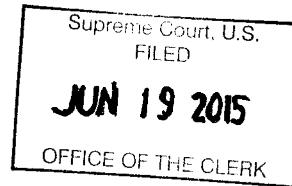
14-1505



No. 14-___

IN THE

Supreme Court of the United States

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, A CORPORATION SOLE, ET AL.,

Petitioners,

v.

SYLVIA BURWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR CERTIORARI

NOEL J. FRANCISCO
Counsel of Record
ERIC S. DREIBAND
DAVID T. RAIMER
ANTHONY J. DICK
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
njfrancisco@jonesday.com
Counsel for Petitioners

BLANK PAGE

QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs below, are the Roman Catholic Archbishop of Washington ("the Archdiocese"); the Consortium of Catholic Academies of the Archdiocese of Washington, Inc.; Archbishop Carroll High School, Inc.; Don Bosco Cristo Rey High School of the Archdiocese of Washington, Inc.; Mary of Nazareth Roman Catholic Elementary School, Inc.; Catholic Charities of the Archdiocese of Washington, Inc.; Victory Housing, Inc.; the Catholic Information Center, Inc.; the Catholic University of America; and Thomas Aquinas College. 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 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

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 2

JURISDICTION 2

LEGAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. The Mandate 3

1. Full Exemptions from the Mandate 4

2. The Nonprofit Mandate 5

B. Petitioners 7

C. The Proceedings Below 9

REASONS FOR GRANTING THE PETITION 12

I. THE DECISION BELOW CONFLICTS WITH *HOBBY LOBBY* AND THIS COURT'S OTHER PRECEDENT 14

A. The Regulations Substantially Burden Petitioners' Religious Exercise 15

B. The Regulations Cannot Survive Strict Scrutiny 22

TABLE OF CONTENTS
(continued)

Page

1. Adding Petitioners to the Long List of Exempt Entities Would Not Undercut Any Compelling Interest 23
2. Conscripting the Health Plans of Objecting Religious Nonprofits Is Not the Least Restrictive Means of Providing Free Contraceptive Coverage 26

II. THE CIRCUITS ARE DIVIDED OVER THE ISSUES PRESENTED 29

A. The Circuits Are Divided on the Nature of RFRA's "Substantial Burden" Test 29

B. The Circuits Are Divided on Whether the Regulations Satisfy Strict Scrutiny 33

III. THIS CASE IS EXCEPTIONALLY IMPORTANT 35

IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THIS ISSUE 36

CONCLUSION 38

TABLE OF CONTENTS
(continued)

Page

APPENDIX A: Opinion, *Priests for Life, et al. v. United States Department of Health & Human Services, et al.*, Nos. 13-5368, 13-5371, 14-5021 (D.C. Cir. Nov. 14, 2014) 1a

APPENDIX B: District Court Order And Memorandum Opinion, *Roman Catholic Archbishop of Washington, et al. v. Kathleen Sebelius, et al.*, No. 13-1441 (ABJ) (D.D.C. Dec. 20, 2013) 94a

APPENDIX C: Order Granting Injunction Pending Appeal, *Priests for Life, et al. v. United States Department of Health & Human Services, et al.*, Nos. 13-5368, 13-5371 (D.C. Cir. Dec. 31, 2013) 212a

APPENDIX D: Order Setting Argument Panel, *Priests for Life, et al. v. United States Department of Health & Human Services, et al.*, Nos. 13-5368, 13-5371, 14-5021 (D.C. Cir. Mar. 14, 2014) 218a

APPENDIX E: Order Resetting Argument Panel, *Priests for Life, et al. v. United States Department of Health & Human Services, et al.*, Nos. 13-5368, 13-5371, 14-5021 (D.C. Cir. Mar. 25, 2014) 220a

TABLE OF CONTENTS
(continued)

Page

APPENDIX F: Order Denying Rehearing, *Priests for Life, et al. v. United States Department of Health & Human Services, et al.*, Nos. 13-5368, 13-5371, 14-5021 (D.C. Cir. May 20, 2015) 222a

APPENDIX G: Order Granting Motion to Stay, *Priests for Life, et al. v. United States Department of Health & Human Services, et al.*, Nos. 13-5368, 13-5371, 14-5021 (D.C. Cir. June 10, 2015) 279a

APPENDIX H: Statutory Appendix 281a

42 U.S.C. § 2000bb-1 .... 281a

42 U.S.C. § 2000bb-2 .... 281a

42 U.S.C. § 2000cc-5 .... 282a

42 U.S.C. § 300gg-13(a)(4) 284a

26 U.S.C. § 4980D 284a

26 U.S.C. § 4980H 290a

26 C.F.R. § 54.9815-2713 .... 295a

26 C.F.R. § 54.9815-2713A 296a

26 C.F.R. § 54.9815-2713AT 302a

29 C.F.R. § 2510.3-16 .... 307a

29 C.F.R. § 2590.715-2713 .... 309a

29 C.F.R. § 2590.715-2713A 315a

45 C.F.R. § 147.130 .... 323a

45 C.F.R. § 147.131 .... 329a

TABLE OF AUTHORITIES

Page(s)

CASES

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014) .... *passim*

Bowen v. Roy,
476 U.S. 693 (1986) 18

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 24

City of Boerne v. Flores,
521 U.S. 507 (1997) 28

Employment Div. v. Smith,
494 U.S. 872 (1990) 16

Eternal Word Television Network, Inc. v. HHS,
756 F.3d 1339 (11th Cir. 2014) 12, 31, 32

Fisher v. Univ. of Tex. at Austin,
133 S. Ct. 2411 (2013) 27

Geneva College v. HHS,
778 F.3d 422 (3d Cir. 2015) 32, 33

Gonzales v. O Centro Espírita Beneficente União do Vegetal,
546 U.S. 418 (2006) 24, 26, 34

Hobby Lobby Stores, Inc. v. Sebelius,
723 F.3d 1114 (2013) (en banc) .... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

Holt v. Hobbs,
135 S. Ct. 853 (2015)............................. 15, 16, 22, 27

Korte v. Sebelius,
735 F.3d 654 (2013)... *passim*

Lawrence v. Chater,
516 U.S. 163 (1996)... 36

Little Sisters of the Poor,
134 S. Ct. 1022 (2014)... 35

Lyng v. Nw. Indian Cemetery Protective Ass'n,
485 U.S. 439 (1988)... 18

Mich. Catholic Conf. v. Burwell,
135 S. Ct. 1914 (2015)... 36

Midrash Sephardi, Inc. v. Town of Surfside,
366 F.3d 1214 (11th Cir. 2004)............................... 31

