14-1418

No. 14-__

IN THE

Supreme Court of the United States

MOST REVEREND DAVID A. ZUBIK, ET AL.,
Petitioners,

v.

SYLVIA MATHEWS BURWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.,
Respondents.

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

PETITION FOR CERTIORARI

NOEL J. FRANCISCO
DAVID T. RAIMER
ANTHONY J. DICK
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
njfrancisco@jonesday.com

PAUL M. POHL
Counsel of Record
JOHN D. GOETZ
LEON F. DEJULIUS, JR.
IRA M. KAROLL
ALISON M. KILMARTIN
MARY PAT STAHLER
JONES DAY
500 Grant St., Suite 4500
Pittsburgh, PA 15219
(412) 391-3939
pmpohl@jonesday.com

Counsel for Petitioners

BLANK PAGE

QUESTION PRESENTED

1. Whether the HHS Mandate and its "accommodation" violate the Religious Freedom Restoration Act ("RFRA") by forcing religious nonprofits to act in violation of their sincerely held religious beliefs, when the Government has not proven that this compulsion is the least restrictive means of advancing any compelling interest.

2. Whether RFRA allows the Government to divide the Catholic Church by creating a narrow "religious employer" exemption that applies to "houses of worship" but excludes the Church's separately incorporated nonprofit entities that implement core Catholic teaching by providing charitable and educational services to their communities.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs below, are the Most Reverend David A. Zubik, the Roman Catholic Diocese of Pittsburgh, Catholic Charities of the Diocese of Pittsburgh, Inc., the Most Reverend Lawrence T. Persico, the Roman Catholic Diocese of Erie, St. Martin Center, Inc., Prince of Peace Center, Inc., and Erie Catholic Preparatory School. No Petitioner has a parent corporation. No publicly held corporation owns any portion of any of the Petitioners, and none of the Petitioners is a subsidiary or an affiliate 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.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

BLANK PAGE

PETITION FOR A WRIT OF CERTIORARI

Petitioners are nonprofit Catholic organizations and Bishops who exercise their religion by providing health coverage to their employees in a manner consistent with their religious beliefs. As part of that religious exercise, Petitioners have historically provided their employees with health plans that exclude coverage for abortifacients, contraceptives, and sterilization. The Government, however, has promulgated a regulatory mandate that makes it effectively impossible for Petitioners to continue that religious exercise. Instead, the mandate forces Petitioners to choose between violating their religious beliefs or else incurring massive penalties.

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), this Court 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. *Id.* at 2775-76. Here the challenged regulations do precisely that, in two specific ways. First, they force Petitioners to submit a "self-certification" or "notification" document that facilitates provision of the objectionable coverage to Petitioners' employees in connection with Petitioners' own health plans. And second, they force Petitioners to maintain an objectionable contractual relationship with the company that will provide or procure the mandated coverage to their employees. It is undisputed that Petitioners sincerely believe that taking these actions would make them complicit in sin. And it is equally undisputed that if Petitioners refuse to take these actions, they will incur ruinous penalties.

In the decision below, the Third Circuit disregarded *Hobby Lobby* and held that the regulations do not impose a substantial burden on Petitioners' religious exercise because the required actions—i.e., submitting the objectionable documentation and maintaining the objectionable contractual relationship—do not *really* make Petitioners complicit in sin. The court expressly held that "the submission of the self-certification form does not make [Petitioners] 'complicit' in the provision of contraceptive coverage," but rather "relieves [Petitioners] of any connection" to the coverage. Pet.App.36a, 44a. That statement is squarely contrary to *Hobby Lobby*'s holding that religious believers must decide *for themselves* whether an act "is connected" to illicit conduct "in a way that is sufficient to make it immoral." 134 S. Ct. at 2778. The Third Circuit simply ignored the undisputed testimony and record evidence in this case establishing that Petitioners sincerely believe that complying with the regulations would make them complicit in sin, and instead "[a]rrogat[ed]" for itself "the authority to provide a binding national answer to th[at] religious and philosophical question." *Id.*

Certiorari is warranted for three reasons. First, the decision below "conflicts with" *Hobby Lobby* and this Court's other precedents, which make clear that courts cannot second-guess a plaintiff's sincere religious belief that taking a particular action would make him complicit in sin. Sup. Ct. R. 10(c). Second, the decision below reflects growing confusion and division in the lower courts regarding the proper test for a "substantial burden" on religious exercise under RFRA. And third, this case implicates an

exceptionally important issue of religious liberty that affects thousands of similarly situated nonprofit religious organizations around the country, all of whom the Government has artificially and irrationally excluded from its narrow exemption for "religious employers."

OPINIONS BELOW

The opinion of the district court is reported at 983 F. Supp. 2d 576. Pet.App.50a-130a. The opinion of the Third Circuit is reported at 778 F.3d 422. Pet.App.1a-49a.

JURISDICTION

The judgment of the Third Circuit was entered on February 11, 2015. That court denied rehearing en banc on April 6, 2015. Pet.App.137a. This Court has jurisdiction under 28 U.S.C. §§ 1254(1).

LEGAL PROVISIONS INVOLVED

The following provisions are reproduced in Appendix I (Pet.App.155a): 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, 54.9815-2713AT; 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"). If an employer's health plan does not include the required coverage, the employer is 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 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 in the first instance and instead outsourced the definition to the Institute of Medicine ("IOM"). 75 Fed. Reg. 41,726, 41,731 (July 19, 2010). The IOM then determined that "preventive care" includes "[a]ll [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 May 27, 2015); *see* 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). [1] FDA-approved contraceptive methods include drugs and devices (such as Plan B and ella) that can induce an abortion. *See Hobby Lobby*, 134 S. Ct. at 2762-63 & n.7.

---

[1] One dissenting IOM committee member stated that "the committee process for evaluation of the evidence lacked transparency and was largely subject to the preferences of the committee's composition. Troublingly, the process tended to result in a mix of objective and subjective determinations filtered through a lens of advocacy." IOM, Clinical Preventive Services for Women: Closing the Gaps 232 (2011), *available at* http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx.

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. § 54.9815-1251T(g). Thus, by the Government's own estimates, as of the end of 2013, over 90 million individuals participated in health plans excluded from the Mandate's scope. 75 Fed. Reg. 34,538, 34,552-53 (June 17, 2010); *Geneva Coll. v. Sebelius*, 941 F. Supp. 2d 672, 684 & n.12 (W.D. Pa. 2013).

