2016 WL 463414 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

DIOCESE OF FORT WAYNE-SOUTH BEND, INC.; Catholic Charities of the Diocese of Fort Wayne-South Bend, Inc.; Saint Anne Home & Retirement Community of the Diocese of Fort Wayne-South Bend, Inc.; Franciscan Alliance, Inc.; Specialty Physicians of Illinois, LLC; University of Saint Francis; and Our Sunday Visitor, Inc., Petitioners,

v.

Sylvia Mathews BURWELL, in her official capacity as Secretary of the U.S. Department of Health and Human Services, et al., Respondents.

No. 15-1003.
February 3, 2016.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

**Petition for Writ of Certiorari**

Noel J. Francisco, David T. Raimer, Anthony J. Dick, Jones Day, 51 Louisiana Ave., NW, Washington, DC, 20001-2113.

Matthew A. Kairis, Melissa D. Palmisciano, Jones Day, 325 John H. McConnell Blvd., Suite 600, Columbus, OH 43215, (614) 469-3939, makairis @jonesday.com, for petitioners.

***i** QUESTION PRESENTED

This case presents the same question on which this Court has granted certiorari in *Zubik v. Burwell*, No. 14-1418; *Priests for Life v. U.S. Department of Health & Human Services*, No. 14-1453; *Roman Catholic Archbishop of Washington v. Burwell*, No. 14-1505; *East Texas Baptist University v. Burwell*, No. 15-35; *Little Sisters of the Poor v. Burwell*, No. 15-105; *Southern Nazarene University v. Burwell*, No. 15-119; and *Geneva College v. Burwell*, No. 15-191. The question presented is:

Whether the Religious Freedom Restoration Act allows the Government to force objecting religious nonprofit organizations to violate their beliefs by offering health plans with "seamless" access to coverage for contraceptives, abortifacients, and sterilization.

***II PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT**

Petitioners, who were the plaintiffs below, are Diocese of Fort Wayne-South Bend, Inc.; Catholic Charities of the Diocese of Fort Wayne-South Bend, Inc.; Saint Anne Home & Retirement Community of the Diocese of Fort Wayne-South Bend, Inc.; Franciscan Alliance, Inc.; Specialty Physicians of Illinois, LLC; University of Saint Francis; and Our Sunday Visitor, Inc. None of Petitioners have parent corporations, except for Petitioner Specialty Physicians of Illinois, whose sole member is Petitioner Franciscan Alliance, Inc. No publicly held corporation owns any portion of Petitioners, and the Petitioners are not subsidiaries or affiliates of any publicly owned corporation.

Respondents, who were Defendants below, are Sylvia Mathews 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.

***iii** TABLE OF CONTENTS



***v** TABLE OF AUTHORITIES



  

## *1 PETITION FOR WRIT OF CERTIORARI

This case involves a challenge under the Religious Freedom Restoration Act ("RFRA") to regulations that force Petitioners to violate their religious beliefs by offering health insurance to their employees through a company that will provide or procure coverage for abortifacients, contraceptives, and sterilization services. By holding that the regulations do not substantially burden Petitioners' religious exercise, the U.S. Court of Appeals for the Seventh Circuit directly contradicted binding precedent from this Court. The Government "substantially burdens" the "exercise of religion" whenever it forces plaintiffs to "engage in conduct that seriously violates their religious beliefs" on pain of "substantial" penalties. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775-76 (2014). The regulations at issue here, however, do just that: they threaten massive penalties unless Petitioners violate their religion by (1) submitting a "self-certification" or "notification" and (2) offering health plans through companies that will provide the objectionable coverage.

This Court has now granted certiorari in *Zubik v. Burwell* and six related petitions to resolve the exact question presented by this case: whether the regulatory scheme at issue in this litigation can survive scrutiny under RFRA. Accordingly, consistent with its usual practice, this Court should hold this petition pending resolution of *Zubik et al.* If this Court correctly determines that the regulations violate RFRA, it should grant this petition, vacate the judgment below, and remand for further proceedings consistent with its opinion.

## *2 OPINIONS BELOW

The district court's opinion granting Petitioners' request for a preliminary injunction (Pet. App. 78a-124a) is reported at 988 F. Supp. 2d 958. The Seventh Circuit's opinion reversing the district court (Pet. App. 1a-77a) is reported at 801 F.3d 788. The Seventh Circuit's order denying Petitioners' request for rehearing en banc (Pet. App. 127a-28a) is unreported.