Thomas & Betts Corp. v. Panduit Corp.,
138 F.3d 277 (7th Cir. 1998)................................... 31

Thomas v. Review Bd. of the Ind. Emp't Sec. Div.,
450 U.S. 707 (1981)... 15, 17

United States v. Lee,
455 U.S. 252 (1982)... 26

Univ. of Notre Dame v. Burwell,
135 S. Ct. 1528 (2015)... 36

TABLE OF AUTHORITIES
(continued)

Page(s)

Univ. of Notre Dame v. Burwell,
No. 13-3853, 2015 U.S. App. LEXIS 8234
(7th Cir. May 19, 2015) .... *passim*

Wheaton Coll. v. Burwell,
134 S. Ct. 2806 (2014) 21, 29, 35

Winter v. NRDC,
555 U.S. 7 (2008) 9

Zubik v. Burwell,
135 S. Ct. 1544 (2015) (Alito, J., in
chambers) 35

STATUTES

26 U.S.C. § 4980D 2, 3

26 U.S.C. § 4980H 3

26 U.S.C. § 6033 4

28 U.S.C. § 1254 2

29 U.S.C. § 1002 7

42 U.S.C. § 300gg-13 3

42 U.S.C. § 2000bb-1 14

42 U.S.C. § 18011 4

OTHER AUTHORITIES

26 C.F.R. § 54.9815-1251T 4

TABLE OF AUTHORITIES
(continued)

Page(s)

26 C.F.R. § 54.9815-2713 .... 3, 37

26 C.F.R. § 54.9815-2713A.............................. 5, 6, 21, 37

26 C.F.R. § 54.9815-2713AT .... *passim*

29 C.F.R. § 2510.3-16 6

29 C.F.R. § 2590.715-2713 3

29 C.F.R. § 2590.715-2713A... 6

45 C.F.R. § 147.130 3

45 C.F.R. § 147.131 .... 4, 21

75 Fed. Reg. 34538 (June 17, 2010)............................. 25

75 Fed. Reg. 41726 (July 19, 2010)................................ 3

78 Fed. Reg. 39870 (July 2, 2013)......................... *passim*

79 Fed. Reg. 13744 (Mar. 11, 2014)................................ 7

79 Fed. Reg. 51092 (August 27, 2014)............................ 7

Becket Fund, HHS Mandate Information
Central,
http://www.becketfund.org/hhsinformationc
entral/ (last visited June 18, 2015).......................... 35

TABLE OF AUTHORITIES
(continued)

Page(s)

HHS, ASPE Data Point, The Affordable Care Act Is Improving Access to Preventive Services for Millions of Americans (May 14, 2015), http://aspe.hhs.gov/health/reports/2015/Prevention/ib_Prevention.pdf 4

HRSA, Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines (last visited June 18, 2015) 3

Shapiro, et al., Supreme Court Practice § 4.5 (10th ed. 2013) 36

Sup. Ct. R. 10 .... 29, 35

PETITION FOR A WRIT OF CERTIORARI

Petitioners are religious nonprofits who sincerely believe that it would be immoral for them to provide, pay for, or facilitate access to abortifacients, contraception, or sterilization in a manner that violates the teachings of the Catholic Church. The Government, however, has made it effectively impossible for Petitioners to offer health coverage to their employees and students in a manner consistent with their religious beliefs. Among other things, the Government compels Petitioners to (1) contract with third parties that will provide or procure the objectionable coverage for those enrolled in Petitioners' health plans, and (2) submit documentation that, in their religious judgment, makes them complicit in the delivery of such coverage. It is undisputed that these actions violate Petitioners' religious beliefs, and it is equally undisputed that if Petitioners refuse to take these actions, they will be subject to massive fines.

Contrary to the Government's characterization, this case is not about a challenge to an exemption or an "opt out," because the regulatory scheme forces Petitioners to act in ongoing violation of their religious beliefs. This case also is not about denying access to free contraceptive coverage, because "the Government can readily arrange for other methods of providing contraceptives, without cost sharing, to employees who are unable to obtain them under their health-insurance plans due to their employers' religious objections." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 & n.37 (2014).

Accordingly, this case is only about whether the Government can commandeer Petitioners and their

health plans as vehicles for delivering abortifacient and contraceptive coverage in violation of their religion. Although Petitioners oppose the Government's goal of providing such coverage as a policy matter, they do not challenge the legality of that objective. Rather, Petitioners ask only that they not be forced to participate in this effort. RFRA clearly accords them that right. Petitioners thus respectfully submit this petition for a writ of certiorari to review the final judgment of the United States Court of Appeals for the D.C. Circuit.

OPINIONS BELOW

The opinion of the district court is reported at 19 F. Supp. 3d 48. Pet.App.94a. The order of the D.C. Circuit granting an injunction pending appeal is unreported. Pet App.212a. The opinion of the D.C. Circuit is reported at 772 F.3d 229, Pet.App.1a, and its order denying rehearing en banc is reported at 2015 U.S. App. LEXIS 8326, Pet.App.222a.

JURISDICTION

The judgment of the D.C. Circuit was entered on Nov. 14, 2014. Pet.App.1a. That court denied rehearing en banc on May 20, 2015. Pet.App.222a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

The following provisions are reproduced in Appendix H (Pet.App.281a): 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"). Employers that fail to include the required coverage are subject to penalties of $100 per day per affected beneficiary. 26 U.S.C. § 4980D(b). Dropping health coverage likewise subjects employers with more than fifty employees to penalties of $2,000 per year per employee after the first thirty employees. *Id.* § 4980H(a), (c)(1).

Congress did not define women's "preventive care." The Department of Health and Human Services ("HHS") also declined to define the term and instead outsourced the definition to a private nonprofit, the Institute of Medicine ("IOM"). 75 Fed. Reg. 41,726, 41,731 (July 19, 2010). The IOM then determined that "preventive care" should include "all [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," HRSA, Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines (last visited June 18, 2015), and HHS subsequently adopted that definition, 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv). Some FDA-approved contraceptive methods (such as Plan B and ella) can induce an abortion. *Hobby Lobby*, 134 S. Ct. at 2762-63 & n.7.

1. Full Exemptions from the Mandate

From its inception, the Mandate exempted numerous health plans covering millions of people. For example, certain plans in existence at the time of the ACA's adoption are "grandfathered" and exempt from the Mandate as long as they do not make certain changes. 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g). As of May 2015, over 46 million individuals participate in grandfathered plans. HHS, ASPE Data Point, The Affordable Care Act Is Improving Access to Preventive Services for Millions of Americans 3 (May 14, 2015), http:// http://aspe.hhs.gov/health/reports/2015/Prevention/ib_Prevention.pdf.