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, is defined to include only religious orders, "churches, their integrated auxiliaries, and conventions or associations of churches." 45 C.F.R. § 147.131(a) (citing 26 U.S.C. § 6033(a)(3)(A)(i) & (iii)). These entities are allowed to offer health coverage in a manner consistent with their religious beliefs through an insurance company or TPA that will exclude coverage for abortifacients, contraceptives, and sterilization services. *See* 78 Fed. Reg. 39,870, 39,873 (July 2, 2013). Notably, this exemption is available for *all* qualifying religious employers, even those that have no objection whatsoever to the mandated products and services. 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 abortifacient and contraceptive coverage, including Petitioners Catholic Charities of the Diocese of Pittsburgh, Prince of Peace Center, St. Martin Center, and Erie Catholic Preparatory School. According to the Government, these nonprofit religious groups do not qualify as "religious employers" and thus 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. at 39,874. In other words, the Government maintains that Catholic Charities of Erie, which qualifies for the exemption as an "integrated auxiliary," is more "likely" to employ co-religionists than Petitioner Catholic Charities of Pittsburgh—an organization that is identical in all material respects, save for the fact that it does not meet that narrow regulatory definition. The Federal Register offers no evidentiary support for this assertion.

2. The "Accommodation"

Despite sustained criticism, the Government refused to expand the "religious employer" exemption to cover all objecting religious nonprofit groups, and instead offered them an inaptly named "accommodation." 78 Fed. Reg. at 39,871 (July 2, 2013). The so-called accommodation is designed to relieve the obligation to *pay for* abortifacient and contraceptive coverage. But unlike the full exemption for "religious employers," it does not relieve the obligation to *facilitate* such coverage. Under the accommodation, religious objectors have no way to provide health coverage in a manner

consistent with their religious beliefs, but instead are forced to take specific actions that they believe immorally facilitate the delivery of coverage for abortifacients, contraceptives, and sterilization services.

i. The Original "Accommodation"

The original accommodation was promulgated in July 2013. To be eligible for the accommodation, an entity must (i) "oppose[] providing coverage for some or all of [the] contraceptive services"; (ii) be "organized and operate[] as a nonprofit entity"; (iii) "hold[] itself out as a religious organization"; and (iv) provide a "self-certifi[cation]" to its insurance company or third-party administrator ("TPA") declaring that it meets the first three criteria. 26 C.F.R. § 54.9815-2713A(a), (b)(1), (c)(1); 29 C.F.R. § 2590.715-2713A(a), (b)(1), (c)(1); 45 C.F.R. § 147.131(b), (c)(1). By submitting the self-certification, the eligible organization authorizes, obligates, and/or incentivizes its insurance company or TPA to arrange "payments for contraceptive services" for beneficiaries enrolled in its health plan. 26 C.F.R. § 54.9815-2713A. Although the TPA or insurance company is not allowed to charge the religious organization for the objectionable coverage, the regulations specify that coverage for abortifacient and contraceptive services is available to beneficiaries only "so long as [they] are enrolled in [the organization's] health plan." 29 C.F.R. § 2590.715-2713A(d).

The accommodation 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). The self-certification is deemed to be an "instrument under which the plan is operated," 29 C.F.R. § 2510.3-16(b), and serves 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 has no authority to provide abortifacient and contraceptive benefits to the plan beneficiaries *unless* the sponsoring organization provides the self-certification.

In addition, once an eligible organization submits the self-certification, it creates a unique incentive for its TPA to provide abortifacient and contraceptive coverage: under the accommodation, TPAs are eligible to be reimbursed for the full cost of the objectionable coverage they provide to the eligible organization's beneficiaries, plus an additional 15 percent. 45 C.F.R. § 156.50; 79 Fed. Reg. 13,744, 13,809 (Mar. 11, 2014). That incentive is not triggered unless and until the eligible organization invokes the accommodation.

Finally, in order to comply with the "accommodation," a self-insured organization must "contract[] with one or more third party administrators." 26 C.F.R. § 54.9815-2713AT(b)(1)(i). At the same time, however, the regulations impose no obligation on TPAs "to enter into or remain in a contract with the eligible organization." 78 Fed. Reg. at 39,880. Consequently, religious organizations that invoke the accommodation are required to either maintain a contractual relationship with a TPA that

will provide or procure the objectionable coverage to their plan beneficiaries, or else find and contract with a TPA willing to do so.

ii. The Revised "Accommodation"

After the district court's order entering an injunction in this case, the Government issued a revised version of the accommodation that offers nonexempt religious nonprofits an "alternative process" for complying with the Mandate. 79 Fed. Reg. 51,092, 51,094 (Aug. 27, 2014). The revision is immaterial. The primary change is that rather than submitting a self-certification directly to its insurance company or TPA, an objecting religious nonprofit entity may trigger the accommodation by notifying *the Government*. The required notice must include "the name of the eligible organization," its "plan name and type," and "the name and contact information for any of the plan's [TPAs] and health insurance issuers." 26 C.F.R. §§ 54.9815-2713AT(b)(1)(ii)(B), (c)(1)(ii); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii); 45 C.F.R. § 147.131(c)(1)(ii). Upon receiving that notice, the Government in turn must notify the organization's insurance company or TPA, which then becomes authorized, obligated, and incentivized to provide payments for the objectionable products and services for the religious organization's plan beneficiaries, just like under the original accommodation. *See* 26 C.F.R. § 54.9815-2713AT(b)(2), (c); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (b)(2), (c); 45 C.F.R. § 147.131(c)(1)(ii), (c)(2)(i).

The self-certification under the original accommodation and the notification under the revised accommodation have the same effect.

Whether an "eligible organization" submits the self-certification form or the notice to the Government, its insurance company or TPA is authorized and obligated to arrange "payments for contraceptive services" for participants and beneficiaries of the organization's health plan. 26 C.F.R. § 54.9815-2713AT(b)(2), (c); 29 C.F.R. § 2590.715-2713A(b)(2), (c); 45 C.F.R. § 147.131(c)(2)(i). The insurance issuer or TPA's obligation to provide the "payments" takes effect only "[w]hen" and "[i]f" a religious organization submits the self-certification or notification. 29 C.F.R. § 2590.715-2713A(b)(2), (c); 45 C.F.R. § 147.131(c). Thus, in either scenario, the authority, obligation, and incentive to provide payments for abortifacient and contraceptive coverage arise only if the religious organization submits an objectionable notice, and payments are available only "so long as [beneficiaries] are enrolled in [the organization's] health plan." 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B).[2]

---

[2] The fact that the Government has revised the accommodation does not alter Petitioners' religious objection or their entitlement to relief. As noted above, under the revised accommodation, Petitioners must still submit a document that they believe immorally facilitates the delivery of the mandated coverage, and Petitioners must still maintain an objectionable contractual relationship with a third party authorized to deliver such coverage to their plan beneficiaries. Thus, the revised rule continues to force Petitioners to violate their beliefs. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 & n.3 (1993) (stating that regulatory changes do not moot suit where "gravamen of [the] complaint" remains, and new rule "disadvantages [plaintiffs] in the same fundamental way").