## JURISDICTION

The judgment of the Seventh Circuit was entered on September 4, 2015. Pet. App. la. That court denied rehearing en banc on November 5, 2015. Pet. App. 127a. Jurisdiction is proper under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The following provisions are reproduced in Appendix E (Pet. App. 129a-75a): 42 U.S.C. §§ 2000bb-1, 2000bb-2, 2000cc-5, 300gg-13; 26 U.S.C. §§ 4980D, 4980H; 26 C.F.R. §§ 54.9815-2713, 54.9815-2713A; 29 C.F.R. §§ 2510.3-16, 2590.715-2713, 2590.715-2713A; 45 C.F.R. §§ 147.130, 147.131.

## STATEMENT OF THE CASE

### A. The Mandate

The Patient Protection and Affordable Care Act ("ACA") requires "group health plan[s]" and "health insurance issuer[s]" to cover women's "preventive care." 42 U.S.C. § 300gg-13(a)(4) (the "Mandate"). Employers that fail to include the required coverage are subject to penalties of $100 per day per affected beneficiary. 26 U.S.C. § 4980D(b). Dropping health coverage likewise subjects employers with more than ***3** fifty employees to penalties of $2,000 per year per employee after the first thirty employees. *Id.*§ 4980H(a), (c)(1).

Congress did not define women's "preventive care." The Department of Health and Human Services ("HHS") also declined to define the term and instead outsourced the definition to a private nonprofit, the Institute of Medicine ("IOM"). 75 Fed. Reg. 41,726, 41,731 (July 19, 2010). The IOM then determined that "preventive care" should include "all [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," HRSA, Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines (last visited February 2, 2016), and HHS subsequently adopted that definition, 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv). Some FDA-approved contraceptive methods (such as Plan B and ella) can induce an abortion. *Hobby Lobby*, 134 S. Ct. at 2762-63 & n.7.

#### 1. Full Exemptions from the Mandate

From its inception, the Mandate exempted numerous health plans covering millions of people. For example, certain plans in existence at the time of the ACA's adoption are "grandfathered" and exempt from the Mandate as long as they do not make certain changes. 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-125*l*T(g). As of November 2015, the Government estimated that roughly 37 percent of firms in the country offer at least one grandfathered health plan, and 26 percent of employees nationwide ***4** are enrolled in a grandfathered plan. In total, roughly 33.9 million people are on ERISA-covered grandfathered plans, and 10.7 million people are on State and local government grandfathered plans. *See*80 Fed. Reg. 72,192, 72,218 (Nov. 18, 2015).

Additionally, in acknowledgement of the burden the Mandate places on religious exercise, the Government created a full exemption for plans sponsored by entities it deems "religious employers." 45 C.F.R. § 147.131(a). That category, however, includes only religious orders, "churches, their integrated auxiliaries, and conventions or associations of churches." 26 U.S.C. § 6033(a)(3)(A)(i) & (iii). These entities are allowed to offer conscience-compliant health coverage through an insurance company or third-party administrator ("TPA") that will not provide or procure contraceptive coverage. Notably, this exemption is available for qualifying "religious employers" regardless of whether they object to providing contraceptive coverage. 45 C.F.R. § 147.131(a).

At the same time, the "religious employer" exemption does *not* apply to many devoutly religious nonprofit groups that *do* object to contraceptive coverage. According to the Government, these nonprofit religious groups do not merit an exemption because they are not as "likely" as "[h]ouses of worship and their integrated auxiliaries" "to employ people of the same faith who share

the same objection" to "contraceptive services." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). The administrative record contains no evidence in support of this assertion.

***5 2. The Nonprofit Mandate**

Instead of expanding the "religious employer" exemption, the Government announced that nonexempt religious nonprofits would be "eligible" for an inaptly named "accommodation." 78 Fed. Reg. at 39,871 (the "Nonprofit Mandate"). In reality, however, the "accommodation" involves a new mandate that also forces religious objectors to violate their beliefs.