Additionally, in acknowledgement of the burden the Mandate places on religious exercise, the Government created a full exemption for plans sponsored by entities it deems "religious employers." 45 C.F.R. § 147.131(a). That category, however, includes only religious orders, "churches, their integrated auxiliaries, and conventions or associations of churches." *Id.* (citing 26 U.S.C. § 6033(a)(3)(A)(i) & (iii)). These entities are allowed to offer conscience-compliant health coverage through an insurance company or third-party administrator ("TPA") that will not provide or procure contraceptive coverage. 78 Fed. Reg. 39,870, 39,873 (July 2, 2013). Notably, this exemption is available for qualifying "religious employers" regardless of whether they object to providing contraceptive coverage. 45 C.F.R. § 147.131(a).

At the same time, the "religious employer" exemption does *not* apply to many devoutly religious

nonprofit groups that *do* object to contraceptive coverage. According to the Government, these nonprofit religious groups do not merit an exemption because they are not as "likely" as "[h]ouses of worship and their integrated auxiliaries" "to employ people of the same faith who share the same objection" to "contraceptive services." 78 Fed. Reg. at 39,874. The administrative record contains no evidence in support of this assertion.

2. The Nonprofit Mandate

Instead of expanding the "religious employer" exemption, the Government announced that non-exempt religious nonprofits would be "eligible" for an inaptly named "accommodation." 78 Fed. Reg. at 39,871 (July 2, 2013) (the "Nonprofit Mandate"). In reality, however, the "accommodation" involves a new mandate that also forces religious objectors to violate their beliefs.

Under the Nonprofit Mandate, an objecting religious organization must either provide a "self-certification" directly to its insurance company or TPA, or submit a "notice" to the Government providing detailed information on the organization's plan name and type, along with "the name and contact information for any of the plan's [TPAs] and health insurance issuers." 26 C.F.R. § 54.9815-2713A(a); *id.* § 54.9815-2713AT(b)(1)(ii)(B), (c)(1)(ii). The ultimate effect of either submission is the same: by submitting the documentation, the eligible organization authorizes, obligates, and/or incentivizes its insurance company or TPA to arrange "payments for contraceptive services" for beneficiaries enrolled in the organization's health plan. *Id.* §§ 54.9815-2713A(a), 54.9815-2713AT(b)-(c).

"If" the organization submits the self-certification, then it directly triggers the obligation for its own TPA or insurance company to provide the objectionable coverage. *Id.* §§ 54.9815-2713A(a), 54.9815-2713AT(b)-(c). And "if" the organization instead submits the notice to the Government, the Government "send[s] a separate notification" to the organization's insurance company or TPA "describing the[ir] obligations" to provide the objectionable coverage. *Id.* § 54.9815-2713AT(b)(1)(ii)(B), (c)(1)(ii). In either scenario, payments for contraceptive coverage are available to beneficiaries only "so long as [they] are enrolled in [the religious organization's] health plan." 29 C.F.R. § 2590.715-2713A(d).

The Nonprofit Mandate has additional implications for organizations that offer self-insured health plans. The Government concedes that in the self-insured context, "'the contraceptive coverage is part of the [self-insured organization's health] plan.'" Pet.App.145a. Both the self-certification and the notification provided by the Government upon receipt of the eligible organization's submission are deemed to be "instrument[s] under which the plan is operated," 29 C.F.R. § 2510.3-16(b), and serve as the "designation of the [organization's TPA] as plan administrator and claims administrator for contraceptive benefits," 78 Fed. Reg. at 39,879. Consequently, the TPA of a self-insured health plan is *barred* from providing contraceptive benefits to the plan beneficiaries *unless* the sponsoring organization provides the self-certification or notification.[1]

---

[1] *See* 29 U.S.C. § 1002(16)(A) (limiting the definition of a plan administrator to "the person specifically so designated

In addition, the Nonprofit Mandate provides a unique incentive for objecting organizations' TPAs to provide the objectionable coverage. If an eligible organization complies with the Nonprofit Mandate, its TPA becomes eligible to be reimbursed for the full cost of providing the objectionable coverage, plus 15 percent. 26 C.F.R. § 54.9815-2713AT(b)(3); 79 Fed. Reg. 13,744, 13,809 (Mar. 11, 2014). TPAs receive this incentive, however, only if the self-insured organization submits the required self-certification or notification.

Finally, the Nonprofit Mandate requires self-insured religious groups to "contract[] with one or more" TPAs, 26 C.F.R. § 54.9815-2713AT(b), but TPAs are under no obligation "to enter into or remain in a contract with the eligible organization," 78 Fed. Reg. at 39,880. Consequently, self-insured organizations must either maintain a contractual relationship with a TPA that will provide the objectionable coverage to their plan beneficiaries, or find and contract with a TPA willing to do so.

B. Petitioners

Petitioners are nonprofit Catholic organizations that provide a range of spiritual, charitable, educational, and social services. Petitioners' religious

(continued…)

by the terms of the instrument under which the plan is operated"); *id.* § 1102(a)(1), (b)(3) (providing that self-insured plans must be "established and maintained pursuant to a written instrument," which must include "a procedure for amending [the] plan, and for identifying the persons who have authority to amend the plan"); 79 Fed. Reg. 51092, 51095 n.8 (August 27, 2014).

beliefs forbid them from taking actions that would make them complicit in the delivery of coverage for abortifacients, contraception, or sterilization services, or that would create "scandal" by encouraging through words or deeds other persons to engage in wrongdoing. Petitioners sincerely believe that compliance with the regulations would violate these principles. Pet.App.15a-16a, 115a-16a.

Historically, Plaintiffs have exercised their religious beliefs by offering health coverage in a manner consistent with Catholic teaching. In particular, they have contracted with insurers and TPAs that would provide conscience-compliant health coverage to their plan beneficiaries, and would not provide or procure coverage for abortifacients, contraceptives, or sterilization. Pet.App.15a-16a. Petitioner Roman Catholic Archbishop of Washington—the formal name for the Archdiocese of Washington—operates a self-insured health plan that qualifies as a "church plan" for purposes of ERISA. Pet.App.13a. This plan covers the Archdiocese's employees as well as the employees of its affiliated ministries, including Petitioners Consortium of Catholic Academies, Archbishop Carroll High School, Don Bosco Cristo Rey High School, Mary of Nazareth Elementary School, Catholic Charities, Victory Housing, and the Catholic Information Center. Pet.App.13a-14a. Petitioner Catholic University of America offers its employees insured health plans provided by United Healthcare, and makes insurance available to its students through AETNA. Pet.App.14a-15a. Petitioner Thomas Aquinas College offers its employees a non-church health plan through the RETA Trust, a self-

insurance trust established by the Catholic bishops of California. Pet.App.14a.

