No. 14-1453

# In the Supreme Court of the United States

PRIESTS FOR LIFE, *et al.*,
*Petitioners*,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
*Respondents*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

The contraceptive services mandate of the Patient Protection and Affordable Care Act requires Petitioner Priests for Life, a non-exempt religious employer, and its directors to affirmatively authorize and facilitate coverage for contraception, sterilization, abortifacients, and related education and counseling for the participants and beneficiaries of Priests for Life's healthcare plan in direct violation of Petitioners' sincerely held religious beliefs.

The question presented is whether the contraceptive services mandate of the Affordable Care Act as applied to non-exempt, nonprofit religious organizations violates the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb, *et seq.*

## PARTIES TO THE PROCEEDING

The Petitioners are Priests for Life, Father Frank Pavone, Alveda King, and Janet Morana.

The Respondents are United States Department of Health and Human Services; Sylvia Burwell, in her official capacity as Secretary, U.S. Department of Health & Human Services; United States Department of the Treasury; Jacob J. Lew, in his official capacity as Secretary, U.S. Department of the Treasury; United States Department of Labor; and Thomas E. Perez, in his official capacity as Secretary, U.S. Department of Labor (collectively referred to as "Respondents").

## RULE 29.6 STATEMENT

Petitioner Priests for Life is a non-stock, nonprofit corporation. Consequently, it has no parent or publicly held company owning 10% or more of the corporation's stock.

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## OPINIONS BELOW

The opinion of the court of appeals appears at App. 1 and is reported at 772 F.3d 229. The opinion of the district court appears at App. 96 and is reported at 7 F. Supp. 3d. 88. The denial of the petition for rehearing en banc appears at App. 137 and is reported at 2015 U.S. App. LEXIS 8326.

## JURISDICTION

The judgment of the court of appeals was entered on November 11, 2014. App. 94-95. A petition for rehearing was denied on May 20, 2015. App. 137-38. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

RFRA provides that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ." 42 U.S.C. § 2000bb-1(a). The government may justify a substantial burden on the free exercise of religion if the challenged law: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* at § 2000bb-1(b).

## STATEMENT OF THE CASE

The district court rendered judgment in favor of Respondents on December 19, 2013, holding, in relevant part, that Petitioners "have not stated a *prima facie* case under RFRA because they have not alleged a substantial burden on their religious exercise." App. 122.

Petitioners filed an immediate appeal of that decision and an emergency motion for an injunction pending appeal. The motion was granted by the D.C. Circuit on December 31, 2013, enjoining Respondents "from enforcing against [Petitioners] the contraceptive services requirements imposed by 42 U.S.C. § 300gg-13(a)(4) and related regulations pending further order of the court."[1] App. 193.

On November 14, 2014, the D.C. Circuit ruled in favor of Respondents, dismissing the case. App. 1-95. The panel held, in relevant part, that Petitioners "failed to demonstrate a substantial burden on their religious exercise that would subject the contraceptive coverage requirement to strict judicial scrutiny." App. 48-49. The panel further held that regardless of the burden the "accommodation" imposes upon Petitioners' religious exercise, it nevertheless survives strict scrutiny. App. 72 ("Because the government has used the least restrictive means possible to further its compelling interest, RFRA does not excuse Plaintiffs from their duty under the ACA either to provide the

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[1] In the order granting the injunction, the court of appeals also consolidated the case with *Roman Catholic Archbishop of Washington v. Sebelius*, 19 F. Supp 3d 48 (D.D.C. 2013), *appeal docketed*, No. 13-5371 (D.C. Cir. 2013). App. 193.

required contraceptive coverage or avail themselves of the offered accommodation to opt out of that requirement.").

Petitioners filed a timely petition for rehearing en banc, which was denied over the dissent of three circuit judges on May 20, 2015. App. 137-91. This petition follows.

As set forth below, the panel's decision creates a circuit split regarding the application of RFRA. *See* Sup. Ct. R. 10(a). That is, the federal appellate courts are divided over whether the challenged regulations impose a "substantial burden" on a non-exempt, nonprofit religious organization's religious exercise, and if so, whether the government has used the least restrictive means possible to further a compelling interest such that the regulations satisfy strict scrutiny. Indeed, the panel has "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Accordingly, the Court should grant this petition.