Under the Nonprofit Mandate, an objecting religious organization must either provide a "self-certification" directly to its insurance company or TPA, or submit a "notice" to the Government providing detailed information on the organization's plan name and type, along with "the name and contact information for any of the plan's [TPAs] and health insurance issuers." 26 C.F.R. § 54.9815-2713A(a), (b)(1)(ii)(B), (c)(1)(ii). The ultimate effect of either submission is the same: by submitting the documentation, the eligible organization authorizes, obligates, and/or incentivizes its insurance company or TPA to arrange "payments for contraceptive services" for beneficiaries enrolled in the organization's health plan. *Id.* § 54.9815-2713A(a), (b)-(c). "If" the organization submits the self-certification, then it creates the obligation for its own TPA or insurance company to provide the objectionable coverage. *Id.* And "if" the organization instead submits the notice to the Government, the Government "send[s] a separate notification" to the organization's insurance company or TPA "describing the[ir] obligations" to provide the objectionable coverage. *Id.* § 54.9815-2713A (b)(1) (ii)(B), (c)(1)(h). In either scenario, payments for contraceptive ***6** coverage are available to beneficiaries only "so long as [they] are enrolled in [the religious organization's] health plan." 29 C.F.R. § 2590.715-2713A(d).

The Nonprofit Mandate has additional implications for organizations that offer self-insured health plans. The Government concedes that in the self-insured context, " 'the contraceptive coverage is part of the [self-insured organization's health] plan.' " *Roman Catholic Archbishop of Wash. v. Sebelius,* 19 F. Supp. 3d 48, 80 (D.D.C. 2013) (citation and alteration omitted); *see also* Br. for the Respondents in Opp. at 19, *Houston Baptist Univ. v. Burwell*, No. 15-35 (U.S. Sept. 8, 2015), 2015 WL 5265293 (conceding that in the self-insured context, "the contraceptive coverage provided by [the] TPA is … part of the same ERISA plan as the coverage provided by the employer"). Both the self-certification and the notification provided by the Government upon receipt of the eligible organization's submission are deemed to be "instrument[s] under which the plan is operated," 29 C.F.R. § 2510.3-16(b), and serve as the "designation of the [organization's TPA] as plan administrator and claims administrator for contraceptive benefits," 78 Fed. Reg. at 39,879. Consequently, the TPA of a self-insured health plan is *barred* from providing contraceptive benefits to the plan beneficiaries *unless* the sponsoring organization provides the self-certification or notification. [1]

***7** In addition, the Nonprofit Mandate provides a unique incentive for objecting organizations' TPAs to provide the objectionable coverage. If an eligible organization complies with the Nonprofit Mandate, its TPA becomes eligible to be reimbursed for the full cost of providing the objectionable coverage, plus at least 10 percent. 45 C.F.R. § 156.50(d). TPAs receive this incentive, however, only if the self-insured organization submits the required self-certification or notification.

Finally, the Nonprofit Mandate requires self-insured religious groups to "contract[] with one or more" TPAs, 26 C.F.R. § 54.9815-2713A(b)(1)(i), but TPAs are under no obligation "to enter into or remain in a contract with the eligible organization," *id.* § 54.9815-2713A(b)(2). Consequently, self-insured organizations must either maintain a contractual relationship with a TPA that will provide the objectionable coverage to their plan beneficiaries, or find and contract with a TPA willing to do so.

**B. Petitioners**

Petitioners are nonprofit Catholic organizations that provide a range of spiritual, charitable, educational, and social services. Petitioners' religious beliefs forbid them from taking actions that would make them complicit in the delivery of coverage for

  

abortifacients, contraception, or sterilization services, or that would create "scandal" by encouraging ***8** through words or deeds other persons to engage in wrongdoing. Petitioners sincerely believe that compliance with the regulations would violate these principles. Pet. App. 88a-89a.

Historically, Plaintiffs have exercised their religious beliefs by offering health coverage in a manner consistent with Catholic teaching. In particular, they have offered health plans through insurers and TPAs that would not provide or procure coverage for abortion, contraceptives, sterilization, or related education and counseling for their employees. They have accomplished this goal using a combination of self-insured church plans, self-insured plans, and insured plans. Pet. App. 89a-98a.

Despite their avowedly religious missions, none of Petitioners except the Diocese qualifies as exempt "religious employers." Even the Diocese is not truly exempt because it offers its health plan to the employees of its non-exempt affiliates, such as Petitioner Catholic Charities. While that health plan currently meets the ACA's definition of a grandfathered plan, the Diocese foregoes approximately $180,000 a year in increased premiums to maintain that status. Were the Diocese's plan to lose its grandfathered status, the employees of Catholic Charities would then be eligible to receive the objectionable coverage through the Diocese's plan under the Nonprofit Mandate. Pet. App. 90a-91a.