Despite their avowedly religious missions, none of Petitioners except the Archdiocese qualify as exempt "religious employers." Even the Archdiocese is not truly exempt because it offers its health plan to the employees of its non-exempt affiliates, whose employees thus become eligible to receive the objectionable coverage through the Archdiocese's plan under the Nonprofit Mandate. Pet.App.13a-14a.

C. The Proceedings Below

Petitioners filed suit in September 2013. The district court issued a final judgment in favor of Petitioner Thomas Aquinas College, but rejected all other Petitioners' RFRA claims. Pet.App.211a. [2] Petitioners and the Government both appealed.

The D.C. Circuit granted Petitioners' motion for an injunction pending appeal, holding that Petitioners "satisfied the requirements" for injunctive relief under *Winter v. NRDC*, 555 U.S. 7 (2008). Pet.App.213a. The court also consolidated this case with *Priests for Life v. U.S. Department of Health & Human Services*, No. 13-5368. Pet.App.213a. The Court scheduled oral argument before an assigned panel in March 2014, Pet.App.221a, but then *sua sponte* reset the case for argument before a different panel, Pet.App.221a.

---

[2] Petitioners also prevailed in a First Amendment challenge to a regulation prohibiting them from seeking to "influence" their TPA's decision to provide contraceptive coverage. Pet.App.100a.

After hearing oral argument and ordering supplemental briefing on *Hobby Lobby*, the D.C. Circuit rejected all of Petitioners' claims. Pet.App.93a. The court first found no substantial burden on Petitioners' religious exercise because the regulations "impose[] [only] a *de minimis* requirement" on Petitioners that required them to do nothing more than submit "a single sheet of paper." Pet.App.34a. The court asserted that forcing Petitioners to submit the required paperwork and then maintain the objectionable contractual relationship would not impose a substantial burden because those actions "do not," in fact, "'facilitate contraceptive coverage." Pet.App.42a.

The court also held that the regulations would survive strict scrutiny, despite the Government's contrary concession in light of previous circuit precedent. Pet.App.117a. According to the panel, the Government has a compelling interest in ensuring "seamless coverage of contraceptive services" in connection with Petitioners' health plans. Pet.App.56a. In the court's view, there are no viable alternative means to provide the coverage, because "[i]mposing even minor added steps" on women to obtain the coverage from any other source "would dissuade [them] from obtaining contraceptives." Pet.App.68a.

Petitioners sought rehearing en banc, which the court denied on May 20, 2015. Judge Brown, joined by Judge Henderson, filed a dissent arguing that "this exceptionally important case is worthy of en banc review" because "[t]he panel's substantial burden analysis is inconsistent with the precedent of the Supreme Court." Pet.App.236a. Judge Brown

would have found a substantial burden because "Plaintiffs identif[ied] at least two acts that the regulations compel them to perform that they believe would violate their religious obligations: (1) 'hiring or maintaining a contractual relationship with any company required, authorized, or incentivized to provide contraceptive coverage to beneficiaries enrolled in Plaintiffs' health plans,' and (2) 'filing the self-certification or notification.'" Pet.App.239a (internal citation omitted). Judge Brown then turned to strict scrutiny, arguing that "[e]ven assuming for the sake of argument that the government possesses a compelling interest in the provision of contraceptive coverage," the Government had "pointed to no evidence in the record" to prove that the coverage must be provided "'seamless[ly]'" through the employer-based health plans of objecting religious nonprofits. Pet.App.246a.

Judge Kavanaugh wrote a separate dissent, arguing that "the regulations substantially burden the religious organizations' exercise of religion because the regulations require the organizations to take an action contrary to their sincere religious beliefs (submitting the form) or else pay significant monetary penalties." Pet.App.255a. He then reasoned that the regulations must fail RFRA's least-restrictive-means test because "[u]nlike the form required by current federal regulations, the [notice this Court ordered in] *Wheaton College/Little Sisters of the Poor* . . . does not require a religious organization to identify or notify its insurer, and thus lessens the religious organization's complicity in what it considers to be wrongful." Pet.App.256a.

Petitioners thereafter asked the D.C. Circuit to stay its mandate pending certiorari. On June 10, 2015, the D.C. Circuit granted a stay pending disposition of this petition. Pet.App.279-80a.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted under this Court's traditional criteria.

First, the decision below conflicts with *Hobby Lobby* and related precedent. *Hobby Lobby* 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. The court below ignored that holding, substituting its religious judgment for that of Petitioners to declare that compliance with the regulations would not truly "facilitate contraceptive coverage" in violation of Catholic doctrine. Pet.App.42a. As at least five different circuit judges have recognized, this judicial second-guessing of private religious beliefs cannot be squared with *Hobby Lobby*. Pet.App.52a (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[.]"); Pet.App.242a (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).

The lower court's strict-scrutiny analysis also conflicts with this Court's precedent by relying on sweeping interests in "'public health'" and "'gender equality,'" which *Hobby Lobby* rejected as overbroad. 134 S. Ct. at 2779. The lower court disregarded *Hobby Lobby*'s holding that the Government bears the burden of proof, and upheld the regulations despite the Government's failure to offer *any evidence* that it must use Petitioners' health plans as the conduit to deliver the objectionable coverage.

Second, the lower court deepened an existing circuit split over the nature of RFRA's substantial-burden inquiry, and created a new circuit split on whether the regulations satisfy strict scrutiny. On the first issue, the court held, in agreement with the Third Circuit, that regulations forcing religious adherents to act contrary to their beliefs do not impose a substantial burden if the court deems those obligations "*de minimis*" or inconsequential. By contrast, the Seventh, Tenth, and Eleventh Circuits have held that the substantial-burden test focuses on *coercion*. In those circuits, the Government substantially burdens religious exercise whenever it forces religious adherents to take *any* action that violates their sincere religious beliefs on pain of substantial penalty.

On the strict-scrutiny issue, the court below held that the Government has a compelling interest in providing free contraceptive coverage, and that the only viable means to achieve that goal is to conscript the private health plans of objecting nonprofits. By contrast, the Seventh and Tenth Circuits have held

that the regulations cannot satisfy strict scrutiny due to the many exemptions the Government has already granted, as well as the many alternative means through which the Government could deliver contraceptive coverage without hijacking the private health plans of religious objectors.

