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July 13, 2015

Deborah S. Hunt
United States Court of Appeals
for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, OH 45202-3988

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Re: No. 13-2723, *Michigan Catholic Conference v. Burwell*
No. 13-6640, *The Catholic Diocese of Nashville v. Burwell*
Letter Brief in light of *Hobby Lobby* and other circuit decisions

Dear Ms. Hunt:

This letter responds to the Court's order of June 29, 2015, requesting the parties to submit supplemental letter briefs addressing the impact of the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and any relevant circuit court decisions published after *Hobby Lobby*.

In *Hobby Lobby*, the Supreme Court held that the Government "substantially burdens" religious exercise when it forces plaintiffs to "engage in conduct that seriously violates their religious beliefs" on pain of "substantial" penalties, including substantial "economic consequences." *Id.* at 2775-76. The regulations at issue here do exactly that. It is undisputed that Plaintiffs sincerely believe, as a matter of Catholic moral principle, that complying with the regulations would seriously violate their religion because it would make them complicit in sin. And it is also undisputed that if Plaintiffs refuse to comply, they will be subject to crippling penalties.

As five circuit judges have now recognized, "it is black-letter law" that this type of coercion imposes a substantial burden on religious exercise under the Religious Freedom Restoration Act (RFRA). *Priests for Life v. HHS*, No. 13-5368, 2015 U.S.

App. LEXIS 8326, at *49 n.3 (D.C. Cir. May 20, 2015) (Kavanaugh, J., dissenting).[1] As the Government cannot show that this burden is the least restrictive means of advancing a compelling state interest, the regulations at issue must be enjoined. Indeed, this explains why the Supreme Court has now granted emergency relief against these regulations to every nonprofit plaintiff that has requested it.[2]

Before the Supreme Court decided *Hobby Lobby*, the panel here held that compliance with the regulations would not impose a substantial burden on Plaintiffs' religious exercise, because taking the required actions—i.e., submitting the required documentation and maintaining a contract with a company that provides contraceptive coverage to Plaintiffs' employees—would not truly "facilitat[e] access to contraception." *Mich. Catholic Conf. v. Burwell* (*MCC*), 755 F.3d 372, 390 (2014). That, however, is a moral conclusion that the panel had no right to draw. *Hobby Lobby* held that religious believers, not courts, must determine whether a course of action "is connected" to illicit conduct "in a way that is sufficient to make it immoral." 134 S. Ct. at 2778. And under well-established Catholic doctrine, taking the acts required by the regulations would make Plaintiffs complicit in sin—a determination no federal court may question.

The Supreme Court appears to have agreed: it has twice granted, vacated, and remanded pre-*Hobby Lobby* appellate decisions where the panel held that compliance with the regulations at issue here would not "facilitate" immoral conduct. *Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015); *Mich. Catholic Conf. v. Burwell*, 135 S. Ct. 1914 (2015). Such action indicates 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). Ultimately, if a plaintiff believes that

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[1] *See id.* at *16-17 (Brown, J., dissenting, joined by Henderson, J.); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 626 (7th Cir. 2015) (Flaum, J., dissenting); *EWTN. v. HHS*, 756 F.3d 1339, 1345 (11th Cir. 2014) (Pryor, J., concurring).

[2] *See Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014); *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014); *Zubik v. Burwell*, No. 14A1065, 2015 U.S. LEXIS 4479 (U.S. June 29, 2015).

taking a certain action would make him complicit in sin and the Government nonetheless forces him to take that action, the Government has imposed a substantial burden on the plaintiff's religious exercise.

Nevertheless, in the wake of *Hobby Lobby*, four circuit courts have ignored the Supreme Court's instruction and misapplied RFRA to hold that the regulations at issue do not impose a substantial burden on objecting religious nonprofits. Those decisions rest on three errors. First, they fail to follow *Hobby Lobby*'s directive that courts may not second-guess a plaintiff's sincere religious belief that taking a particular action would facilitate wrongdoing and thus make the plaintiff complicit in sin. Second, they wrongly assume that religious objectors' insurance companies and third-party administrators (TPAs) have an "independent" obligation to provide contraceptive coverage. And third, they incorrectly maintain that plaintiffs object only to the actions of third parties, as opposed to the actions that the regulations require *plaintiffs themselves* to take.

THE CHALLENGED REGULATIONS

The Patient Protection and Affordable Care Act requires employers to cover women's "preventive care" in their group health plans. 42 U.S.C. § 300gg-13(a)(4); 45 C.F.R. § 147.130(a)(1)(iv). The Administration has defined such care to include contraceptives, including certain abortifacients. *See Hobby Lobby*, 134 S. Ct. at 2762-63 & n.7.