### C. Proceedings Below

Left with no alternative to avoid violating their beliefs, Petitioners sought relief under RFRA in the U.S. District Court for the Northern District of ***9** Indiana. The district court granted their request for a preliminary injunction, and the Government appealed. Pet. App. 78a-124a.

The U.S. Court of Appeals for the Seventh Circuit consolidated this appeal with the Government's separate appeal in *Grace Schools v. Sebelius*, 988 F. Supp. 2d 935 (N.D. Ind. 2013). On September 4, 2015, a panel of that court reversed the rulings of the district courts, and held that Petitioners could not prevail on their RFRA claim. Pet. App. 1a-40a. The panel did not deny that the regulations force Petitioners to submit the objectionable documentation and offer health insurance through a company that would provide or procure the objectionable coverage for Petitioners' plan beneficiaries. It concluded, however, that despite Petitioners' express protestations to the contrary, that compliance with the Nonprofit Mandate would absolve Petitioners of "any connection to the provision of contraceptive services." Pet. App. 39a. On this basis, the court concluded that the Government had not imposed a substantial burden on Petitioners' religious exercise. Pet. App. 39a-40a. Judge Manion dissented, explaining that while the opinion paid lip-service to this Court's substantial-burden test, Pet. App. 29a-32a, the panel majority "refuse[d] to apply [it]." Pet. App. 42a (Manion, J., dissenting). And while the panel majority asserted that filing the objectionable documentation "throw[s] the entire administrative and financial burden of providing contraception on the insurer" or TPA, Pet. App. 33a, he noted that this completely "ignores" the reality that it is Petitioners who are "forced to do the throwing," Pet. App. 46a (Manion, J., dissenting).

***10** Petitioners sought rehearing en banc, which was denied on November 5, 2015. Pet. App. 127a-28a. Petitioners subsequently requested a stay of the Seventh Circuit's mandate pending disposition of their forthcoming petition for certiorari. That request was granted on November 12, 2015. Pet. App. 125a-26a.

## REASONS FOR GRANTING THE WRIT

This case presents the exact question on which this Court has recently granted review: whether RFRA allows the Government to force objecting religious nonprofit organizations to violate their beliefs by offering health plans with "seamless" access to coverage for contraceptives, abortifacients, and sterilization. To ensure the similar treatment of similar cases, this Court routinely holds petitions that implicate the same issue as other cases pending before the Court, and, once the related case is decided, it resolves the held petitions in a consistent manner. Because this case raises the same question presented in *Zubik* and six related petitions, Petitioners respectfully request that the Court follow that course here. If this Court correctly determines

  

that the regulations violate RFRA, it should grant this petition, vacate the judgment below, and remand for further proceedings consistent with its decision.

**A.** It is axiomatic that like cases should receive like treatment. To implement that principle, this Court routinely holds petitions for certiorari presenting the same question at issue in other cases pending in this Court, and, once the related case is decided, it resolves the held petitions in a consistent manner. *See, e.g.*, ***11** *Burwell v. Korte*, 134 S. Ct. 2903, 2903 (2014) (held pending *Hobby Lobby*); *Gilardi v. Dep't of Health & Human Servs.*, 134 S. Ct. 2902, 2902 (2014) (held pending *Hobby Lobby*); *IMS Health, Inc. v. Schneider*, 131 S. Ct. 3091, 3091 (2011); *Am. Home Prods. Corp. v. Ferrari*, 131 S. Ct. 1567, 1567 (2011); *State Farm Mut. Auto. Ins. Co. v. Willes*, 551 U.S. 1111, 1111 (2007); *see also Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (noting that the Court has "GVR'd in light of a wide range of developments, including [its] own decisions"); *id.* at 181 (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted *in order that* (if appropriate) they may be 'GVR'd' when the case is decided.").