Third, both of these issues are exceptionally important because they implicate core protections of religious liberty, and because they affect thousands of religious nonprofits around the country, which hope to avoid being put to the choice between violating their religious beliefs or incurring ruinous penalties.

Finally, this case presents an ideal vehicle for resolving this question. The panel opinion addresses *Hobby Lobby* and the revised regulations directly. It discusses all issues in the case: substantial burden, compelling interest, and least-restrictive means. These matters were vigorously aired and debated below, including in two dissenting opinions. And perhaps most importantly, this case presents the full gamut of insurance arrangements that may give rise to RFRA claims (insured plans, self-insured plans, church plans, and non–church plans).

Accordingly, this Court should grant certiorari and reverse the decision below.

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

regulations at issue survive that analysis conflicts directly with this Court's precedent.

A. The Regulations Substantially Burden Petitioners' Religious Exercise

Under *Hobby Lobby*, the test for a "substantial burden" on religious exercise is whether the Government is imposing 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 this 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").

Applying that test here leads inexorably to the conclusion 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 panel below did not even cite *Hobby Lobby* in its substantial-burden analysis. Instead of evaluating whether the "consequences" for noncompliance would be "severe," 134 S. Ct. at 2775, the court erroneously focused on the *nature of the actions required* by the Nonprofit Mandate. The court thus dismissed Petitioners' religious objections as involving only a "bit of paperwork" and the submission of a "single sheet of paper." Pet.App.7a. In the panel's view, complying with the regulations was nothing more than a "*de minimis* administrative" burden. Pet.App.38a, 48a (stating that "the regulatory requirement that [Petitioners file] a sheet of paper" "is not a burden that any precedent allows us to characterize as substantial").

The panel's analysis squarely conflicts with *Hobby Lobby*. That decision made clear that RFRA protects "'*any* exercise of religion,'" 134 S. Ct. at 2762 (emphasis added), which includes "'the performance of (or abstention from) physical acts'" that are "engaged in for religious reasons," *id.* at 2770 (quoting *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990)). It makes no difference whether the religious exercise at issue is refraining from shaving one's beard (*Holt*), refraining from paying for contraceptive coverage (*Hobby Lobby*), or refraining from maintaining an objectionable contractual relationship and submitting an objectionable form (here). Pet.App.266a (Kavanaugh, J., dissenting) (explaining that being forced to comply with the Nonprofit Mandate 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"). Once a plaintiff identifies an action that would violate his religious beliefs, the only question for a court is whether the Government has placed "substantial" pressure on the plaintiff to take that action. 134 S. Ct. at 2776-79. It is plaintiffs who must "dr[a]w" a "line" regarding the actions their religion deems objectionable. *Id.* at 2778-79. Once that line is drawn, "'it is not for [courts] to say that [it is] unreasonable.'" *Id.* at 2778 (quoting *Thomas*, 450 U.S. at 715).

Likewise, the lower court's repeated insistence that the Nonprofit Mandate amounts to an "opt out" is plainly false. In fact, the Nonprofit Mandate forces Petitioners to violate their beliefs by submitting objectionable documentation and maintaining an objectionable contractual relationship. The lower court's assertion that taking these actions "do[es] not," in fact, "'facilitate contraceptive coverage,'" Pet.App.42a, flatly ignores *Hobby Lobby*'s command that plaintiffs, not courts, must determine whether an act "is connected" to illicit conduct "in a way that is sufficient to make it immoral." 134 S. Ct. at 2778. The lower court failed to appreciate that whether the required actions make Petitioners complicit in wrongdoing or allow them to "wash[] their hands of any involvement in [contraceptive] coverage," Pet.App.28a, is itself a religious judgment rooted in Catholic teachings. As *Hobby Lobby* confirms, courts may not "[a]rrogat[e]" unto themselves "the authority" to "answer" the "religious and philosophical question" of "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." 134 S. Ct. at 2778.

For similar reasons, *Hobby Lobby* also forecloses the panel's attempt to recast Petitioners' religious objection as an "object[ion] to . . . the government's independent actions in mandating contraceptive coverage, not to any action that the government has required [Petitioners] themselves to take." Pet.App.37a (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' RFRA claim is not based on mere "unease" or "anguish" at the prospect of "third parties provid[ing] Plaintiffs' beneficiaries [with] products and services that Plaintiffs believe are sinful." Pet.App.27a, 37a. Rather, the regulations compel *Petitioners themselves* to violate their religious beliefs by submitting objectionable documentation and maintaining an objectionable insurance relationship. "Make no mistake: the harm [Petitioners] complain of" is "their inability to conform *their own* actions and inactions to their religious beliefs without facing massive penalties from the government." Pet.App.236a (Brown, J., dissenting).

Hobby Lobby rejected a similar attempt to transform 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). 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. The Court rightly noted that the Government's argument "dodge[d] the question that RFRA presents" because it refused to acknowledge the plaintiffs' religious objections were 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* Pet.App.241-45a (Brown, J., dissenting); Pet.App.252-78a (Kavanaugh, J., dissenting); *Notre Dame*, 2015 U.S. App. LEXIS 8234, at *60 (Flaum, J., dissenting).

Finally, the panel asserted that Petitioners' objection rests on a simple misunderstanding of "how the challenged regulations operate." Pet.App.229a (Pillard, J., concurring). That assertion is based on the panel's view that Petitioners' "insurers and TPAs" have an "independent obligation" to provide the objectionable coverage to Petitioners' beneficiaries, and that if Petitioners only understood this, they would not object to the Nonprofit Mandate. Pet.App.42a. That is doubly wrong.

At the outset, Petitioners would object to compliance even if the regulatory scheme worked exactly as described by the panel. Petitioners object to "'hiring or maintaining a contractual relationship with any company required, authorized, or incentivized to provide contraceptive coverage to beneficiaries enrolled in [Petitioners'] health plans.'" Pet.App.239a (Brown, J., dissenting). And everyone

agrees that under the Nonprofit Mandate, Petitioners will incur ruinous penalties unless they maintain such a relationship. Moreover, as Judge Kavanaugh recognized, it is also undisputed that the Nonprofit Mandate forces Petitioners to submit a "'self-certification'" or "'notification'" form that must either "identify or notify their insurers." Pet.App.239a, 273a (Kavanaugh, J., dissenting). Petitioners would object to filing such a document even if the regulations worked exactly as articulated by the panel. Thus, even under the panel's interpretation, the Nonprofit Mandate would still impose a substantial burden on Petitioners by forcing them to maintain an objectionable contractual relationship and submit an objectionable form. *Cf. Notre Dame*, 2015 U.S. App. LEXIS 8234, at *58-59 (Flaum, J., dissenting) (stating that the existence of 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 the objectionable coverage would violate its beliefs).