B. The Petitioners and Their Health Plans

Petitioners provide a range of spiritual, charitable, educational, and social services to members of their communities, Catholic and non-Catholic alike.

- The Most Reverend David A. Zubik is the Bishop of the Roman Catholic Diocese of Pittsburgh, and is the Trustee of the Roman Catholic Diocese of Pittsburgh, a Charitable Trust. Bishop Zubik also acts as Chairman of the Membership Board of Catholic Charities of the Diocese of Pittsburgh, Inc.
- The Roman Catholic Diocese of Pittsburgh provides pastoral care and spiritual guidance for approximately 700,000 Catholics in Southwestern Pennsylvania, while overseeing spiritual, educational, and social service programs. The Diocese operates a self-insured health plan through the Catholic Benefits Trust and makes its health plan available to the employees of its nonprofit religious affiliates.
- Catholic Charities of the Diocese of Pittsburgh, Inc. serves approximately 81,000 underserved and underprivileged people in Southwestern Pennsylvania by offering a variety of health care and support services. Catholic Charities is insured through the Diocese of Pittsburgh's Catholic Benefits Trust.
- The Most Reverend Lawrence T. Persico is the Bishop of the Roman Catholic Diocese of Erie, and is the Trustee of The Roman Catholic Diocese of Erie, a Charitable Trust. Bishop Persico also acts as Chairman of the Membership Boards of St. Martin Center, Inc.

and Prince of Peace Center, Inc. Bishop Persico also serves on the board of directors of Erie Catholic Preparatory School.

- The Roman Catholic Diocese of Erie provides pastoral care and spiritual guidance for 187,500 Catholics, while serving many Northwestern Pennsylvania residents through schools and charitable programs. The Diocese makes its self-insured health plan available to the employees of its nonprofit religious affiliates.
- St. Martin Center, Inc. is an affiliate nonprofit corporation of the Diocese of Erie, which has been providing individuals and families with resources to gain self-sufficiency for the last fifty years. The Diocese of Erie provides health coverage to St. Martin Center's employees.
- Prince of Peace Center, Inc. is an affiliate nonprofit corporation of the Diocese of Erie, which provides various social and self-sufficiency services to the needy in the greater Mercer County, Pennsylvania community. The Diocese of Erie provides health coverage to Prince of Peace Center's employees.
- Erie Catholic Preparatory School is an affiliate nonprofit corporation of the Diocese of Erie that provides a Christ-centered, college preparatory education to approximately 870 students. The Diocese of Erie provides health coverage to the school's employees.

As entities affiliated with the Catholic Church, Petitioners sincerely believe that life begins at the moment of conception, and that certain "preventive" services that interfere with conception or terminate a

pregnancy are immoral. Pet.App.83a-85a. Petitioners adhere to Catholic doctrines regarding material cooperation with evil and "scandal."[3] Pet.App.76a, 84a. Accordingly, they believe they may not provide, pay for, and/or facilitate access to contraception, sterilization, abortion, or related counseling. *Id.* Among other things, Petitioners' religious beliefs prohibit them from signing a document that authorizes, obligates, designates, or incentivizes their TPA to provide their plan beneficiaries with coverage for abortifacients, contraceptives, and sterilization. Pet.App.84a-85a. Petitioners believe that signing such a document facilitates moral evil and makes them complicit in sin, regardless of whether they are required to pay for the objectionable coverage. Pet.App.84a. Although it takes only a few minutes, signing the self-certification form has "eternal ramifications." Pet.App.84a (quoting testimony of Bishop Persico). The Government stipulated to the sincerity of all of Applicants' articulated religious beliefs. Pet.App.55a n.5, 150a.

Historically, Petitioners have exercised their religious beliefs by offering health coverage in a manner consistent with Catholic teaching. Pet.App.75a-79a. In particular, they have contracted with TPAs that would provide health coverage consistent with their religious beliefs to their plan beneficiaries. Under the Government's regulations,

---

[3] "Scandal" involves leading, by words or actions, other persons to engage in wrongdoing. *See* Catechism of the Catholic Church ¶ 2284, *available at* http://www.vatican.va/archive/ENG0015/_P80.HTM.

however, when Petitioners sign and submit the self-certification or notification, the carefully structured provisions of their health plans change: their TPAs for the first time become authorized, obligated, and incentivized to deliver the objectionable coverage to Petitioners' beneficiaries, through Petitioners' health plans.

This affects all of the Petitioners. Despite their religious missions, the non-diocesan Petitioners do not qualify as exempt "religious employers" under the Government's definition. Even the Dioceses, which qualify as "religious employers," are not truly exempt because they offer their health plans to the employees of their non-exempt charitable and educational affiliates. The regulations thus require the Dioceses to facilitate the delivery of the objectionable coverage to enrolled affiliates' employees.

C. The Proceedings Below

To protect their rights of religious exercise, Petitioners filed suit on October 8, 2013, challenging the regulations, including the original "accommodation" as promulgated in July 2013. On November 12 and 13, 2013, the district court held an evidentiary hearing where it admitted 172 joint stipulations, testimony from six witnesses including one Roman Catholic Cardinal and two Bishops, and 64 exhibits, of which the Government proffered only nine unique exhibits. As a result, the well-developed record in this case makes it unique among challenges to the regulations at issue here.

On November 21, 2013, the district court granted a preliminary injunction in favor of Petitioners after making extensive findings of fact and assessments of

witness credibility. The court concluded that the regulations substantially burden Petitioners' sincerely-held religious beliefs under RFRA by requiring them to sign and submit a morally offensive self-certification form under penalty of massive fines that would "gravely impact their spiritual, charitable and educational activities." Pet.App.96a. The court specifically found that Petitioners "have a sincerely-held religious belief that 'shifting responsibility'" to provide contraceptive coverage onto their own TPA "does not absolve or exonerate them from the moral turpitude created by the 'accommodation.'" Pet.App.110a.

The district court further held that the "application of the government's two regulations—one an exemption and one an accommodation—has the effect of dividing the Catholic Church into two separate entities." Pet.App.114a. The court explained that the "religious employer" exemption available to employees who work "inside a church's walls" is not available to the employees of affiliated nonprofits "who stand on the church steps and pass out food and clothes to the needy." Pet.App.114a. "[B]y dividing the Catholic Church in such as manner . . . the Government has created a substantial burden on Plaintiffs' right to freely exercise their religious beliefs." Pet.App.114-15a.