In acknowledgement of the burden this 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). But that category includes only religious orders, "churches, their integrated auxiliaries, and conventions or associations of churches." *Id.*; 26 U.S.C. § 6033(a)(3)(A)(i) & (iii). As the Government has explained, the exemption is narrowly defined to protect only "the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). These entities are allowed to offer conscience-compliant health coverage through an insurance company or 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).

In *Hobby Lobby*, the Supreme Court held that the original mandate—which requires employers to directly subsidize contraceptive and abortifacient coverage—cannot be enforced against employers with religious objections. Here, the Government seeks to enforce against Plaintiffs a slightly revised version of the regulations that is designed to relieve objecting religious nonprofit groups from having to *pay for* the objectionable coverage. *See*, *e.g.*, 26 C.F.R. § 54.9815-2713A(a); *id.* § 54.9815-2713AT ("the Nonprofit Mandate"). The Government refers to these regulations as an "accommodation," but in reality, they force Plaintiffs to violate their religious beliefs by (1) submitting objectionable documentation and (2) requiring them to contract with an insurance provider that will offer the mandated coverage to their plan beneficiaries.

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)(4); *id.* § 54.9815-2713AT(b)(1)(ii)(B), (c)(1)(ii). "If" a nonprofit submits either document, its insurer or TPA becomes obligated and incentivized to arrange "separate" "payments for contraceptive services." *Id.* Plaintiffs' employees receive the exact same coverage, from the exact same insurer or TPA, as under the ordinary contraceptive mandate. The only difference is that, under the Nonprofit Mandate, Plaintiffs must initiate the alternative delivery process by submitting the "self-certification" or "notice."

The Nonprofit Mandate leaves no way for Plaintiffs to "provid[e] insurance coverage in accordance with their religious beliefs." *Hobby Lobby*, 134 S. Ct. at 2779. If they contract with an insurance company or TPA to provide health plans without the mandated coverage, Plaintiffs will incur penalties of $100 per day per affected beneficiary. 26 U.S.C. § 4980D(b). And if they attempt to avoid the mandate by

dropping their health plans, they will incur penalties of $2,000 per year per employee after the first thirty employees. *Id.* § 4980H(a), (c)(1). Plaintiffs, therefore, must either comply and violate their religious beliefs, or pay massive fines.

ARGUMENT

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. For the reasons detailed below, the Nonprofit Mandate fails this demanding test and therefore must be enjoined.

I. UNDER *HOBBY LOBBY*, THE NONPROFIT MANDATE IMPOSES A SUBSTANTIAL BURDEN ON RELIGIOUS EXERCISE

Under *Hobby Lobby*, there is a "substantial burden" on religious exercise whenever the Government imposes substantial pressure on religious adherents to take (or forgo) any action contrary to their sincere religious beliefs. *See* 134 S. Ct. at 2770 (explaining that the exercise of religion includes the "abstention from[] physical acts . . . for religious reasons" (citation omitted)). That test is met when the Government "demands that [plaintiffs] engage in conduct that seriously violates their religious beliefs" or suffer "substantial" consequences. *Id.* at 2775-76; *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (concluding that petitioner "easily satisfied" the substantial-burden standard where he was "put . . . to th[e] choice" of violating his beliefs or suffering "serious disciplinary action"); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) (defining "substantial burden" 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 Nonprofit Mandate substantially burdens Plaintiffs' religious exercise. Plaintiffs exercise their religion in two ways. First, Plaintiffs refuse to file the required "self-certification" or "notice" because they believe it would assist the Government in enforcing an immoral regulatory scheme. In this respect, the Government has placed Plaintiffs in a situation

akin to that faced by German Catholics in the 1990s. At the time, Germany allowed certain abortions only if the mother obtained a certificate that she had received state-mandated counseling. If the mother decided to abort her child, she had to present the certificate from her counselor to her doctor as a prerequisite. Pope John Paul II concluded that Church representatives could not act as counselors in this regulatory scheme, even where they counseled against abortion, because "the certification issued by the churches was a necessary condition for abortion." *EWTN*, 756 F.3d at 1343 (Pryor, J., concurring).

