to explaining why HHS cannot do the same.

* * *

In sum, each of the purportedly compelling interests the government identifies suffers from the same fatal flaw: The government is perfectly happy to set those interests aside for the employers of tens of millions of other employees, yet refuses to do the same for petitioners. That the government's "proffered objectives are not pursued with respect to analogous non-religious conduct," *Church of Lukumi*, 508 U.S. at 546, not only "raises serious doubts about whether the government [was] in fact pursuing the interest[s] it invokes" when it refused to grant petitioners an exemption, *Brown*, 131 S. Ct. at 2740, but also defeats any argument that the interests it asserts are compelling. The government simply "cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi*, 508 U.S. at 547.

B. The Government Has Not Established that Requiring Petitioners To Comply Via the Regulatory Mechanism Is the Least Restrictive Means of Furthering the Interests It Asserts.

Even if the government could meet its burden of demonstrating that forcing petitioners to comply with the contraceptive mandate furthers a compelling interest, it falls woefully short of meeting RFRA's "exceptionally demanding" least restrictive means test. *Hobby Lobby*, 134 S. Ct. at 2780. Contrary to the government's contentions, achieving the provision of contraceptive coverage without involving petitioners or their plans would not require the "imposition of a whole new program or burden on the Government." *Id.* at 2786 (Kennedy, J., concurring). "[I]n fact the mechanism for doing so is already in place." *Id.* If petitioners' employees would prefer to have a health plan that includes contraceptive coverage, then they can do what the employees of all the employers who already have exemptions can do: obtain one on an exchange.

The government protests that "'requiring [employees] to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women.'" No. 15-35 Br. in Opp. 23 (quoting 78 Fed. Reg. at 39,888). But the government may not "assume a plausible, less restrictive alternative would be ineffective" just because it "requires a consumer to take action." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 815 (2000). And the government certainly may not proceed on any such assumption here, where the purportedly burdensome

steps it identifies are the same steps expected of employees of employers with grandfathered plans, or small businesses that provide no health plan, or exempt religious employers that exclude contraceptive coverage from their plans. If those employees want a plan that includes contraceptive coverage, then they must select and sign up for it on the individual market.

Indeed, every employee who wants to enroll in *any* health plan must "learn about, and sign up for, a new health benefit." And the government has spent *billions* of dollars creating exchanges that are supposed to make that process just as easy for people who obtain insurance on the individual market as it is for people who obtain it through an employer. Whatever "minor added steps" obtaining insurance on those exchanges may entail, No. 14-1505 Pet.App.68a—steps that surely are no more burdensome than navigating Medicaid, a means by which the government furthers its goal for tens of millions of individuals—the government does not view those steps as a barrier to accomplishing its goal with respect to the tens of millions of employees of employers who are already exempt from the contraceptive mandate. The government's insistence that those same steps are too burdensome for *petitioners*' employees is inexplicable.

To be sure, as with the employees of employers with grandfathered plans, or small businesses, or exempt religious employers, petitioners' employees may not all currently qualify for subsidies for insurance purchased on an exchange. But this Court has already made clear that RFRA "may in some

circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs," as the "view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law." *Hobby Lobby*, 134 S. Ct. at 2781. And here it really is a simple matter of money, as the exchanges are an "existing, recognized, workable, and already-implemented framework to provide coverage" to petitioners' employees with the assistance of government subsidies. *Id.* at 2786 (Kennedy, J., concurring); *see also King v. Burwell*, 135 S. Ct. 2480 (2015). If the government's interest in doing so is really as compelling as it claims, then it should be easy enough to ensure that those subsidies are available to petitioners' employees, or subsidize contraceptive-only plans if the government would prefer to keep its costs down. Indeed, in the case of self-insured plans, the government has *already* agreed to pay for TPAs to provide or arrange for contraceptive coverage under the regulatory mechanism for compliance.