## INTRODUCTION

This case challenges the contraceptive services mandate of the Affordable Care Act and its so-called "accommodation" as applied to non-exempt, religious employers. Petitioners, a Catholic, pro-life advocacy organization and several of its directors, including Father Frank Pavone, are uniquely situated to advance this important challenge on behalf of non-exempt religious employers who object to the contraceptive services mandate on religious grounds. Priests for Life was founded in 1991 to pursue in a singularly-focused way one of the most important religious purposes of the

Catholic Church today: to spread the Gospel of Life to people throughout the world.

The Gospel of Life is an expression of the Catholic Church's position and central teaching regarding the value and inviolability of human life. Contraception, sterilization, and abortifacients are contrary to this teaching, and their use can never be approved, endorsed, facilitated, promoted, or supported in any way. Thus, this challenge goes to the very core of Priests for Life's corporate *raison d'être*.

As set forth in the regulations, the government's stated objective for mandating coverage for contraceptive services is as follows: "By expanding coverage and eliminating cost sharing for recommended preventive services,[2] [the regulations are] expected to increase access to and utilization of these services, which are not at optimal levels today." 75 Fed. Reg. 41,726, 41,733 (July 19, 2010).

Pursuant to the regulations, the singular exemption from the proscriptions of the contraceptive services mandate for organizations that object to it on religious grounds applies only to those organizations that fall

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[2] The "preventive services" required by the challenged mandate include "all Food and Drug Administration approved contraceptive methods [and] sterilization procedures." App. 100. FDA-approved contraceptive methods include devices and procedures, birth control pills, prescription contraceptive devices, Plan B (also known as the "morning after pill"), and ulipristal (also known as "ella" or the "week after pill"). Plan B and ella, as well as certain intrauterine devices ("IUD"), can prevent the implantation of a human embryo in the wall of the uterus, thereby causing the embryo's death and thus operating as abortifacients. *See* App. 99-100, 165.

under Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). These organizations are essentially churches and religious orders—a very narrow class of nonprofit organizations.

And while Priests for Life is a nonprofit religious organization which exists for the very purpose of opposing what the government seeks to do through the challenged mandate, it does not qualify for the only statutory exemption from the mandate. App. 103-04.

The government rejected considering a "broader exemption" from the challenged mandate because it believes that such an exemption "would lead to more employees having to pay out of pocket for contraceptive services, thus making it less likely that they would use contraceptives, which would undermine the benefits [of requiring the coverage]." 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012). According to the government:

> Employers that do not primarily employ employees who share the religious tenets of the organization are more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to use contraceptives. Including these employers within the scope of the exemption would subject their employees to the religious views of the employer, limiting access to contraceptives, thereby inhibiting the use of contraceptive services and the benefits of preventive care.

77 Fed. Reg. at 8728.

Thus, as the government acknowledges, the ultimate goal of the challenged mandate is to increase the "use of contraceptive services" by compelling access to these services and to ensure that employees, including employees of religious organizations such as Priests for Life, are not "subject" to the employer's religious beliefs regarding such services.

Accordingly, instead of providing an exemption for organizations such as Priests for Life — an exemption that would have addressed Priests for Life's religious objections to the mandate — the government created an "accommodation" scheme for "eligible organizations" — a scheme that has the purpose and effect of advancing the government's objective of "increasing access to and utilization of" contraceptive services by requiring, *inter alia*, coverage of such services for the participants and beneficiaries of the religious organization's healthcare plan so long as they are enrolled in the plan. 78 Fed. Reg. at 39,896.

To qualify for the "accommodation," Priests for Life must affirm that it meets certain eligibility criteria via a "self-certification" form sent to its group health plan issuer or a letter to the Secretary of HHS (the "alternative notice"). App. 34. "An alternative notice to HHS must identify the forms of contraceptive services to which the employer objects, and specify, among other things, the name of the plan, the plan type, and the contact information for the plan issuer or TPA." App. 34.

An insurer that is so notified or receives a copy of the certification must, *inter alia*, provide separate payments for the required contraceptive services for the "eligible organization's" plan participants and

beneficiaries. 78 Fed. Reg. at 39,896. Priests for Life's insurer's obligation—an obligation triggered by Priests for Life's execution and delivery of the certification or notice—to make direct payments for contraceptive services would continue only "for so long as the participant or beneficiary remains enrolled in [Priests for Life's] plan." 78 Fed. Reg. at 39,876.