After finding a substantial burden, the district court held that the Mandate, as applied to Petitioners, cannot satisfy RFRA's strict-scrutiny provision. The court noted that the Government asserted only two "'compelling'" interests: (1) "'promotion of public health,'" and (2) "'assuring that women have equal access to health care services.'"

Pet.App.116a. The court held that these interests are "so broadly stated" that they are not "'of the highest order'" such that they "'can overbalance legitimate claims to the free exercise of religion.'" Pet.App.121a (citation omitted). In addition, the court explained that because the Government has granted an exemption for entities it deems "religious employers," it cannot possibly have a "compelling" need to deny a similar exemption for other nonprofit religious organizations: "If there is no compelling governmental interest to apply the contraceptive mandate to the religious employers who operate the 'houses of worship,' then there can be no compelling governmental interest to apply (even in an indirect fashion) the contraceptive mandate to the religious employers of the nonprofit, religious affiliated/related entities." Pet.App.119a.

The court also noted the Government's "fail[ure] to adduce evidence that definitively establishes that it used the least restrictive means to meet the stated compelling government interests." Pet.App.121a. Specifically, the Government failed at the injunction hearing, or in the administrative record, to offer "any evidence" to prove that it utilized the least restrictive means of advancing its asserted interests. Pet.App.122a.

On December 20, 2013, the district court converted its preliminary injunction into a permanent injunction "based on the Government's concession that it would not present additional evidence" on any of the relevant legal elements. Pet.App.132a. Again, the court found that the "Government has not met its burden of demonstrating that it used the least

restrictive means of achieving any compelling governmental interest." Pet.App.132a.

The Government appealed to the Third Circuit. On February 11, 2015, the Third Circuit issued an opinion reversing the district court. Pet.App.1a-49a. The court found no substantial burden on Petitioners' religious exercise because, in the court's view, complying with the "accommodation" by submitting the self-certification form "does not make [Petitioners] 'complicit' in the provision of contraceptive coverage." Pet.App.36a. The court held the regulations impose an "independent obligation" on Petitioners' TPAs to provide the objectionable coverage, and Petitioners' "real objection" is not to any actions they *themselves* are required to take, but only to "what happens after the form is provided." Pet.App.37-38a. Because the court found no substantial burden, it did not reach the issue of strict scrutiny.[4]

Petitioners sought rehearing en banc on March 26, 2015, but the Third Circuit rejected their request on April 6, 2015. Pet.App.137a. Petitioners thereafter filed a motion asking that court to stay its mandate on April 9, 2015, which was denied on April 15. Pet.App.138a. Despite the ordinary rule providing for the court's mandate to issue 7 days after that denial, Fed. R. App. P. 41(b), the Third Circuit ordered the mandate to issue immediately. Pet.App.144a.

---

[4] Unlike the district court, the Third Circuit passed on the validity of both the original and the revised "accommodation" under RFRA. *See* Pet.App.15a n.3 ("[W]e also conclude that the alternative compliance mechanism set forth in the August 2014 regulations poses no substantial burden.").

Petitioners then sought emergency relief from Circuit Justice Alito, who entered an order the same day directing the Third Circuit to recall and stay its mandate, thereby leaving the district court's injunction in place pending further order of this Court. Pet.App.148a. The Government submitted its opposition to Petitioners' stay motion on April 20, 2015, and Petitioners filed their reply on April 21.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted under this Court's traditional criteria.

First, the decision below squarely conflicts with this Court's decision in *Hobby Lobby*, which 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 (emphasis added). *Hobby Lobby* made clear that religious believers must decide *for themselves* whether taking a particular action would make them complicit in sin. But the court below ignored that holding, and instead declared that forcing Petitioners to comply with the regulations cannot impose a substantial burden on their religious exercise because it would not *truly* make them "'complicit' in the provision of contraceptive coverage." Pet.App.36a. As at least five different circuit judges have recognized, that analysis is clearly inappropriate and contrary to this Court's precedent because it involves impermissible second-guessing of private religious beliefs. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5368, 2015 U.S. App. LEXIS 8326, at *30 (D.C. Cir. May 20, 2015) (Brown, J., dissenting, joined by Henderson, J.)

("Plaintiffs, including an Archbishop and two Catholic institutions of higher learning, say compliance with the regulations would facilitate access to contraception in violation of the teachings of the Catholic Church[, and no] law or precedent grants [any court] authority to conduct an independent inquiry into the correctness of this belief[.]"); *id.* at *49-52 (Kavanaugh, J., dissenting) (same); *Univ. of Notre Dame v. Burwell*, No. 13-3853, 2015 U.S. App. LEXIS 8234, at *59-60 (7th Cir. May 19, 2015) (Flaum, J., dissenting) (same); *Eternal Word Television Network, Inc. v. HHS*, 756 F.3d 1339 (11th Cir. 2014) ("*EWTN*") (Pryor, J., concurring) (same).

Second, the decision below added to the growing confusion and division among the circuits over the proper way to conduct RFRA's substantial-burden inquiry. The court below held, in agreement with the D.C. Circuit, that forcing religious adherents to act contrary to their religious beliefs does not substantially burden their religious exercise if a court determines that the required actions do not, in its opinion, *really* facilitate wrongdoing. By contrast, the Seventh, Tenth, and Eleventh Circuits have held that courts must defer to a plaintiff's sincere religious belief that taking a particular act is objectionable because it would facilitate wrongdoing. These circuits focus on *coercion*, recognizing that the Government substantially burdens religious exercise whenever it imposes substantial pressure on religious adherents to violate *their* beliefs, including by taking any action that *they believe* would make them complicit in sin. This Court's intervention is needed to resolve this fundamental disagreement among the circuits.

Third, the issue presented here is exceptionally important because it implicates core protections of religious liberty. The outcome of this case will affect thousands of religious nonprofits around the country, which hope to avoid being put to the agonizing choice between violating their religious beliefs or incurring ruinous penalties.

I. THE DECISION BELOW CONFLICTS WITH *HOBBY LOBBY* AND THIS COURT'S OTHER PRECEDENT

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 panel's conclusion that the challenged regulations do not impose a substantial burden on Petitioners' religious exercise squarely conflicts with this Court's precedent.