To the extent the government complains that ensuring the availability of subsidies on the exchanges may require congressional action, that alone is not enough to render the exchanges an ineffective alternative. This Court routinely identifies options that would require congressional action as feasible less restrictive means. *See, e.g.*, *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 669 (2004); *Playboy Entm't Grp.*, 529 U.S. at 815. At any rate, the government is in no place to complain about any need for congressional action when neither the contraceptive mandate nor the exemption for a

fortunate few religious employers was the result of congressional action. Congress never authorized HHS or any other agency to design an ad hoc exemption for some religious employers but not others. And if Congress is unwilling to shoulder the cost of ensuring that the employees of the objecting religious employers that the agencies have refused to exempt have access to cost-free contraceptive coverage on an exchange, then perhaps it is time for those agencies to rethink their position that the contraceptive mandate HHS has imposed not only furthers the ACA's goals, but does so in a manner so critical as to override the protections for religious exercise that Congress enshrined in RFRA.

Of course, the exchanges are just one existing avenue through which the government could achieve its goal of providing petitioners' employees with access to free contraceptives without involving petitioners or their plans. The government also has at the ready Title X, an entire "federal grant program dedicated solely to providing individuals with comprehensive family planning and related preventive health services." U.S. Dep't of Health & Human Servs., Title X Family Planning, http://1.usa.gov/1pJryIZ; *see* 42 U.S.C. §300; 42 C.F.R. §59.3 ("[a]ny" public entity in a state eligible to participate). In 2014 alone, Congress appropriated more than $285 million for Title X grants, *see* Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, 365 (2014), and it has given HHS broad authority to decide how to issue those grants, *see* 42 U.S.C. §300. Again, using Title X to provide petitioners' employees with free contraceptives would not entail the "imposition of a whole new program or burden on the Government."

Hobby Lobby, 134 S. Ct. at 2786 (Kennedy, J., concurring). It would be as simple as ensuring that Title X clinics have sufficient funding to cover the cost of providing free contraceptives to the employees of employers with religious objections who want them, and informing those employees of this "existing, recognized, workable, and already-implemented framework," *id.*, for obtaining free contraceptives.

To the extent the government claims that petitioners would object to "*any* system in which their employees gain an entitlement to contraceptive coverage from third parties," No. 15-35 Br. in Opp. 22, that is simply wrong. As petitioners have told the government over and over again, they do not claim that RFRA entitles them to prevent their employees from *receiving* contraceptive coverage. They simply object to being forced to provide or facilitate the provision of that coverage themselves through their own plan infrastructure. Thus, it is not petitioners who are trying to leverage their existing relationship with their employees, in an effort to *preclude* them from receiving access to contraceptive coverage. It is instead the government that is trying to leverage that existing relationship, in service of the general interest that it claims in getting cost-free contraceptive coverage to *all* women, whether they have employer-provided insurance plans or are employed at all. If RFRA precludes the government's effort to use that existing relationship to get contraceptive coverage to petitioners' employees, then the government can still pursue that interest in the same way that it pursues it with respect to women who do not have employer-provided insurance: by ensuring that they have easy

access to free contraceptives or insurance that includes contraceptives elsewhere.

Ultimately, then, the pervasive exemptions from the contraceptive mandate defeat not just the government's compelling interest argument, but also its least restrictive means argument, as the government simply cannot explain why the alternative means that it has already created to get cost-free contraceptives to individuals who do not receive them through their employers are good enough for millions of other people but not good enough for petitioners' employees. In other words, once again, it cannot reconcile its decision to exempt so many others from the contraceptive mandate—whether for religious reasons or otherwise—with its refusal to do the same for petitioners.

That perhaps explains why the government strained so hard to convince the courts below that it is not burdening petitioners' religious exercise *at all*. But the government cannot avoid the strict scrutiny that RFRA requires by obscuring the details of its regulatory scheme, or by trying to portray petitioners' RFRA claims as something they are not. Instead, if the government wants to enlist petitioners in its efforts to get contraceptive coverage to their employees—which is quite plainly what its regulatory scheme is designed to do—it must demonstrate that forcing petitioners to act in violation of their sincere religious objections to providing or facilitating contraceptive coverage is the least restrictive means of furthering a compelling interest. The government's complete and utter failure to do so dooms its efforts to

reconcile its regulatory scheme with the protections for religious exercise that RFRA affords.

CONCLUSION

The Court should reverse the judgments of the Courts of Appeals.

Respectfully submitted,

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