Additionally, for each plan year to which the "accommodation" applies, Priests for Life's insurer must provide to Priests for Life's plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify, *inter alia*, that the insurer provides coverage for contraceptive services, and it must provide contact information for questions and complaints. 78 Fed. Reg. at 39,897.

Thus, pursuant to this "accommodation," Petitioners will play a direct, central, and indispensable role in facilitating the government's objective of promoting the use of contraceptive services required by the mandate, contrary to Petitioners' religious beliefs. App. 38-39, 110-11.

Consequently, the government mandate directly forces Petitioners to provide the means and mechanism by which contraception, sterilization, and abortifacients (and related education and counseling) are provided to Priests for Life's healthcare plan participants and beneficiaries, which is unacceptable because it compels

Petitioners to violate their sincerely held religious beliefs. App. 110-11.

Petitioners' refusal to cooperate with the government's "accommodation" scheme subjects Priests for Life to crippling fines. *See* 26 U.S.C. § 4980D(b)(1). The only other "option" presented by way of this Hobson's choice is for Priests for Life to drop its healthcare coverage altogether, which would also be a violation of Petitioners' religious beliefs and would cause further harm to the individual Petitioners and Priests for Life as an organization. *See* App. 153 (dissent).

In her dissent from the denial for rehearing, Circuit Judge Brown made several initial and important observations. "First, this case is not about denying any woman access to contraception." App. 148 (dissent). The question of whether a woman has a legal right to obtain and use contraception was decided long ago, and nothing about this case calls that issue into question. App. 148 (dissent) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

"Second, this case is about the religious freedom of [Petitioners] and not about the free exercise concerns of the plaintiffs in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)." App. 148 (dissent). While this Court indicated that an approach similar to the "accommodation" at issue here was a plausible and thus less restrictive means available for the for-profit corporations, the Court expressly did not decide whether this approach "complies with RFRA for purposes of all religious claims," *id.* at 2782, such as the claim at issue here, App. 148 (dissent). In other words, whether the "accommodation" would satisfy the

religious objections of the plaintiffs in *Hobby Lobby* is irrelevant to this Court's consideration of the religious objections advanced by Petitioners in this case. *See* App. 148 (dissent).

Third, there is nothing "paradoxical" about Petitioners' challenge to "regulatory requirements the government intended as a religious accommodation." App. 148-49 (dissent). The fact that the government labels its regulatory scheme a religious "accommodation" does not make it so. Neither the government's motives nor its labels control the analysis. Rather, the Court asks only whether the government's action operates to place "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981); *see* App. 149 (dissent).

Finally, "this case is not one in which [Petitioners'] 'only harm . . . is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out.'" App. 149 (dissent) (quoting opinion at App. 26). Rather, the government is forcing Petitioners to engage in at least two acts that violate their religious obligations: (1) hiring or maintaining a contractual relationship with a company required, authorized, or incentivized to provide contraceptive coverage to the employees and beneficiaries enrolled in Priests for Life's health plan and (2) filing a self-certification or notification that authorizes such objectionable coverage. This point goes to the heart of the panel's flawed substantial burden analysis—an analysis that

is inconsistent with this Court's precedent and the decisions of other courts of appeals. *See infra* Sec. I.A.

In sum, Petitioners' sincerely held religious beliefs, which prohibit them from cooperating with the government's "accommodation" scheme, are neither trivial nor immaterial, but rather central to the teaching and core moral admonition of the Catholic faith, which requires Petitioners to avoid mortal sin and scandal. As a result, Petitioners object to being forced by the federal government to purchase a healthcare plan that provides access to contraceptives, sterilization, and abortifacients, all of which are prohibited by Petitioners' religious convictions. This is true whether the immoral services are paid for directly, indirectly, or even not at all by Priests for Life. Contraception, sterilization, and abortifacients are immoral regardless of their cost. Consequently, the burden imposed upon Petitioners' religious exercise by the challenged mandate is precisely the same whether the government is forcing Petitioners to authorize and facilitate "access to and utilization of" contraceptive services for Priests for Life's plan participants and beneficiaries via submitting a "certification" or notice or via payment to Priests for Life's insurance carrier.