Under *Hobby Lobby*, the test for a "substantial burden" on religious exercise is whether the Government imposes substantial pressure on religious adherents to take (or forgo) *any* action contrary to their sincere religious beliefs. That test is met when the Government "demands that [plaintiffs] engage in conduct that seriously violates their religious beliefs" or else suffer "substantial economic consequences." 134 S. Ct. at 2775-76; *see also Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (concluding that the petitioner "easily satisfied" the substantial-burden standard where he was "put . . . to the choice" of violating his religious beliefs or suffering "serious disciplinary action"); *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981) (defining "substantial burden" on religious exercise

as "substantial pressure on an adherent to modify his behavior and to violate his beliefs"); *Notre Dame*, 2015 U.S. App. LEXIS 8234, at *60 n.1 (Flaum, J., dissenting) ("*Hobby Lobby* instructs that . . . substantiality is measured by the severity of the penalties for non-compliance.").

Applying that test here leaves no doubt that the regulations substantially burden Petitioners' religious exercise. Just as in *Hobby Lobby*, Petitioners believe that if they "comply with the [regulations]" "they will be facilitating" immoral conduct in violation of their religion. 134 S. Ct. at 2759. And just as in *Hobby Lobby*, if Petitioners "do not comply" "they will pay a very heavy price." *Id.* In short, because the Government "forces [Petitioners] to pay an enormous sum of money . . . if they insist on providing insurance coverage in accordance with their religious beliefs, [it has] clearly impose[d] a substantial burden" on their religious exercise. *Id.* at 2779.

Rather than applying this test, the court below undertook what it called an "objective evaluation" to "assess whether [Petitioners'] compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contraceptive coverage." Pet.App.29a. As part of that "objective" analysis, the court stated that it would "consider the nature of the action required of the [Petitioners], the connection between that action and the [Petitioners'] beliefs, and the extent to which that action interferes with or otherwise affects the [Petitioners'] exercise of religion." Pet.App.31a. After conducting that inquiry, the court concluded that "the submission of the self-certification form does not

make [Petitioners] 'complicit' in the provision of contraceptive coverage," and indeed "relieves [Petitioners] of any connection" to the objectionable coverage. Pet.App.36a, 44a.

That analysis cannot be reconciled with *Hobby Lobby*, which explained that whether a particular action makes a plaintiff complicit in sin is "a difficult and important question of religion and moral philosophy." 134 S. Ct. at 2778. Contrary to the panel's analysis, RFRA allows religious plaintiffs, not courts, to determine whether a particular act is "connected to" wrongdoing "in a way that is sufficient to make it immoral." *Id.* Courts may not "[a]rrogat[e] the authority to provide a binding national answer to [that] religious and philosophical question." *Id.* But that is exactly what the lower court did: by proclaiming that complying with the "accommodation" would not make Petitioners complicit in sin, the court substituted its own moral judgment for that of Petitioners, effectively telling a Roman Catholic Cardinal and two Bishops "that their beliefs are flawed." *Id.*

In addition to applying the wrong legal test, the court below also departed from *Hobby Lobby* and this Court's other precedent in at least four discrete ways.

First, the court asserted that this case is unlike *Hobby Lobby* because the "accommodation" does not force Petitioners to choose between providing contraceptive coverage or paying a penalty, but instead gives them a "third option" of complying with the "accommodation." Pet.App.33a. But that distinction is irrelevant because Petitioners likewise object, based on sincerely held religious beliefs, to

taking the actions required under the "accommodation"—namely, submitting the required documentation and maintaining the required contractual relationship. True, the "accommodation provides an alternative, but the alternative itself imposes a substantial burden on the religious organization's exercise of religion." *Priests for Life*, 2015 U.S. App. LEXIS 8326, at *60 (Kavanaugh, J., dissenting). This Court's precedent makes clear that RFRA protects "'*any* exercise of religion,'" which includes "the performance of (or abstention from) physical acts" that are "engaged in for religious reasons." *Hobby Lobby*, 134 S. Ct. at 2762, 2770 (emphasis added). Once a plaintiff "dr[a]w[s] a line" as to which actions are religiously objectionable, "it is not for [courts] to say that the line he drew was an unreasonable one." *Thomas*, 450 U.S. at 715. It makes no difference whether the religious exercise at issue is refraining from shaving one's beard (*Holt*), refraining from paying for abortifacient and contraceptive coverage (*Hobby Lobby*), or refraining from submitting an objectionable form and maintaining an objectionable contractual relationship (here). *See Priests for Life*, 2015 U.S. App. LEXIS 8326, at *60-61 (Kavanaugh, J., dissenting) (explaining that being forced to comply with the accommodation is no different than being forced to "shav[e] your beard," "send[] your children to high school," "pay[] the Social Security tax," or "work[] on the Sabbath").

Second, *Hobby Lobby* also forecloses the lower court's attempt to recast Petitioners' religious objection as an objection to the conduct of third parties. *See* Pet.App.37a-40a (citing *Bowen v. Roy*, 476 U.S. 693 (1986); *Lyng v. Nw. Indian Cemetery*

Protective Ass'n, 485 U.S. 439 (1988)). Contrary to the lower court's characterization, Petitioners' "real objection" is not to the actions of "the insurance issuers and the third-party administrators." Pet.App.37a. Rather, the undisputed record reveals that Petitioners object to acts that they *themselves* are compelled to take, namely: (1) signing and submitting the required self-certification or notification, and (2) maintaining the objectionable contractual relationship. "Make no mistake: the harm Plaintiffs complain of" is "their inability to conform *their own* actions and inactions to their religious beliefs without facing massive penalties from the government." *Priests for Life*, 2015 U.S. App. LEXIS 8326, at *22 (Brown, J., dissenting). The regulations thus plainly interfere with "the ability *of* [*Petitioners themselves*] to conduct [their operations] in accordance with their religious beliefs." *Hobby Lobby*, 134 S. Ct. at 2778 (emphasis added).

Hobby Lobby rejected a similar attempt to transform the plaintiffs' religious objection into an objection to the actions of third parties. "There, as here, [the Government's] main argument was 'basically that the connection between what the objecting parties must do . . . and the end that they find to be morally wrong was simply too attenuated." *Notre Dame*, 2015 U.S. App. LEXIS 8234, at *59 (Flaum, J., dissenting (quoting *Hobby Lobby*, 134 S. Ct. at 2777)). In other words, the Government argued that the plaintiffs had no cognizable claim under RFRA because "the ultimate event" to which they objected—"the destruction of an embryo"—would come about only as a result of independent actions taken by others. 134 S. Ct. at 2777 & n.33. This Court rightly noted that the Government's argument

"dodge[d] the question that RFRA presents" because it refused to acknowledge the plaintiffs' religious objections was based on their perceived moral duty to avoid "enabling or facilitating the commission of an immoral act by another." *Id.* at 2778. The same is true here. *See Notre Dame*, 2015 U.S. App. LEXIS 8234, at *60 (Flaum, J., dissenting); *Priests for Life*, 2015 U.S. App. LEXIS 8326, at *29-35 (Brown, J., dissenting); *id.* at *48-62 (Kavanaugh, J., dissenting).