In any event, the D.C. Circuit panel was clearly wrong to suggest that Petitioners' TPAs and insurers have an "independent obligation" to provide the objectionable coverage to Petitioners' employees. In the self-insured context, the Government has *conceded* that "[a TPA's] duty to [provide the mandated coverage] only arises by virtue of the fact that [it] has a contract with the religious organizations" and has "receive[d] the self-certification form." Hr'g Tr. at 12-13, *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441 (D.D.C. Nov. 22, 2013). Indeed, the regulations plainly state that a TPA is obligated to "provide or arrange

payments for contraceptive services" only "if" an eligible organization decides to invoke the "accommodation" by submitting the self-certification or notification document. 26 C.F.R. § 54.9815-2713AT(b)(2). This unequivocal conditional language makes clear that a TPA "bears the legal obligation to provide contraceptive coverage *only* upon receipt of a valid self-certification" or notification. *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2814 n.6 (2014) (Sotomayor, J., dissenting) (emphasis added).

Likewise, in the context of an insured plan, a religious organization's insurance issuer has no obligation to provide "separate" contraceptive coverage unless the organization invokes the "accommodation" by submitting the self-certification or notification. 45 C.F.R. § 147.131(c)(2). The mandated coverage cannot be otherwise provided, because *Hobby Lobby* forbids the Government from requiring such coverage to be included in an objecting religious organization's health plan.

Moreover, the notion of an "independent obligation" is plainly wrong because if Petitioners stopped offering health plans to their employees and students, then their insurers and TPAs would have no obligation to provide the objectionable coverage. *See* 26 C.F.R. § 54.9815-2713AT(b)(2) (stating that a TPA has an obligation to provide or procure coverage only if it is "in a contractual relationship with the eligible organization"); *id.* § 54.9815-2713A(c)(2)(B) (stating that insurance issuers must provide payments for contraceptive services "for plan participants and beneficiaries for so long as they remain enrolled in the plan").

Indeed, this Court need look no further than the Government's own arguments to confirm Petitioners' integral role in the regulatory scheme. If TPAs and insurers truly had an "independent" obligation to provide the mandated coverage to Petitioners' beneficiaries, then the Government could not plausibly claim that exempting Petitioners "would deprive hundreds of employees" of abortifacient and contraceptive coverage. Opp'n at 36, *Wheaton*, 134 S. Ct. 2806 (U.S. July 2014) (No. 13A1284). And if the regulatory scheme were in fact completely "disassociated" and "separate" from Petitioners' actions, Pet.App.43-44a, the Government could not possibly have a "compelling interest" in coercing Petitioners' compliance. "After all, if the form were meaningless, why would the government require it?" Pet.App.264a (Kavanaugh, J., dissenting).

B. The Regulations Cannot Survive Strict Scrutiny

In addition to concluding that the regulations did not substantially burden Petitioners' religious exercise, the panel also held that the regulations survived strict scrutiny. In the process, it transformed a mere eight pages of the Government's supplemental briefing on this (previously conceded) issue into a twenty-one page paean to a "confluence of compelling interests" that purportedly necessitate the conscription of the health plans of religious objectors to ensure "seamless" provision of contraceptive coverage. Pet.App.8a. That conclusion cannot be squared with *Hobby Lobby*, *Holt*, or this Court's prior precedent.

1. Adding Petitioners to the Long List of Exempt Entities Would Not Undercut Any Compelling Interest

In *Hobby Lobby*, the Government asserted that the Mandate was justified by two "very broadly framed interests" in "'public health'" and "'gender equality.'" 134 S. Ct. at 2779. This Court rejected those interests, explaining that RFRA requires "a 'more focused' inquiry" that looks to the strength of the Government's interest in denying a religious exemption for the particular religious plaintiff before the court. *Id.* Here, the Government originally asserted nothing more than the same two overbroad interests. *See* Defs.' Sum. Judgment Br. at 21, 24, *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441 (D.D.C. Oct. 16, 2013) (Doc. 26). But instead of rejecting those interests in accordance with *Hobby Lobby*, the D.C. Circuit concluded that the "converge[nce]" of these two inadequate interests somehow justified the denial of an exemption for Petitioners. Pet.App.56a. That is wrong for several reasons.

First, the combination of the two overbroad interests rejected in *Hobby Lobby* cannot give rise to an interest sufficiently "focused" to preclude relief for Petitioners. As *Hobby Lobby* explained, the question is not whether the Government has a compelling interest in enforcing its regulatory scheme as a whole, but whether it has a compelling interest in refusing to "'grant[] specific exemptions *to* [*the*] *particular religious claimants*'" who have filed suit. 134 S. Ct. at 2779 (citation omitted) (emphasis added). The court below paid only lip service to that inquiry. While extolling the general virtues of

contraception for its broad societal effect on "'public health'" and "'gender equality,'" the court made no real effort to "look to the marginal interest in enforcing the contraceptive mandate in th[is] case[]." *Id.* For example, the court did not attempt to show a lack of access to contraceptive services among Petitioners' plan beneficiaries, nor did it ask whether the Mandate would significantly increase contraception use among women who choose to work for Catholic nonprofits. Instead, the court simply declared that the "evidence justifying the contraceptive coverage requirement" in general "equally supports its application to Plaintiffs." Pet.App.70a. RFRA, however, demands a more exacting inquiry. 134 S. Ct. at 2779.

Second, as *Hobby Lobby* suggested, it is difficult to see how enforcing the Mandate against Petitioners is necessary to protect an interest of the "highest order," given that the Mandate already contains numerous exemptions that leave millions of women without cost-free contraceptive coverage. *See* 134 S. Ct. at 2780-81. This Court has repeatedly emphasized that "'[a] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (citation omitted); *see also Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 433 (2006). And here, the Government has already granted more than an appreciable number of exemptions for "grandfathered" plans and plans sponsored by qualifying "religious employers." *Hobby Lobby*, 134 S. Ct. at 2779-80, 2783.