## REASONS FOR GRANTING THE PETITION

### I. The Circuit Courts Are Split on the Application of RFRA in Cases Challenging the *Regulations at Issue Here.*

#### A. The Circuit Courts Are Split on the "Substantial Burden" Question.

A split among the federal courts of appeals is among the most important factors in determining whether certiorari should be granted. *See* Sup. Ct. R. 10(a). This Court has already recognized that the issues presented by this RFRA challenge, including whether the government can force Petitioners to submit documentation they believe makes them morally complicit, have divided the courts of appeals. *See Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (July 3, 2014) (noting that "Circuit Courts have divided on whether to enjoin" the so-called accommodation for "religious nonprofit organizations" (citing Sup. Ct. R. 10(a))); *see also id.* at 2811 (Sotomayor, J., dissenting) (acknowledging disagreement among the circuits).[3] "Such division is a traditional ground for certiorari." *Id.* at 2807 (majority op.).

To begin, the circuit courts are split over the test to apply to determine whether a "substantial burden"

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[3] *Compare, e.g.*, *Diocese of Cheyenne v. Burwell*, No. 14-8040, 2014 U.S. App. LEXIS 12686 (10th Cir. June 30, 2014) (granting injunction pending appeal); *Eternal World Television Network, Inc.* ("*EWTN*") *v. Sec'y U.S. Dep't of Health & Human Servs*, 756 F.3d 1339 (11th Cir. 2014) (same), *with Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015) (denying injunction).

exists for purposes of RFRA. *Compare Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir. 2013) (en banc) (holding that the substantial burden inquiry turns solely on "the intensity of the coercion applied by the government to act contrary to [sincere religious] beliefs"), *aff'd*, 134 S. Ct. 2751; *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) (same); *EWTN v. Sec'y U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339 (11th Cir. 2014) (granting motion for injunction pending appeal), *with Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 435 (3d Cir. 2015) (declining to analyze coercion and instead assessing "whether the appellees' compliance with the [regulations] does, in fact, . . . make them complicit in the provision of contraceptive coverage"); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014) (same). This division among the appellate courts is likely to grow in light of the fact that some courts may agree with the three circuit judges who dissented from the denial of rehearing in this case based on the view that the panel's decision is mistaken and inconsistent with this Court's precedent. *See* App. 150 (dissent) (observing that "[t]he panel's substantial burden analysis is inconsistent with the precedent of the Supreme Court"). Indeed, this split exists principally because the courts which have employed the reasoning of the panel in this case have done so contrary to this Court's precedent.[4]

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[4] In *Thomas v. Review Board*, 450 U.S. 707 (1981), for example, this Court held that the State's denial of unemployment compensation benefits because the employee voluntarily terminated his employment with a factory that produced armaments, claiming that the production of items that could be

As forcefully stated by Circuit Judge Brown in her dissent from the denial for rehearing in this case:

> In declaring that—contrary to Catholic Plaintiffs' contentions—it would be consistent

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used for war was contrary to his religious beliefs, placed a substantial burden on the employee's right to the free exercise of religion. *See id.* at 717-18 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."). Thomas specifically stated that he did not object to the physical work required of him. *Id.* at 711 (observing that Thomas "testified that he could, in good conscience, engage indirectly in the production of materials that might be used ultimately to fabricate arms"). In fact, Thomas made it clear that it was not the physical act of the work that violated his religious beliefs, but the purposes and effects of what someone else would do with the result of his "work" at some later point in time (*i.e.*, use the tanks he worked on for war). *See id.* at 714 (quoting Thomas at his hearing).