As the leading treatise on Supreme Court practice explains, "a petition for certiorari may be held, without the Court's taking any action, until some event takes place that will aid or control the determination of the matter," such as "a decision … by the Court in a pending case raising identical or similar issues." Shapiro, *et al., Supreme Court Practice* § 5.1.9, at 340 (10th ed. 2013) (emphasis added). Indeed, when "an issue is pending before the Court in a case to be decided on the merits, the Court will typically 'hold' petitions presenting questions that will be - or might be - affected by its ruling in that case, deferring further consideration of such petitions until the related issue is decided." *Id.* § 6.XIV.31(e), at 485-86 (stating that this Court may defer action on a petition "pending some anticipated legal event (such as further proceedings below or the rendition of an opinion in a related case) that may affect the appropriateness of certiorari"). This ***12** practice makes good sense, as it would offend basic "interests of justice" for similar cases to be treated differently, based on nothing more than the vagaries of "timing of litigation in different courts." *Id.* § 15.1.3(b), at 833.

B. This petition presents the same question presented in *Zubik v. Burwell*, No. 14-1418; *Priests for Life v. U.S. Department of Health & Human Services*, No. 14-1453; *Roman Catholic Archbishop of Washington v. Burwell*, No. 14-1505; *East Texas Baptist University v. Burwell*, No. 15-35; *Little Sisters of the Poor v. Burwell*, No. 15-105; *Southern Nazarene University v. Burwell*, No. 15-119; and *Geneva College v. Burwell*, No. 15-191. The question is whether RFRA allows the Government to force objecting religious nonprofit organizations to violate their beliefs by offering health plans with "seamless" access to coverage for contraceptives, abortifacients, and sterilization.

RFRA prohibits the Government from imposing a "substantial burden" on religious exercise unless doing so "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1. The Seventh Circuit's conclusion that the Government's regulatory scheme is consistent with this statute cannot be reconciled with *Hobby Lobby* and related precedent.

*Hobby Lobby* squarely held that the Government substantially burdens religious exercise whenever it forces plaintiffs to "engage in conduct that seriously violates their religious beliefs" on pain of "substantial" penalties. 134 S. Ct. at 2775-76. Under *Hobby Lobby*'s simple test, the regulations at issue ***13** here impose a clear substantial burden on Petitioners' religious exercise. Just as in *Hobby Lobby*, Petitioners believe that if they "comply with the [regulations]" - here, by submitting objectionable documentation and offering health insurance through an insurance company or TPA that provides or procures the objectionable coverage - they "will be facilitating" wrongdoing in violation of their Catholic religious beliefs. *Id.* at 2759. And just as in *Hobby Lobby*, if Petitioners "do not comply, they will pay a very heavy price." *Id.* Thus, because the regulations "force[] [Petitioners] to pay an enormous sum of money … if they insist on providing insurance coverage in accordance with their religious beliefs, the [Government has] clearly impose [d] a substantial burden" on Petitioners' religious exercise. *Id.* at 2779. Because the Government's regulatory regime is not the least restrictive means of furthering a compelling interest, Petitioners are entitled to relief under RFRA.

  

These issues, however, will be resolved by this Court's disposition of *Zubik* and the related petitions listed above. Just as in *Zubik et al.*, this case turns on whether compliance with the Government's so-called "accommodation" imposes a substantial burden on religious exercise. And just as in *Zubik et al.*, if the answer to that initial question is yes, the Court will have to decide whether the Government's regulatory scheme is the least restrictive means of advancing a compelling government interest.

Accordingly, Petitioners respectfully request that the Court hold this case pending the outcome of *Zubik et al.*, and then dispose of the petition as appropriate in light of the Court's decision in those ***14** cases. If this Court correctly determines that the regulations violate RFRA, it should grant this petition, vacate the judgment below, and remand for further proceedings consistent with its opinion.

## CONCLUSION

The petition for certiorari should be held pending this Court's disposition of *Zubik et al.* Should this Court conclude that the regulatory scheme violates RFRA, it should grant this petition, vacate the decision of the Seventh Circuit, and remand this case for further consideration in light of its decision.

Footnotes

1 *See*29 U.S.C. § 1002(16)(A) (limiting the definition of a plan administrator to "the person specifically so designated by the terms of the instrument under which the plan is operated"); *id.* § 1102(a)(1), (b)(3) (providing that self-insured plans must be "established and maintained pursuant to a written instrument," which must include "a procedure for amending [the] plan, and for identifying the persons who have authority to amend the plan"); 79 Fed. Reg. 51,092, 51,095 n.8 (August 27, 2014).

**End of Document**