The panel's attempt to diminish the significance of these exemptions cannot withstand even cursory scrutiny. As this Court noted in *Hobby Lobby*, the "interest" furthered by the expansive grandfathering exemption "is simply the interest of employers in avoiding the inconvenience of amending an existing plan." *Id.* at 2780. Because the Government is willing to exempt millions of individuals for the sake of avoiding mere "inconvenience," it cannot claim a "compelling" need to deny a religious exemption for Petitioners. Indeed the Government itself has tacitly admitted that its interests here are less than compelling: it has taken steps to ensure that grandfathered plans "'comply with a subset of the Affordable Care Act's health reform provisions'" it has deemed "'particularly significant,'" but "the contraception mandate is expressly excluded from this subset." *Id.* (quoting 75 Fed. Reg. 34540 (2010)).

The panel's attempt to explain away the "religious employer" exemption is even less persuasive. As *Hobby Lobby* noted, the Government's decision to fully exempt an artificial category of "religious employers"—regardless of whether they even object to providing contraceptive coverage—is "not easy to square" with its refusal to exempt other religious groups such as Petitioners, who actually do have religious objections. *Id.* at 2777 n.33. The panel offered no persuasive reason for "distinguishing between different religious believers—burdening one while [exempting] the other—when [the Government] may treat both equally by offering both of them the same [exemption]." *Id.* at 2786 (Kennedy, J., concurring). After all, "[e]verything the Government says about [exempt religious employers] applies in equal measure to" Petitioners, who are

equally religious nonprofit groups. *O Centro*, 546 U.S. at 433. [3]

Finally, the panel suggested that the regulations may also be justified by the Government's interest in maintaining a "sustainable system of taxes and subsidies under the ACA." Pet.App.53a (citing *United States v. Lee*, 455 U.S. 252 (1982)). Because the Government did not make this argument, this *sua sponte* assertion conflicts with established law placing the burden to satisfy strict scrutiny "squarely on the Government['s]" shoulders. *O Centro*, 546 U.S. at 429. In any event, *Hobby Lobby* specifically rejected the panel's suggestion, explaining that "[r]ecognizing a religious accommodation under RFRA for particular coverage requirements . . . does not threaten the viability of ACA's comprehensive scheme in the way that recognizing religious objections to particular expenditures from general tax revenues would." 134 S. Ct. at 2783-84.

2. Conscripting the Health Plans of Objecting Religious Nonprofits Is Not the Least Restrictive Means of Providing Free Contraceptive Coverage

Even if the Government had a compelling interest in providing free contraceptive coverage, it would have many less restrictive ways of doing so without

[3] For example, the Government cannot explain why St. Augustine's School, a Catholic school incorporated as part of the Archdiocese, should qualify for the "religious employer" exemption, while a Catholic school that is part of the separately incorporated Consortium of Catholic Academies should not.

using Petitioners' health plans as the conduit. As *Hobby Lobby* emphasized, the least-restrictive means test is "exceptionally demanding." 134 S. Ct. at 2780. The Government must "*prove*" that its preferred method "is the least restrictive means of furthering a compelling governmental interest"—"mere[] . . . expla[nations]" do not suffice. *Holt*, 135 S. Ct. at 864 (emphasis added). In addition, the Government must show a "'serious, good faith consideration of workable [alternatives].'" *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013).

In *Hobby Lobby*, this Court stated that "[t]he most straightforward way" of providing cost-free contraceptive coverage to women "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 (emphasis added). Accordingly, Petitioners here identified numerous ways the Government could deliver contraceptive coverage apart from their employer-based health plans. *E.g.*, *infra* p.33-34. These alternatives would require only minor adjustments to existing programs such as Title X, Medicaid, or the ACA exchanges. Though the Government offered *no evidence* of why these alternatives are infeasible, the panel held that the conscription of Petitioners' health plans was necessary to ensure the "seamless[]" provision of coverage to their beneficiaries. Pet.App.68a. In the panel's view, using *any* other means to deliver contraceptive coverage apart from Petitioners' employer-based plans would be unworkable because "[i]mposing even minor added steps would dissuade women from obtaining contraceptives." Pet.App.68a.

That conclusion, upon which the panel's entire analysis hinges, is supported by nothing more than citation to ipse dixit statements in the Federal Register. Pet.App.68a (citing 78 Fed. Reg. at 39,888). In other words, the panel determined that it could force Petitioners to violate their sincerely held religious beliefs based on unsubstantiated assertions that some unknown number of women might otherwise suffer "minor" inconvenience in receiving *free* contraceptive coverage. Thus, in the end, the panel's decision does not rest on the Government's much-touted need to provide free contraceptive coverage, but instead on its desire to conscript religious objectors to help provide the coverage in a more convenient manner.

Whatever may be said for this interest, it cannot possibly be enough to satisfy the "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The Government may not force religious believers to violate their conscience for the sake of avoiding "minor" inconvenience. Though it is certainly true that "in applying RFRA, 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries,'" Pet.App.70a, *Hobby Lobby* was clear that "[n]othing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit"—however minor—"on other individuals." 134 S. Ct. at 2781 n.37. Thus, just as the Government cannot mandate that "all supermarkets must sell alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets)," *id.*, it cannot

mandate that all health plans must come with "seamless" access to abortifacient and contraceptive coverage, and thereby exclude Catholic nonprofits from offering health insurance.

II. THE CIRCUITS ARE DIVIDED OVER THE ISSUES PRESENTED

A. The Circuits Are Divided on the Nature of RFRA's "Substantial Burden" Test

As this Court has acknowledged, the "Circuit Courts have divided on whether to enjoin" the regulations that apply to "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 Third Circuit has agreed with the D.C. Circuit's decision below that when analyzing substantial burden, courts should focus on the nature of the *actions* religious adherents are forced to take. 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. 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 (2013) (en banc), *aff'd*, 134 S. Ct. 2751, the Tenth Circuit held that the substantial-burden standard 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, in the Tenth Circuit, a 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 (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 [substantial] pressure on the plaintiffs to

violate their religious beliefs and conform to its regulatory mandate." *Id.*[4]

The Eleventh Circuit has adopted the same test, and has also issued a temporary injunction against the Nonprofit Mandate. *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 1344-45 (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. Judge Pryor openly acknowledged that other circuits have recently applied a contrary rule to uphold the Nonprofit Mandate, but he dismissed that rule as "[r]ubbish." *Id.* at 1347.