So it is in this case: Petitioners do not object to declaring their objection to contraceptive coverage, such as signing the pleadings in this case and the declarations submitted in support of Petitioners' motion for summary judgment, or even writing an op-ed in a Catholic newspaper. That is, the physical act of signing some statement that is aligned in its purposes and effects with Petitioners' religious beliefs is perfectly consonant with Petitioners' religious faith. But Thomas did object to doing the exact same unobjectionable work when that work resulted in a thing (*i.e.*, a tank) that would be used subsequently by a third-party (*i.e.*, the military) to do that which was objectionable: to wage war. That is, not only is waging war objectionable to Thomas, but any act, the purpose and effect of which is to facilitate the waging of war by a third party at some later time, was proscribed by Thomas' religious beliefs, and thus a substantial burden was found. And the same is true in this case. Thus, *Thomas* provides an *a fortiori* argument for a RFRA violation here. *See id.* at 715 ("Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs.").

with the teaching of the Catholic Church for Plaintiffs to comply with the regulations the panel exceeded both the "judicial function and [the] judicial competence." *Thomas*, 450 U.S. at 716. What amounts to "facilitating immoral conduct," . . . "scandal," . . . and "material" or "impermissible cooperation with evil," *id.*; Slip Op. at 14, are inherently theological questions which objective legal analysis cannot resolve and which "federal courts have no business addressing." *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2778; *see also id.* (stating "the circumstances under which it is wrong for a person to perform an act that is innocent in itself but has the effect of enabling or facilitating the commission of an immoral act by another" is "a difficult and important question of religion and moral philosophy"). The causal connection sufficient to create impermissible "facilitation" in the eyes of a religious group may be very different from what constitutes proximate cause in the common law tradition. *See Univ. of Notre Dame* [*v. Sebelius*, 743 F.3d 547, 566 (7th Cir. 2014)] (Flaum, J., dissenting) ("[W]e are judges, not moral philosophers or theologians; this is not a question of legal causation but of religious faith."). Likewise, where civil authorities may conclude an individual has "wash[ed his] hands of any involvement," Slip Op. at 26, adherents of a faith may examine the same situation and, in their religious judgment, reach the opposite conclusion. Pontius Pilate, too, washed his hands, but perhaps he perceived the stain of complicity remained. *See Matthew* 27:24.

> Under the panel's analysis, it seems no claim of substantial burden may prevail where the religious significance of conduct under scripture as interpreted by a faith tradition differs from the legal significance of that conduct under the laws of the United States as interpreted by federal judges. But RFRA would be an exceedingly shallow—perhaps nonexistent—protection of religious exercise if adherents were only permitted to give the same meaning to their actions or inactions as does the secular law.

App. 155-56 (dissent).

As stated by the Seventh Circuit in *Korte*:

> [T]he judicial duty to decide substantial-burden questions under RFRA does not permit the court to resolve religious questions or decide whether the claimant's understanding of his faith is mistaken. . . . The question for us is not whether compliance with the contraception mandate can be reconciled with the teachings of the Catholic Church. That's a question of religious conscience for [Petitioners] to decide. They have concluded that their legal and religious obligations are incompatible: The contraception mandate forces them to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise, properly understood.

*Korte*, 735 F.3d at 685.

Thus, a proper application of *Hobby Lobby* and *Thomas* compels the conclusion that Petitioners have demonstrated a "substantial burden" to their religious

exercise under RFRA, contrary to the conclusion reached by the panel and other courts of appeals.

### B. The Circuit Courts Are Split on the Application of Strict Scrutiny.

In addition to resolving the substantial burden question under RFRA, certiorari is appropriate because the panel's decision on the issue of strict scrutiny creates a split with the Seventh and Tenth Circuits.

In *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013), the Seventh Circuit held that the government could employ several less-restrictive means of providing free contraceptive coverage without using the health plans of religious objectors as the means to accomplishing this objective: "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." *Id.*

The panel in this case rejected such workable alternatives, 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." App. 26; *but see* App. 160 (dissent) ("The government has pointed to no evidence in the record demonstrating its purported interest in providing contraceptive coverage without cost-sharing is harmed when women must undergo additional administrative steps to receive the coverage.").

The panel's decision also conflicts with the Tenth Circuit's decision in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1143 (10th Cir. 2013) (en banc), in which the court held that the government's goal of providing contraceptive coverage to employees 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. Relying upon this Court's precedent, the Tenth Circuit appropriately held 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 *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006)). By contrast, the panel 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." App. 70.

In sum, because the circuits are split on important questions of federal law that ultimately dictate the outcome of this RFRA challenge, the petition for certiorari should be granted.