Second, Plaintiffs refuse to hire or maintain a contract with any company that will provide or procure the objectionable coverage for their plan beneficiaries, because they believe that doing so would transform their health plans into conduits for the objectionable coverage and impermissibly entangle them in sinful conduct. By way of illustration, the regulations here are akin to a law requiring all schools, on pain of substantial fines, to offer free lunches to their students. If ham sandwiches were required to be on the menu, such a law could substantially burden the religious exercise of a Jewish school. And the burden would remain even if the Government offered an "accommodation" whereby the school's lunch vendor paid for and served the sandwiches. In that scenario, the school may well object to its forced participation in the lunch program—namely, to the fact that it would have to hire and maintain a relationship with a vendor that would serve non-kosher food to its students in its facilities—even though it would not be placing the sandwiches on the students' plates. The same is true here. It makes no difference whether Plaintiffs must pay for the contraceptive coverage; what matters is that, in their religious judgment, it would be immoral for them to contract with a vendor that will provide the offending coverage to their plan beneficiaries.

Both of these refusals are "exercise[s] of religion" because they are "abstention[s] from" "physical acts" "for religious reasons." *Hobby Lobby*, 134 S. Ct. at 2770. Accordingly, the only relevant question is whether the Government is threatening to impose "substantial" consequences on Plaintiffs unless they act in violation of their religious beliefs. *Id.* at 2775-76. That issue is not in dispute. If

Plaintiffs refuse to take the actions required by the Nonprofit Mandate, they will be subject to the exact same fines at issue in *Hobby Lobby*. *See supra* pp. 4-5.

The Nonprofit Mandate thus provides a textbook example of a substantial burden on religious exercise. Just as in *Hobby Lobby*, Plaintiffs 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 Plaintiffs "do not comply" "they will pay a very heavy price." *Id.* Thus, because the Government "forces [Plaintiffs] 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.

Under RFRA, it is irrelevant that the religious exercise here (refusing to maintain an objectionable relationship and to submit objectionable documentation) is different than the religious exercise in *Hobby Lobby* (refusing to pay for contraceptive coverage). RFRA protects "'*any* exercise of religion,'" *Id.* at 2762 (emphasis added) (citation omitted). Thus, as Judge Kavanaugh recognized, forcing Plaintiffs to comply with the Nonprofit Mandate is no different than forcing religious objectors to "shav[e] [their] beard," "send[] [their] children to high school," "pay[] the Social Security tax," or "work[] on the Sabbath," all of which the Supreme Court has deemed substantial burdens. *Priests for Life*, 2015 U.S. App. LEXIS 8326, at *61 (Kavanaugh, J., dissenting). "The essential principle is crystal clear: When the Government forces someone to take an action"—any action—"contrary to his or her sincere religious belief . . . or else suffer a financial penalty . . . , the Government has substantially burdened the individual's exercise of religion." *Id.* at *62.

II. DECISIONS REJECTING CHALLENGES TO THE NONPROFIT MANDATE ARE MISTAKEN

Five circuit judges have now recognized that the Nonprofit Mandate imposes a substantial burden on religious exercise, *supra* p. 2 & n.1, and the Supreme Court has granted emergency injunctive relief to every nonprofit plaintiff that has requested it, *supra* p. 2 n.2. Nevertheless, the D.C., Third, Fifth, and Seventh Circuits have rejected

RFRA challenges to the Nonprofit Mandate.[3] Those circuits' decisions, like this panel's original decision, are based on three fundamental errors.

A. COURTS CANNOT SECOND-GUESS A SINCERE RELIGIOUS OBJECTION TO A PARTICULAR ACT

As described above, *Hobby Lobby* makes clear that courts may not second-guess a plaintiff's sincere religious belief that taking a particular action is religiously objectionable because it makes him complicit in wrongdoing. "[T]he question . . . 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." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1142 (2013) (en banc), *aff'd*, 134 S. Ct. 2751. Once plaintiffs have "'dr[a]w[n]'" a line regarding actions their faith deems impermissible, "'it is not for [courts] to say [that line is] unreasonable.'" *Hobby Lobby*, 134 S. Ct. at 2778-79 (citation omitted). Consequently, when a plaintiff exercises his religion by refusing to take a certain action for religious reasons—such as submitting a particular document or maintaining a particular contractual relationship—the only question for purposes of RFRA's "substantial burden" inquiry is whether the Government is imposing substantial pressure on the plaintiff to take the action in question. *Supra* Part I. In other words, while it is true that "[w]hether a government obligation substantially burdens the exercise of religion is a question of law," *MCC*, 755 F.3d at 385, *Hobby Lobby* makes clear that this inquiry is limited to the substantiality *of the pressure* the Government imposes on the plaintiff to violate his beliefs, 134 S. Ct. at 2775-76 (assessing the consequences of noncompliance); *Notre Dame*, 786 F.3d at 628 n.1 (Flaum, J., dissenting) ("*Hobby Lobby* instructs that once we determine a religious belief is burdened, substantiality is measured by the severity of the penalties for non-compliance").