Third, the court below concluded that there can be no substantial burden because Petitioners' TPAs have an "independent obligation" to provide abortifacient and contraceptive coverage to Petitioners' plan beneficiaries. Pet.App.38a. But *Hobby Lobby* shows that conclusion to be both irrelevant and wrong. It is irrelevant because Petitioners cannot be forced to maintain a contractual relationship with any company obligated, authorized, or incentivized to provide abortifacient and contraceptive coverage to their plan beneficiaries, regardless of whether the company has an "independent obligation" to do so. *Cf. Notre Dame*, 2015 U.S. App. LEXIS 8234, at *59-60 (Flaum, J., dissenting) (stating that whether the regulations impose an "independent" obligation "really is of no moment here, because Notre Dame also believes that being driven into an ongoing contractual relationship with an insurer . . . that provides its students with contraception compels it to act in contravention of its beliefs").

In any event, the lower court's analysis is plainly wrong because the "obligation" imposed on Petitioners' TPAs to provide abortifacient and

contraceptive coverage to Petitioners' plan beneficiaries is not "independent" of Petitioners. Instead, Petitioners' TPAs have that obligation only "so long as [the beneficiaries] are enrolled in [the] health plan" that Petitioners are forced to offer them, 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B), and only so long as Petitioners submit the required notification or form, *see supra* 7-10; *see also Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2814 n.6 (2014) (Sotomayor, J., dissenting) (stating that the TPA of a religious objector "bears the legal obligation to provide contraceptive coverage *only upon* receipt of a valid self-certification." (emphasis added)).[5] Consequently, the regulations coerce Petitioners into serving as the crucial link between contraceptive providers and recipients.

Indeed, this Court need look no further than the Government's own arguments to confirm Petitioners' integral role in the regulatory scheme. If TPAs truly had an "independent" obligation to provide abortifacient and contraceptive coverage to Petitioners' employees, then the Government could not plausibly claim that granting an exemption for Petitioners "would deprive hundreds of employees" of abortifacient and contraceptive coverage. Opp'n at

---

[5] The Government itself has *conceded* that "[w]ithout the self-certification form, the TPA is prohibited from providing coverage for the objectionable services to [the Affiliates'] employees." Pet.App.150a, 153a. The same is true under the "notification" option, because the notification has the same effect of authorizing, obligating, and incentivizing the objecting organization's TPA to provide the objectionable coverage. *See* 26 C.F.R. § 54.9815-2713AT(b)(1)(ii)(B), (c)(1)(ii).

36, *Wheaton*, 134 S. Ct. 2806 (U.S. July 2014) (No. 13A1284). And if the regulatory scheme were in fact "totally disconnected" from Petitioners' actions, Pet.App.44a, then it is impossible to see how the Government could claim a "compelling interest" in forcing Petitioners to take any action to comply with the regulations. "After all, if the form were meaningless why would the government require it?" *Priests for Life*, 2015 U.S. App. LEXIS 8326, at *58 (Kavanaugh, J., dissenting).

Finally, the court below ignored the fact that the regulations split the Catholic church into an exempt "worship" wing and a non-exempt "charitable and educational" wing. As the district court recognized, Petitioners "sincerely believe that religious worship, faith, and good works are essential and integral components of the Catholic faith and constitute the core mission of the Catholic Church." Pet. App.64a. But while the regulations allow the Bishops to act consistently with their beliefs on behalf of exempt "worship" entities, they require the Bishops to violate their religious beliefs when acting on behalf their equally religious charitable and educational affiliates, which are subject to the requirements of the "accommodation." The regulatory scheme thus penalizes the Catholic Church for venturing beyond the walls of a "church" and exercising its religion through charitable and educational services that are at the very heart of its faith and religious mission.

II. THE CIRCUITS ARE DIVIDED OVER THE ISSUES PRESENTED

A. The Circuits Are Divided on How to Apply RFRA's "Substantial Burden" Test

As this Court has acknowledged, the "Circuit Courts have divided on whether to enjoin" the accommodation for "religious nonprofit organizations," and "[s]uch division is a traditional ground for certiorari." *Wheaton*, 134 S. Ct. at 2807 (citing Sup. Ct. R. 10(a)). This division is based on a fundamental disagreement about the proper test for a "substantial burden" under RFRA.

The D.C. Circuit has agreed with the Third Circuit's decision below that forcing religious adherents to act in violation of their sincere religious beliefs is not a substantial burden on religious exercise if a court determines that the required actions are insubstantial or do not truly make the believer complicit in wrongdoing. In stark contrast, the Seventh, Tenth, and Eleventh Circuits have properly focused on the substantiality of the *pressure* placed on religious adherents to act in violation of their beliefs, while deferring to the adherent's religious understanding that a particular action would make him complicit in sin. In these latter circuits, the nature of the compelled action is irrelevant to the substantial-burden analysis, as long as the plaintiff sincerely believes the compelled action is religiously objectionable.

1. In *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), *aff'd*, 134 S. Ct. 2751, the Tenth Circuit held that the substantial-burden test does not allow "an inquiry into the theological merit of the [religious objection] in question," but instead turns solely on "the *intensity of the coercion* applied by the government to act contrary to [sincere religious] beliefs." *Id.* at 1137. Thus, when a plaintiff brings a RFRA claim in the

Tenth Circuit, the court's "only task" in applying the substantial-burden test "is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." *Id.* Crucially, the Tenth Circuit has emphasized that religious believers *themselves* must determine whether a particular act is religiously objectionable on the ground that it would facilitate wrongdoing and thus make them complicit in sin. *Id.* at 1142 ("[T]he question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity.").