## II. The Panel Decided an Important and Unsettled Question of Federal Law that Should Be Settled by This Court.

An additional reason for this Court to grant certiorari is because the panel "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

In *Hobby Lobby*, this Court expressly reserved the question presented in this case. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2782 & n.40 (discussing the accommodation and clarifying that the Court "do[es] not decide today whether an approach of this type complies with RFRA for purposes of all religious claims"). Similarly, the Court expressly did not decide this question on the merits when granting extraordinary relief to other nonprofit religious organizations. *Wheaton Coll.*, 134 S. Ct. at 2807 ("In light of the foregoing, this order should not be construed as an expression of the Court's views on the merits."); *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014) ("[T]his order should not be construed as an expression of the Court's views on the merits.").

Moreover, the religious freedom question at issue in this case is exceedingly important, as this Court recognized by granting extraordinary relief to every entity that has requested it under the demanding All Writs Act. *See Wheaton Coll.*, 134 S. Ct. 2806; *Little Sisters of the Poor*, 134 S. Ct. at 1022. Indeed, the large number of challenges to the "accommodation" across the country and the results in those cases thus far further confirm the importance of the question presented.[5]

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[5] *See* Becket Fund, HHS Mandate Information Central, available at http://www.becketfund.org/hhsinformationcentral/ (last visited June 2, 2015) (listing the numerous cases challenging the regulations at issue here and noting that injunctions have been granted in many of them).

Accordingly, the manner in which this Court and lower federal courts have treated the issues at stake here confirms that this case raises important questions of federal law that should ultimately be decided by this Court. And this is further highlighted by the fact that the panel's decision runs counter to this Court's decision in *Hobby Lobby* and its recent decision in *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

As noted, the panel concluded that the challenged regulations do not impose a "substantial burden" on Petitioners' exercise of religion. App. 7. In *Hobby Lobby*, however, this Court held that a "substantial burden" exists when the government "demands" that persons or entities either "engage in conduct that seriously violates their religious beliefs" or else suffer "substantial" "economic consequences." 134 S. Ct. at 2775-76, 2779. When resolving the "substantial burden" question, the Court accepted the plaintiffs' representation that if they "compl[ied] with the [regulations]," "they w[ould] be facilitating" immoral conduct in violation of their religious beliefs. *Id.* at 2759. And the Court found a substantial burden because the penalty for non-compliance was substantial. *Id.* ("If these consequences do not amount to a substantial burden, it is hard to see what would.").

The panel, however, applied a different (and incorrect) "substantial burden" analysis. The panel's ruling on the "substantial burden" issue hinged on its conclusion that complying with the regulations would not "facilitate contraceptive coverage." App. 42-45. But whether the conduct required of Petitioners under the regulations constitutes impermissible facilitation is a religious question that is beyond the judicial function

and its competency to resolve. *See* App. 155 (dissent); *see also Thomas*, 450 U.S. at 716 ("[I]n this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").

As this Court explained, this issue "implicates a difficult and important question of religion and moral philosophy, 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." *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2778. In sum, resolution of this fundamental question should be left to religious adherents, not the courts. *See id.*

By asking whether the actions Petitioners are required to take under the challenged regulations "facilitate" contraceptive coverage (a religious question) rather than asking whether the government has placed substantial pressure on Petitioners to take those actions (a legal question), the panel misapplied the substantial burden standard and effectively turned RFRA into "an exceedingly shallow—perhaps nonexistent—protection of religious exercise." *See* App. 156 (dissent).

Here, Petitioners sincerely believe the actions they are required to take to comply with the regulations would impermissibly facilitate immoral conduct and thus make them morally complicit. Specifically, Petitioners sincerely believe that it would be immoral for them to submit the required documentation or to maintain a contractual relationship with any third

party that will provide contraceptive coverage to Priests for Life's health plan participants and beneficiaries. Yet, if Petitioners fail to take those required actions, they will be subject to substantial penalties and other ruinous economic and organizational consequences. Thus, under this Court's reasoning in *Hobby Lobby*, the regulations at issue here impose a "substantial burden" on Petitioners' religious exercise.

The panel's decision also rested in part on its conclusion that the "accommodation" is the least restrictive means of advancing a compelling governmental interest. That is, that the challenged regulations survive strict scrutiny. *See* App. 49-72.