2. In sharp contrast, the Third Circuit has joined the court below in holding that courts may assess

---

[4] The rule of *Korte* was not displaced by the Seventh Circuit's subsequent 2-1 decision in *Notre Dame,* 2015 U.S. App. LEXIS 8234, issued after this Court vacated and remanded the original *Notre Dame* decision. Under applicable Seventh Circuit precedent, "findings of fact and conclusions of law made at the preliminary injunction stage" are "not binding." *Thomas & Betts Corp. v. Panduit Corp.*, 138 F.3d 277, 292-93 (7th Cir. 1998).

whether the actions RFRA claimants are required to take are truly "substantial" in nature, and may second-guess a claimant's sincere belief that taking a particular action would make him complicit in sin.

In *Geneva College v. HHS*, 778 F.3d 422 (3d Cir. 2015), the Third Circuit adopted the same flawed approach as the court below to conclude that the Nonprofit Mandate did not substantially burden the plaintiffs' religious exercise. Explicitly declining to consider "the intensity of the coercion faced by appellees," *id.* at 442, the court stated that it was required to "assess whether the appellees' compliance with the [regulations] does, in fact, . . . make them complicit in the provision of contraceptive coverage." *Id.* at 435. After a lengthy analysis the court ultimately concluded that complying "does not make [the plaintiffs] 'complicit,'" and therefore forcing them to comply does not substantially burden their religious exercise. *Id.* at 438. 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*, 735 F.3d at 683; *EWTN*, 756 F.3d at 1348. Indeed, the court expressly disagreed with the Seventh Circuit by citing to the *Korte* dissent for the proposition that courts "*may* consider the nature of the action required of the appellees, the connection between that action and the appellees' beliefs, and the extent to which that action interferes with or otherwise affects the appellees' exercise of religion." *Geneva*

Coll., 778 F.3d at 436 (emphasis added) (citing *Korte*, 735 F.3d at 710 (Rovner, J., dissenting)).

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 in no way diminishes the conflict among the circuits. That conflict arises from the fact that different appellate courts have applied different legal rules 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." *Hobby Lobby*, 723 F.3d at 1137. In stark contrast, the test applied by the Third and D.C. Circuits considers instead "the nature of the action required of the [religious objector]." *Geneva Coll.*, 778 F.3d at 436. 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 decision below also created a split with the Seventh and Tenth Circuits over whether the challenged regulations can satisfy strict scrutiny.

In *Korte*, the Seventh Circuit held that the Government could use several less-restrictive means to provide free 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 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"). Here, by contrast, the D.C. Circuit ruled out these alternative means because they would "make the coverage no longer seamless from the beneficiaries' perspective, instead requiring them to take additional steps to obtain contraceptive coverage elsewhere." Pet.App.26a.

The decision below also conflicts with the Tenth Circuit's en banc decision in *Hobby Lobby*, which 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). Here, by 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." Pet.App.71a.

Again, although *Korte* and *Hobby Lobby* involved for-profit regulations, they nonetheless conflict

squarely with the D.C. Circuit's strict-scrutiny analysis here. The Seventh Circuit in *Korte* identified several "less restrictive" ways of providing 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.

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). This case is exceptionally important because it affects the rights of untold thousands of nonprofit religious groups under federal law. Aside from the instant case, there are at least 40 cases pending in the lower courts challenging the Nonprofit Mandate, and courts have granted injunctions in 29 of those cases.[5]

The core question of religious liberty at issue in this case is also exceedingly important. Indeed, 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*, 134 S. Ct. 1022 (2015); *cf. Zubik v. Burwell*, 135 S. Ct. 1544 (2015) (Alito, J., in chambers) (recalling and

---

[5] *See* Becket Fund, HHS Mandate Information Central, http://www.becketfund.org/hhsinformationcentral/ (last visited June 18, 2015).

staying the lower court's mandate). Moreover, this Court has twice granted, vacated, and remanded pre-*Hobby Lobby* appellate decisions upholding the Nonprofit Mandate, 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); *Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015); *Mich. Catholic Conf. v. Burwell* ("*MCC*"), 135 S. Ct. 1914 (2015). Notably, those two now-vacated decisions undergirded much of the panel's reasoning in the case at hand. Pet.App.11a, 26a, 28a, 37-42a, 46a, 50-51a (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 here. *See* 134 S. Ct. at 2782 & n.40 ("We do not decide today whether [the Nonprofit Mandate] complies with RFRA for purposes of all religious claims.").

IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THIS ISSUE

This case presents an ideal vehicle for resolving the lawfulness of the Nonprofit Mandate. The district court issued a final judgment that fully disposed of the parties' claims on cross-motions for summary judgment and the Government's motion to dismiss. Pet.App.211a. As detailed above, the D.C. Circuit squarely addressed both *Hobby Lobby* and the most recent version of the regulations. In doing so, it applied both the substantial-burden and strict-

scrutiny components of RFRA to the Nonprofit Mandate. All of these issues, moreover, were fully aired below, including through two opinions dissenting from the denial of rehearing en banc issued by three judges. Pet.App.231-51a (Brown, J., dissenting); Pet.App.252-78a (Kavanaugh, J., dissenting).

Moreover, Petitioners present the full range of insurance arrangements that may give rise to RFRA claims challenging the Nonprofit Mandate, including insured plans, self-insured plans, and self-insured church plans. Pet.App.12a-15a.

First, a decision here would resolve RFRA objections involving both self-insured and fully insured health plans. The Archdiocese and Thomas Aquinas College have self-insured plans administered by a TPA. Catholic University, by contrast, offers its students and employees the ability to enroll in health plans that are fully insured by outside companies.

Second, the Archdiocese sponsors a "church plan," while the other Petitioners do not. The Government argued in courts below that this makes some difference because church plans are technically exempt from ERISA, even though the contraceptive-coverage regulations are not solely based on ERISA and do not exempt church plans. *E.g.*, 26 C.F.R. §§ 54.9815-2713, 54.9815-2713A, 54.9815-2713AT. A decision here would resolve that issue.

Third, like many dioceses, the Archdiocese has a self-insured plan that includes not only its own employees, but also the employees of its religious affiliates. *Supra* p.8. Although the Archdiocese is exempt from the self-certification or notification

requirement due to its status as a "religious employer," its participating affiliates are not exempt: they are forced to submit the "self-certification" or "notification" to the Archdiocese's TPA, which in turn enables the TPA to provide their employees with the objectionable coverage as part of the Archdiocese's self-insured health plan. A decision here would thus resolve the legality of the Nonprofit Mandate as applied to this arrangement.

This case, therefore, would allow this Court to definitively resolve the application of the Nonprofit Mandate to the numerous types of organizations and insurance arrangements that are subject to it.

CONCLUSION

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

Respectfully submitted,

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

Counsel for Petitioners

June 19, 2015