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[3] *Wheaton Coll. v. Burwell*, No. 14-2396, 2015 U.S. App. LEXIS 11369 (7th Cir. July 1, 2015); *E. Tex. Baptist Univ. v. Burwell*, 14-20112, 2015 U.S. App. LEXIS 10513 (5th Cir. June 22, 2015); *Notre Dame*, 786 F.3d 606; *Geneva Coll. v. HHS*, 778 F.3d 422 (3d Cir. 2015); *Priests for Life v. HHS*, 772 F.3d 229 (D.C. Cir. 2014).

The courts that have found no substantial burden under the Nonprofit Mandate have all failed to grasp this basic point about how RFRA's substantial-burden analysis works and have instead decided for themselves whether a particular practice would run afoul of a plaintiff's beliefs. For example, in the case at hand, this Court's original opinion is devoid of any reference to the massive fines that will be imposed on Plaintiffs should they fail to comply with the regulations. Rather than assessing the severity of the "consequences" facing Plaintiffs if they refuse to violate their religious beliefs, *Hobby Lobby*, 134 S. Ct. at 2759, 2775-76, the panel devoted the entirety of its analysis to assessing the *actions* Plaintiffs are compelled to take. Significantly, the panel opinion does not "dispute that federal law operates to compel Plaintiffs to maintain a relationship with an issuer or TPA that will provide the contraceptive coverage and to execute the self-certification or alternative notice." *Priests for Life*, 2015 U.S. App. LEXIS 8326, at *27 (Brown, J., dissenting). Instead, it simply holds that in the panel's view, those actions do "not require[plaintiffs] to 'facilitate access to' contraceptive coverage." 755 F.3d at 387.

Other courts have applied similar reasoning. In *Geneva College*, the Third Circuit stated that it was required to "assess whether the [plaintiffs'] compliance with the [regulations] does, in fact . . . make them complicit in the provision of contraceptive coverage." 778 F.3d at 435. After conducting that inquiry, the court concluded that compliance would "not make [the plaintiffs] 'complicit' in the provision of contraceptive coverage," and indeed "relieves [them] of any connection" to the objectionable coverage. *Id.* at 438, 442. Likewise, in *Priests for Life*, the D.C. Circuit held that the Nonprofit Mandate does not impose a substantial burden because taking the required actions "do[es] not," in fact, "'facilitate contraceptive coverage." 772 F.3d at 253; *see also Wheaton*, 2015 U.S. App. LEXIS 11369, at *16-19 (questioning the college's claim of "complicity"); *E. Tex. Baptist Univ.*, 2015 U.S. App. LEXIS 10513, at *21 (holding that the Nonprofit Mandate would "not . . . facilitat[e] access to contraceptives"); *Notre Dame*, 786 F.3d at 612 (concluding that in the view of the panel majority, the Nonprofit Mandate does not "actually force[] Notre Dame to act in a way that would violate [its] beliefs").

The problem with this line of reasoning is that it fails to recognize that "[w]hat amounts to 'facilitating immoral conduct,' [or] 'scandal,' . . are inherently theological questions which objective legal analysis cannot resolve and which 'federal courts have no business addressing.'" *Priests for Life*, 2015 U.S. App. LEXIS 8326, at *29 (Brown, J., dissenting) (internal citations omitted). Whether or not a particular act "impermissibly assist[s] the commission of a wrongful act in violation of the moral doctrines of the Catholic Church," *Korte v. Sebelius*, 735 F.3d 654, 685 (7th Cir. 2013), "is not a question of legal causation but of religious faith." *Univ. of Notre Dame v. Burwell*, 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting). *Hobby Lobby* made this point clear by holding that religious plaintiffs, not courts, must determine whether a particular act is "connected to" wrongdoing "in a way that is sufficient to make it immoral." 134 S. Ct. at 2778; *see also Thomas*, 450 U.S. at 715 (holding that plaintiffs are entitled to determine whether actions they are compelled to take are "sufficiently insulated" from actions they deem immoral). Courts may not "[a]rrogat[e]" unto themselves "the authority" to "answer" that "religious and philosophical question." *Hobby Lobby*, 134 S. Ct. at 2778.