In *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), the Seventh Circuit expressly "agree[d] with . . . the Tenth Circuit that the substantial-burden test under RFRA focuses primarily on the 'intensity of the coercion applied by the government to act contrary to religious beliefs.'" *Id.* at 683 (quoting *Hobby Lobby*, 723 F.3d at 1137). Thus, in the Seventh Circuit, "the substantial-burden inquiry evaluates the coercive effect of the governmental pressure on the adherent's religious practice and steers well clear of deciding religious questions." *Id.* Like the Tenth Circuit, the Seventh Circuit emphasized that where plaintiffs have a religious objection to taking a particular action because *they* believe it would make them "complicit in a grave moral wrong," courts may not second-guess that religious judgment. *Id.* Accordingly, the test for a substantial burden in the Seventh Circuit is whether the Government has "placed [sufficient] pressure on the plaintiffs to

violate their religious beliefs and conform to its regulatory mandate." *Id.* [6]

The Eleventh Circuit has adopted the same test laid out in *Korte*, and has issued an injunction pending appeal against the nonprofit "accommodation." *See EWTN*, 756 F.3d 1339. The injunction in *EWTN* was based on the Eleventh Circuit's rule that the Government substantially burdens religious exercise whenever it requires a "religious adherent" to "'participat[e] in an activity prohibited by religion,'" by imposing "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Id.* at 1345 (Pryor, J., concurring) (quoting *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004)). Whether an action is religiously objectionable because it makes the actor "complicit in a grave moral wrong" cannot be second-guessed by courts, but must be left up to the judgment of individual religious believers. *Id.* at 1348 (citing

---

[6] The Seventh Circuit's substantial-burden test as set forth in *Korte* was not displaced by its subsequent 2-1 decision in *Notre Dame*, No. 13-3853, 2015 U.S. App. LEXIS 8234, issued after this Court vacated and remanded the original *Notre Dame* decision for reconsideration in light of *Hobby Lobby*. On remand, the court declined to grant a preliminary injunction to Notre Dame. *Id.* at *15, *35. Under applicable Seventh Circuit precedent, "findings of fact and conclusions of law made at the preliminary injunction stage" are "not binding," in recognition of the fact that they are "often based on incomplete evidence and a hurried consideration of the issues." *Thomas & Betts Corp. v. Panduit Corp.*, 138 F.3d 277, 292-93 (7th Cir. 1998). Consequently, *Korte* remains good law in the Seventh Circuit.

Hobby Lobby, 134 S. Ct. at 2778). Judge Pryor openly acknowledged that other circuits have recently applied a contrary rule to uphold the accommodation, but he dismissed that rule as "[r]ubbish." *Id.* at 1347.

2. In sharp contrast, the D.C. Circuit, like the Third Circuit below, has held that courts may second-guess a claimant's sincere religious belief that taking a particular action would make him complicit in sin, and has further indicated that courts should assess whether the *actions* RFRA claimants are required to take are truly "substantial" in nature.

In *Priests for Life*, the D.C. Circuit concluded that the "accommodation" did not substantially burden plaintiffs' religious exercise because it does not require plaintiffs to take any substantial action, and because complying with the accommodation would not truly make them complicit in wrongdoing. Far from focusing on "the *intensity of the coercion*" as required by the Tenth, Seventh, and Eleventh Circuits, *Hobby Lobby*, 723 F.3d at 1137, the court stated that the "requirement that [plaintiffs file] a sheet of paper" "is not a burden that any precedent allows us to characterize as substantial." *Priests for Life v. U.S. Dep't Health & Human Servs.* 772 F.3d. 229, 256 (D.C. Cir. 2014). The court also refused to accept the plaintiffs' religious belief that complying with the accommodation would make them complicit in sin, and instead concluded that such action would "[n]ot . . . [f]acilitate [c]ontraceptive coverage" because it would render them completely "dissociated from the provision of contraceptive services." *Id.* at 253. That pronouncement squarely contradicts the approach of the Tenth, Seventh, and Eleventh

Circuits, which have properly held that whether an action impermissibly "facilitates" wrongdoing (and thus makes the actor complicit in sin) is a *religious* judgment that courts may not second-guess. *See Hobby Lobby*, 723 F.3d at 1142; *Korte*, 723 F.3d at 1137; *EWTN*, 756 F.3d at 1348.

3. The fact that the Seventh Circuit's decision in *Korte* and the Tenth Circuit's decision in *Hobby Lobby* involved regulations applicable to for-profit entities does not diminish the conflict among the circuits. That conflict arises from the fact that different appellate courts have applied different legal tests to determine whether a regulation imposes a substantial burden on religious exercise. As detailed above, the substantial-burden test applied by the Seventh, Tenth, and Eleventh Circuits evaluates only "the *intensity of the coercion* applied by the government to act contrary to [sincere religious] beliefs." 723 F.3d at 1137. In stark contrast, the test applied below, as well as in the D.C. Circuit, attempts to independently assess the nature of the required action, and to ascertain whether compliance *truly* makes the religious objector "complicit" in sin. Pet.App.36a. The split in authority is thus squarely presented and in need of resolution.

B. The Circuits Are Divided on Whether the Regulations Satisfy Strict Scrutiny

The circuits are also divided regarding whether the regulations at issue can satisfy strict scrutiny. Although the Third Circuit did not reach this issue, the matter was fully briefed in the district court, where the Government conceded that it had presented the entirety of its evidence. Pet.App.132a.

Accordingly, this case would be an appropriate vehicle to resolve the existing split.

In *Korte*, the Seventh Circuit held that the Government could use several less-restrictive means to provide free abortifacient and contraceptive coverage without using the health plans of religious objectors as a conduit. "The government can provide a 'public option' for contraception insurance; it can give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers; it can give tax incentives to consumers of contraception and sterilization services. No doubt there are other options." *Korte,* 735 F.3d at 686; *see also Notre Dame*, 2015 U.S. App. LEXIS 8234, at *65-66 (Flaum, J., dissenting) (noting in a nonprofit case that *Korte*'s strict-scrutiny analysis "remains the law of [the Seventh] circuit," such that the Government "conceded . . . that *Korte* dictates the issuance of a preliminary injunction if the court finds a substantial burden"). In contrast, the D.C. Circuit ruled out these alternatives in *Priests for Life*, claiming that they would "make the coverage no longer seamless from the beneficiaries' perspective, instead requiring them to take additional steps to obtain contraceptive coverage elsewhere." 772 F.3d at 245, 264-67.

Likewise, the Tenth Circuit's en banc decision in *Hobby Lobby* held that the Government's goal of providing free contraceptive coverage cannot qualify as a "compelling" interest "because the contraceptive-coverage requirement presently does not apply to tens of millions of people" under its various exemptions. 723 F.3d at 1143. The Tenth Circuit reasoned that the regulations "'cannot be regarded as

protecting an interest of the highest order when [they] leave[] appreciable damage to that supposedly vital interest unprohibited.'" *Id.* (quoting *O Centro*, 546 U.S. at 547). In contrast, the D.C. Circuit held that "[t]he government's interest in a comprehensive, broadly available system is not undercut by the other exemptions in the ACA, such as the exemptions for religious employers, small employers, and grandfathered plans." 772 F.3d at 245, 266.