Below, the government asserted only "two compelling governmental interests" "in public health and gender equality." Defs.' Summ. J. Br. (Doc. No. 13). Those "very broadly framed" interests, however, were rejected by this Court in *Hobby Lobby*, which noted that RFRA "contemplates a 'more focused' inquiry." 134 S. Ct. at 2779. The Court similarly rejected the government's supposed interest, set forth *sua sponte* by the panel, in a "sustainable system of taxes and subsidies under the ACA to advance public health." App. 52-53 (citing *United States v. Lee*, 455 U.S. 252 (1982)); *see Hobby Lobby Stores, Inc.,* 134 S. Ct. at 2783-84.

In addition, even if the government did have a compelling interest in providing such coverage, the government could provide it in many alternative ways without forcing religious objectors and their health plans to serve as the delivery vehicles. In *Hobby Lobby*, this Court emphasized that the least-restrictive

means test is "exceptionally demanding." 134 S. Ct. at 2780. And it is well established that "if there are other, reasonable ways to achieve [the government's interests] with a lesser burden on constitutionally protected activity, [it] may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

Here, the panel held that the government has a compelling interest in ensuring the "seamless[]" provision of contraceptive coverage as part of employee health coverage because "[i]mposing even minor added steps would dissuade women from obtaining contraceptives." App. 68. But avoiding the inconvenience of "minor added steps" to obtain free contraceptive coverage is not a sufficiently compelling interest by any measure to justify a substantial burden on religious liberty. This Court has noted that RFRA requires the government to satisfy "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Indeed, in light of the Court's admonition that the government "does not have a compelling interest in each marginal percentage point by which its goals are advanced," *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2741 n.9 (2011), there is little doubt that the interest in "seamless" access is something much less than compelling.

As noted by the Seventh Circuit, "[t]here are many ways to [provide free contraceptive coverage], almost all of them less burdensome on religious liberty" than forcing religious objectors to participate in the delivery of that coverage. *Korte*, 735 F.3d at 686 (giving examples of alternative ways of delivering such

coverage independently of religious employers' health plans). The Seventh Circuit's argument is particularly strong given this Court's observation in *Hobby Lobby* that "[t]he most straightforward way of [providing contraceptive coverage] would be for the Government to assume the cost" of independently providing "contraceptives . . . to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." 134 S. Ct. at 2780.

Petitioners have also offered numerous other alternatives that would require only minor tweaks to existing programs, such as Title X, the Medicaid program, or the Affordable Care Act's insurance exchanges. *See, e.g.*, Joint Supplemental Br. of Appellants/Cross-Appellees at 20. The government, however, has not introduced any evidence showing why these "alternative[s]" are not "viable." *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2780; *see also id.* at 2781 ("If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal.").

Finally, this Court's recent decision in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), further supports granting the petition. In *Holt*, the Court held that the government could not force a prisoner to shave his beard in violation of his religious beliefs, relying upon the *Hobby Lobby* substantial burden analysis. Consequently, it makes no difference whether the religious exercise at issue is refraining from shaving

one's beard (*Holt*), refraining from paying directly for contraceptive coverage (*Hobby Lobby*), or refraining from maintaining an objectionable contractual relationship and submitting an objectionable form that effectively authorizes and necessarily facilitates such coverage, as in this case. The relevant and dispositive inquiries are whether the religious exercise is "sincere," and whether the believer "will face serious disciplinary action" unless he forgoes the exercise. *Holt*, 135 S. Ct. at 862. When the government "puts [the plaintiff] to this choice, it substantially burdens his religious exercise," *id.*, as in this case.

*Holt* also demonstrates why the government fails the "exceptionally demanding" least-restrictive-means test. The government must "not merely explain" its exemption denial (here, the denial of an exemption awarded to thousands of other religious objectors), but must "*prove* that denying the exemption is the least restrictive means of furthering a compelling governmental interest." *Id.* at 864 (emphasis added). The Court also found that where a policy, such as the regulations at issue here, is riddled with many exemptions, the government "cannot show" that it passes the least-restrictive-means test. *Id.* at 863-64 (exemptions made the government's position "hard to take seriously").

In the final analysis, the challenged regulations as applied to Petitioners violate RFRA in that they substantially burden Petitioners' religious exercise, and they cannot survive strict scrutiny.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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