Accordingly, by claiming that compliance with the Nonprofit Mandate would not "facilitate" the provision of contraceptive coverage, these courts substituted their own moral judgment for that of plaintiffs, effectively telling them "that their beliefs are flawed." *Id.* That analysis cannot be reconciled with *Hobby Lobby*.

B. THERE IS NO "INDEPENDENT" OBLIGATION TO PROVIDE CONTRACEPTIVE COVERAGE

The courts that have rejected challenges to the Nonprofit Mandate have also relied in part on the premise that there is an "independent obligation" for the TPAs and insurers of religious objectors to provide contraceptive coverage to the religious objectors' employees, regardless of whether the religious objectors comply with the Nonprofit Mandate. *Priests for Life*, 772 F.3d at 253; *see also Wheaton*, 2015 U.S. App. LEXIS 11369, at *12-13; *E. Tex. Baptist Univ.*, 2015 U.S. App. LEXIS 10513, at *21-27 & n.36; *Geneva Coll.*, 778 F.3d at 440; *Notre Dame*, 786 F.3d at 614-15. The panel's original decision in this case suggested the same thing, stating that Plaintiffs have a

religious objection here only because they misunderstand the way the regulatory scheme "*actually works*." *MCC*, 755 F.3d at 385. That assertion is both wrong and irrelevant.

As an initial matter, the supposed "independent obligation" is irrelevant because Plaintiffs object to hiring or maintaining a relationship with any TPA or insurer that is obligated to provide the objectionable coverage to Plaintiffs' employees, regardless of how that obligation is "triggered." *Id.* at 387; *Notre Dame*, 786 F.3d at 627 (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). Thus, even if the regulatory scheme works exactly in the way the panel here originally believed, it would make no difference.

But regardless, it is mistaken to suggest that Plaintiffs' TPAs and insurers somehow have an "independent" obligation to provide the objectionable coverage to Plaintiffs' employees regardless of whether Plaintiffs comply with the Nonprofit Mandate. The law is clear that no such obligation exists *unless* Plaintiffs (a) maintain an objectionable contractual relationship with their insurers or TPAs and then (b) submit the objectionable "self-certification" or "notice."

Most obviously, if Plaintiffs stopped offering health plans, their insurers and TPAs would have no obligation whatsoever to provide Plaintiffs' beneficiaries with the objectionable coverage.[4] The Government has never suggested otherwise. It is thus undeniable that the provision of the objectionable coverage by Plaintiffs' TPAs and insurers is entirely contingent on Plaintiffs' actions. Under these circumstances, Plaintiffs believe the decision to offer health plans entangles them in wrongdoing and facilitates delivery of the objectionable coverage, thus making them complicit in sin.

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[4] 26 C.F.R. § 54.9815-2713AT(b)(2) (TPA's obligation to provide coverage arises only if it is "in a contractual relationship" with an eligible organization); *id.* § 54.9815-2713A(c)(2)(B) (issuers must provide coverage "for plan participants and beneficiaries for so long as they remain enrolled in the plan").

In addition, even once Plaintiffs decide to offer health plans, their TPAs and insurers cannot provide the objectionable coverage unless Plaintiffs invoke the "accommodation" by submitting the objectionable "self-certification" or "notice." In the self-insured context, the Government itself has *conceded* that compliance with the accommodation is necessary to "ensure[] that there is a party with legal authority" to provide the objectionable coverage, 78 Fed. Reg. at 39,880, and that a TPA's "duty" to provide such 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 13, *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-1441 (D.D.C. Nov. 22, 2013). That conclusion is unavoidable because, in the ordinary course, a TPA merely administers the health plan established by the employer—the content of that plan is determined entirely by the employer. The only way this changes is "if" an eligible organization invokes the "accommodation" by submitting the "self-certification" or "notice," which *then* triggers the TPA's obligation to "provide or arrange payments for contraceptive services." 26 C.F.R. § 54.9815-2713AT(b)(2). The unequivocally conditional language of the regulations makes clear that a TPA "bears the legal obligation to provide contraceptive coverage *only* upon receipt of a valid self-certification" or notification. *Wheaton*, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting) (emphasis added).