Again, although *Korte* and *Hobby Lobby* involved for-profit regulations, they nonetheless conflict squarely with the D.C. Circuit's strict-scrutiny analysis. The Seventh Circuit in *Korte* identified several "less restrictive" ways of providing abortifacient and contraceptive coverage that would also be less restrictive here, because they would require *no action* from nonprofit religious objectors. And the Tenth Circuit's analysis in *Hobby Lobby* equally shows why the Government lacks a "compelling" interest here, in light of the numerous other exemptions the Government has already granted from the "accommodation." The law of the Seventh and Tenth Circuits is thus flatly contrary to the decision of the D.C. Circuit in both reasoning and result.

III. THIS CASE IS EXCEPTIONALLY IMPORTANT

Certiorari is warranted for the independent reason that the court below has "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). The question of federal law presented here affects the rights of untold thousands of nonprofit religious groups who are subject to the Government's

regulatory scheme. Application of the regulations and massive fines not only affects Petitioners' rights, but also would negatively impact Petitioners' ability to provide food, shelter, education, and other basic services to the needy in the communities Petitioners serve. Aside from the instant case, there are at least 40 other cases pending in the lower courts challenging the accommodation, and courts have granted injunctions in 29 of those cases.[7]

---

[7] *See, e.g.*, *Wheaton Coll.*, 134 S. Ct. 2806; *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014); *Ass'n of Christian Schs. Int'l v. Burwell*, No. 14-1492 (10th Cir. Dec. 19, 2014) (Doc. 14); *Catholic Charities Archdiocese of Phila. v. HHS*, No. 14-3126 (3d Cir. Sept. 2, 2014); *EWTN*, 756 F.3d 1339; *Diocese of Cheyenne v. Burwell*, No. 14-8040 (10th Cir. June 30, 2014) (Doc. 27); *Insight for Living Ministries v. Burwell*, No. 14-cv-00675, 2014 U.S. Dist. LEXIS 165228 (E.D. Tex. Nov. 25, 2014); *Ave Maria Univ. v. Burwell*, No. 2:13-cv-630, 2014 WL 5471048 (M.D. Fla. Oct. 28, 2014); *Ave Maria Sch. of Law v. Burwell*, No. 2:13-cv-795, 2014 WL 5471054 (M.D. Fla. Oct 28, 2014); *La. College v. Sebelius*, No. 12-0463, 2014 U.S. Dist. LEXIS 113083 (W.D. La. Aug. 13, 2014); *Archdiocese of St. Louis v. Burwell*, 28 F. Supp. 3d 944 (E.D. Mo. 2014); *Brandt v. Burwell*, No. 14-CV-0681, 2014 WL 2808910 (W.D. Pa. June 20, 2014); *Colo. Christian Univ. v. Sebelius*, 51 F. Supp. 3d 1052 (D. Colo. 2014); *Catholic Benefits Ass'n v. Sebelius*, 24 F. Supp. 3d 1094 (W.D. Okla. 2014); *Dordt Coll. v. Sebelius*, 22 F. Supp. 3d 934 (N.D. Iowa2014); *FOCUS v. Sebelius*, No. 1:13-cv-03263 (D. Colo. Apr. 23, 2014) (Docs. 39, 40); *Dobson v. Sebelius*, 38 F. Supp. 3d 1245 (D. Colo. 2014); *Roman Catholic Archdiocese of Atl. v. Sebelius*, No. 1:12-CV-03489, 2014 WL 1256373 (N.D. Ga. Mar. 26, 2014); *Ave Maria Found. v. Sebelius*, 991 F. Supp. 2d 957 (E.D. Mich. 2014); *Catholic Diocese of Beaumont v. Sebelius*, 10 F. Supp.

Indeed, there can be little doubt that the core question of religious liberty at issue in this case is "exceptionally important." *Priests for Life*, 2015 U.S. App. LEXIS 8326, at *20 (Brown, J., dissenting). This Court has already recognized the importance of this issue by granting extraordinary relief to every entity that has requested it under the All Writs Act. *See Wheaton*, 134 S. Ct. 2806; *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014). Moreover, it has twice granted, vacated, and remanded pre-*Hobby Lobby* appellate decisions upholding the accommodation, indicating a "reasonable probability that th[ose] decision[s] . . . rest[] upon a premise" that should be "reject[ed]" in light of subsequent authority. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam); *Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015); *Mich. Catholic Conf. v. Burwell*, 135 S. Ct. 1914 (2015). Notably, those two now-vacated decisions undergirded much of the

---

(continued...)

3d 725 (E.D. Tex. 2014); *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-314 (N.D. Tex. Dec. 31, 2013) (Doc. 99); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12 cv-92, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013); *Diocese of Fort Wayne-S. Bend v. Sebelius*, 988 F. Supp. 2d 958 (N.D. Ind. 2013); *Grace Schs. v. Sebelius*, 988 F. Supp. 2d 935 (N.D. Ind. 2013); *E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743 (S.D. Tex. 2013); *S. Nazarene Univ. v. Sebelius*, No. Civ-13-1015-F, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); *Reaching Souls Int'l, Inc. v. Sebelius*, No. 13-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Legatus v. Sebelius*, 988 F. Supp. 2d 794 (E.D. Mich. 2013); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, 987 F. Supp. 2d 232 (E.D.N.Y. 2013).

panel's reasoning in the case at hand. Pet.App.29a-30a, 34a-37a, 42a-43a, 46a. (invoking repeatedly the reasoning of *MCC* and *Notre Dame*).

Finally, certiorari is warranted because "the court of appeals based its decision upon a point expressly reserved or left undecided in prior Supreme Court opinions." Shapiro, et al., Supreme Court Practice § 4.5, at 254 (10th ed. 2013) (citing cases). *Hobby Lobby* expressly reserved the issue presented in this case, 134 S. Ct. at 2782 & n.40, and it is now ripe for resolution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

NOEL J. FRANCISCO
DAVID T. RAIMER
ANTHONY J. DICK
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
njfrancisco@jonesday.com

PAUL M. POHL
JOHN D. GOETZ
LEON F. DEJULIUS, JR.
IRA M. KAROLL
ALISON M. KILMARTIN
MARY PAT STAHLER
JONES DAY
500 Grant St., Suite 4500
Pittsburgh, PA 15219
(412)391-3939
pmpohl@jonesday.com

Counsel for Petitioners

May 29, 2015

BLANK PAGE