Moreover, all parties agree that the "accommodation" creates a unique incentive for an eligible organization's TPA to provide the objectionable coverage, because once an organization invokes the "accommodation," its TPA is eligible to be reimbursed for 115% of the cost of coverage. *See* 26 C.F.R. § 54.9815-2713AT(b)(3); 79 Fed. Reg. 13,744, 13,809 (Mar. 11, 2014). Even the Government acknowledges this incentive is available *only if* an eligible organization invokes the "accommodation." *E.g.*, 26 C.F.R. § 54.9815-2713AT(b)(3); 79 Fed. Reg. 51092, 51095 n.8 (Aug. 27, 2014).

Likewise, in the context of an insured plan, a religious organization's insurance issuer has no enforceable obligation to provide the mandated coverage unless the organization submits the self-certification or notification form. Without the form, the regulations purport to require the religious organization *itself* to pay for the

objectionable coverage, 45 C.F.R. § 147.130(a)(1)(iv), an arrangement precluded by *Hobby Lobby*. Thus, the only way the Government can require a religious objector's insurer to provide the objectionable coverage is if the objector invokes the "accommodation," which obligates the insurer to pay for the "contraceptive services." 45 C.F.R. § 147.131(c). Needless to say, Plaintiffs object *both* to paying for the objectionable coverage themselves (*Hobby Lobby*) *and* to facilitating its provision by providing the notice and maintaining a contract with the coverage provider (this case).

Ultimately, this Court need look no further than the Government's own arguments to confirm Plaintiffs' integral role in the regulatory scheme. If TPAs and insurers truly had an "independent" obligation to provide the mandated coverage to Plaintiffs' beneficiaries, then the Government could not plausibly claim that exempting Plaintiffs "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 truly "did not require anything" of Plaintiffs, *MCC*, 755 F.3d at 388, the Government could not possibly have a "compelling interest" in coercing Plaintiffs' compliance. "After all, if the form were meaningless, why would the government require it?" *Priests for Life*, 2015 U.S. App. LEXIS 8326, at *58 (Kavanaugh, J., dissenting).[5]

[5] To the extent the panel opinion's assertion that "'[f]ederal law, not the [submission of the self-certification]'" requires Plaintiffs' insurers or TPAs to provide the coverage, 755 F.3d at 387 (citation omitted), is anything beyond a restatement of the erroneous "independent obligation" theory, it too is without merit. To be sure, federal law compels an insurance company or TPA to provide contraceptive coverage to Plaintiffs' plan beneficiaries under the Nonprofit Mandate *if they are in a contractual relationship* with Plaintiffs, and *if Plaintiffs submit the self certification or notice*. But to say Plaintiffs cannot object to taking those actions is akin to suggesting that a member of the Shinto faith opposed to organ donation could be compelled to fill out an organ donor card, because "federal law" would then authorize a third party to use that card to initiate an organ transplant.

C. PLAINTIFFS OBJECT TO ACTIONS *THEY* ARE REQUIRED TO TAKE, NOT TO THE ACTIONS OF THIRD PARTIES

Relying on the Supreme Court's decisions in *Bowen v. Roy*, 476 U.S. 693 (1986) and *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), as well as the D.C. Circuit's decision in *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008), other circuits have concluded that the Nonprofit Mandate does not substantially burden plaintiffs' religious exercise because "the acts that violate [plaintiffs'] faith are those of third parties," not the acts required of plaintiffs themselves. *E. Texas Baptist Univ.*, 2015 U.S. App. LEXIS 10513, at *21; *Notre Dame*, 786 F.3d at 618; *Priests for Life*, 772 F.3d at 251; *Geneva Coll.*, 778 F.3d at 440-41. The panel here originally relied on the same premise. *See MCC*, 755 F.3d at 388. But that premise is also incorrect.

In fact, plaintiffs challenging the Nonprofit Mandate "vigorously object on religious grounds to the act[s] that the government requires *them* to perform, not merely to later acts by third parties." *E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743, 765 (S.D. Tex. 2013). Specifically, Plaintiffs here object to (1) submitting the required "self-certification" or "notice"; and (2) maintaining a contract with any company that will provide their plan beneficiaries with the mandated coverage. It is undisputed that the Nonprofit Mandate forces Plaintiffs to take exactly those actions. Thus, as Judge Brown recognized, "[m]ake no mistake: the harm Plaintiffs complain of" is "their inability to conform *their own actions* and inactions to their religious beliefs without facing massive penalties from the government." *Priests for Life*, 2015 U.S. App. LEXIS 8326, at *22 (Brown, J., dissenting) (emphasis added).

To be sure, Plaintiffs object to submitting the objectionable form and maintaining the objectionable relationship *because* they believe those actions facilitate a third party's efforts to provide or procure the mandated coverage. But the fact that a plaintiff objects to an act because it "has the effect of enabling or facilitating the commission of an immoral act by another" does not transform the plaintiff's religious objection into an objection to the actions of third parties. 134 S. Ct. at 2778. Indeed, *Hobby Lobby* rejected this very argument. *Id.* at 2799 (Ginsburg, J., dissenting) (no substantial burden due to the involvement of "independent decisionmakers"). There,

the Government contended that plaintiffs' claim failed because "the end that they f[ou]nd to be morally wrong"—"the destruction of an embryo"—would come about only as a result of actions taken by others. *Id.* at 2777 (majority op.). The Supreme Court rightly rejected that argument because it "dodge[d] the question that RFRA presents." *Id.* at 2778. Rather than deferring to the plaintiffs' belief that their compelled conduct was "connected to the destruction of an embryo in a way that [wa]s sufficient to make it immoral," the Government attacked the "reasonable[ness]" of that belief. *Id.* The courts' analysis at issue here suffers from the same flaw.

Ultimately, *Bowen*, *Lyng*, and *Kaemmerling* stand for nothing more than the proposition that an individual cannot challenge an "activit[y] of [a third party], in which [he] play[ed] *no role*." 553 F.3d at 679 (emphasis added) (government extraction of DNA from sample already in its possession); *Lyng*, 485 U.S. at 449 (government building road on public land); *Bowen*, 476 U.S. 693 (government use of Social Security number in its possession).[6] While RFRA confers no right to challenge the conduct of third parties, that is simply not what Plaintiffs are doing in this case. It is undisputed that the Nonprofit Mandate "compels [*Plaintiffs*] to act," *EWTN*, 756 F.3d at 1348 (Pryor, J., concurring), by forcing them to submit the "self-certification" or "notice" and to maintain a contractual relationship with a company that will provide contraceptive coverage to Plaintiffs' employees. And it is equally undisputed that taking those actions would violate Plaintiffs' sincere religious beliefs. In that scenario,

[6] In fact, *Bowen* itself instructs that religious objections to administrative tasks such as the filing of paperwork fall within the scope of protected exercise of religion. The plaintiffs in that case objected not only to the Government's *use* of their daughter's Social Security number (to which the Court held they could not object), but also to the separate requirement that *plaintiffs themselves* submit a form containing their daughter's Social Security number in order for her to receive benefits. 476 U.S. at 701-12 & n.7 (opinion of Burger, C.J.). While the Court did not rule on the second question due to a dispute over mootness, "five justices . . . expressed the view that the plaintiffs *were entitled* to an exemption from [that second,] administrative requirement." *Notre Dame*, 743 F.3d at 566 (Flaum, J., dissenting) (internal quotation marks and citation omitted).

a court has "no choice but to decide that compelling [Plaintiffs'] participation" in the regulatory scheme "is a substantial burden on [their] religious exercise." *Id.*

III. *HOBBY LOBBY* SHOWS THAT THE NONPROFIT MANDATE CANNOT SATISFY STRICT SCRUTINY

Because Plaintiffs have shown a substantial burden on their religious exercise, the "burden is placed squarely on the Government" to show that the Nonprofit Mandate satisfies strict scrutiny. *Gonzales v. O Centro Espírita*, 546 U.S. 418, 429-31(2006). *Hobby Lobby*, however, establishes that the Government cannot bear that burden.

A. Adding Plaintiffs to the Long List of Exempt Entities Would Not Undercut Any Compelling Interest

Hobby Lobby explains that under RFRA, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] 'the particular claimant whose sincere exercise of religion is being substantially burdened.'" 134 S. Ct. at 2779 (citation omitted). "This requires [courts] to 'loo[k] beyond broadly formulated interests' and to 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants'—in other words, to look to the marginal interest in enforcing the contraceptive mandate in [a particular] case[]." *Id.* (citation omitted).

Here, the Government has proffered two purportedly compelling interests in (1) "public health" and (2) "ensuring that women have equal access to health care." 78 Fed. Reg. at 39,872; CDN-RE41, PageID#801-05. But *Hobby Lobby* rejected these "very broadly framed" interests, explaining that RFRA "contemplates a 'more focused' inquiry." 134 S. Ct. at 2779. The fact that the Government asserted nothing more than these same interests here should end the compelling interest inquiry.

In any event, as *Hobby Lobby* suggested, it is difficult to see how enforcing the contraceptive mandate is necessary to protect an interest of the "highest order," given that it already contains numerous exemptions that leave millions of women without

cost-free contraceptive coverage. *See id.* at 2780-81. The Supreme 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 O Centro*, 546 U.S. at 433. And here, the Government has already granted exemptions for "grandfathered" plans and plans sponsored by qualifying "religious employers," which are free to exercise their religion by contracting with insurers that will not provide contraceptive coverage. *Hobby Lobby*, 134 S. Ct. at 2779-80, 2783.

Any attempt to diminish the significance of these exemptions cannot withstand even cursory scrutiny. As the Supreme 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 Plaintiffs. Indeed the Government 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 contraceptive mandate is expressly excluded from this subset." *Id.* (quoting 75 Fed. Reg. 34,538, 34,540 (June 17, 2010)).

As for the "religious employer" exemption, the Government's decision to fully exempt an artificial category of entities—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 Plaintiffs, who actually do have religious objections. *Id.* at 2777 n.33. The Government 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" Plaintiffs, who are equally religious nonprofit groups. *O Centro*, 546 U.S. at 433.

B. 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 using Plaintiffs' 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).

The Government cannot do that here because "[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." *Hobby Lobby* 134 S. Ct. at 2780. "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. This could be accomplished by adjusting the eligibility requirements of the Title X family planning program, Medicaid, or any number of other federal programs that already provide cost-free contraceptives to women. *Cf. Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012). Indeed, nothing prevents the Government from allowing employees of religious objectors to purchase subsidized coverage (either for contraceptives alone, or full plans) on the network of insurance exchanges it has established under the Affordable Care Act.

The Government has never offered any evidence to show why these "alternative[s]" are not "viable." *Hobby Lobby*, 134 S. Ct. at 2780. Even if the Government attempted to shoulder its burden, it would not be able to meet this test. For example, the Government cannot plausibly assert that the cost of providing

contraceptive coverage independently of religious objectors would be prohibitive as it has already committed to paying TPAs 115% of their costs under the Nonprofit Mandate. 79 Fed. Reg. at 13,809. And regardless, if "providing all women with cost-free access to [contraceptives] is a Government interest of the highest order, it is hard to understand [an] argument that [the Government] cannot be required . . . to pay *anything* in order to achieve this important goal." *Hobby Lobby*, 134 S. Ct. at 2781.

In other cases, the Government has insisted that conscription of plaintiffs' health plans is necessary to ensure "seamless[]" provision of coverage to their beneficiaries. *Priests for Life*, 772 F.3d at 265. The D.C. Circuit agreed. Citing ipse dixit statements in the Federal Register, that court concluded that using *any* means to deliver contraceptive coverage apart from the employer-based plans of religious objectors would be unworkable because "[i]mposing even minor added steps would dissuade women from obtaining contraceptives." *Id.* at 265 (citing 78 Fed. Reg. at 39,888). In other words, the D.C. Circuit held that the Government could force plaintiffs 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 D.C. Circuit's rationale 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 *more conveniently*.

Whatever may be said for this interest, it cannot 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. *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. 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 contraceptive coverage, and thereby exclude Catholic nonprofits from offering employee health coverage.

Finally, any suggestion that *Hobby Lobby* definitively endorsed the "accommodation" is badly mistaken. In fact, the Court expressly did "not decide" that question. 134 S. Ct. at 2782. Instead, the Court simply found the accommodation *less* restrictive than requiring plaintiffs to *pay for* contraceptives, in the context of a challenge brought by plaintiffs who *did not object* to complying with the Nonprofit Mandate. *See id.* at 2782 n.40; *id.* at 2786 (Kennedy, J., concurring) (noting that "the plaintiffs have not criticized [the Nonprofit Mandate] with a specific objection"). While the Nonprofit Mandate may "effectively exempt[]" such plaintiffs, *id.* at 2763, it does not "effectively" exempt Plaintiffs here, who *do* object. Indeed, if there was ever any suggestion that *Hobby Lobby* somehow blessed the accommodation, the Court dispelled that notion by entering an injunction against the Nonprofit Mandate in *Wheaton*, 134 S. Ct. 2806, and then again in *Zubik*, 2015 U.S. LEXIS 4479. Far from foreclosing challenges to the Nonprofit Mandate, the dissenters in *Wheaton* stated that this injunction "entitle[d] hundreds or thousands of other [nonprofits]" to relief. *Wheaton*, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting).

Very truly yours,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 13, 2015, I filed the foregoing Supplemental Letter Brief with this Court through the CM/ECF system, which then served it upon all counsel of record.

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