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No. ________

In the
Supreme Court of the United States

SOUTHERN NAZARENE UNIVERSITY, et al.,
Petitioners,

v.

SYLVIA MATHEWS BURWELL, et al.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014), this Court held that the application of federal regulations implementing the Patient Protection and Affordable Care Act of 2010 ("ACA") to compel certain for-profit religious employers to provide health-insurance coverage for all FDA-approved contraceptives, *see* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) (the "Mandate"), violated the Religious Freedom Restoration Act ("RFRA"). The government offers nonprofit religious employers an alternative means of complying with the Mandate that involves submitting a form that includes all FDA-approved contraceptives in or under the auspices of employers' healthcare plans.

Petitioners, four religious universities, object as a matter of conscience to facilitating contraception that may prevent the implantation of a human embryo in the womb, and brought suit seeking relief from the Mandate under RFRA. The decision below rejected their claims, ruling that RFRA's substantial burden analysis turns on courts' secular assessment of the time, cost, and energy involved in complying with the Mandate, not Petitioners' religious view of the required action's moral significance.

The question presented is:

Whether the alternative means for nonprofit religious employers to comply with the ACA's contraceptive-coverage Mandate alters *Hobby Lobby's* substantial-burden analysis or identification of a free exercise violation under RFRA.

PARTIES TO THE PROCEEDING

Petitioners, who were Plaintiffs below, are Southern Nazarene University; Oklahoma Wesleyan University; Oklahoma Baptist University; and Mid-America Christian University.

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.

CORPORATE DISCLOSURE STATEMENT

All Petitioners are nonprofit religious corporations. No Petitioner has a parent corporation. No publicly held corporation owns any portion of any of Petitioners.

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INTRODUCTION

Petitioners, four religious universities, object as a matter of conscience to facilitating four contraceptives that they believe can destroy human life. Regulations promulgated under the ACA, however, compel employers with more than fifty full-time employees to provide health-insurance coverage and compel most kinds of group insurance plans to cover FDA-approved contraceptives that may prevent the implantation of a fertilized egg. The government provides an alternative means of complying with the Mandate for religious nonprofits, but it involves executing and submitting a form that includes these objectionable contraceptives in or under the auspices of their health plans.

Although the government argues that executing and submitting the so-called "accommodation" form insulates religious nonprofits from the provision of abortifacient contraceptives, that is not the case. This permission slip directly involves Petitioners in providing objectionable contraceptives in multiple ways by, for example: (1) altering their health plans to allow for the provision of abortifacients, (2) requiring them to notify or identify for the government their insurers or third party administrators ("TPA") so that they can provide abortifacients on Petitioners' behalf, (3) officially authorizing their TPA as a plan and claims administrator solely for the purpose of providing abortifacients, and (4) requiring them to identify and contract with a TPA willing to provide the abortifacients to which they religiously object.

The form is thus far more than a notification of Petitioners' religious objection to abortifacient contraceptives; it legally and practically serves to bring the provision of those contraceptives about. Below, the court of appeals failed to appreciate this fact or the binding nature of this Court's substantial-burden analysis in *Hobby Lobby*. It consequently denied Petitioners' RFRA claim and those of a number of other religious nonprofit groups.

This case presents the "specific [religious] objection" to the government's accommodation scheme, "considered in detail by the courts" below, that *Hobby Lobby* lacked. *Id.* at 2786 (Kennedy, J, concurring). Both the enforceability of the ACA and the scope of RFRA are at stake. Religious nonprofits urgently need this Court's guidance, and this case is a clean vehicle for clarifying free exercise law. Further review by this Court is warranted.

DECISIONS BELOW

The panel opinion of the court of appeals is not yet reported but is available at No. 13-1540, 2015 WL 4232096 (10th Cir. July 14, 2015), and reprinted in Pet. App. at 1a-155a. The district court's opinion is not reported but is available at No. CIV-13-1015-F, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013), and reprinted in Pet. App. at 156a-184a.

JURISDICTION

The Tenth Circuit's judgment was entered on July 14, 2015. Pet. App. 185a-193a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY AND REGULATORY PROVISIONS

The Religious Freedom Restoration Act of 1993 provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb–1(a), unless "it demonstrates that the application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest," 42 U.S.C. § 2000bb–1(b).

"[T]he term 'exercise of religion' means religious exercise, as defined in section 2000cc–5 of this title." 42 U.S.C. § 2000bb–2(4). "The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc–5(7). "Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb–3(b).

The Patient Protection and Affordable Care Act of 2010 states, in relevant part, that "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for ... (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services

Administration for purposes of this paragraph." 42 U.S.C. § 300gg–13(a)&(a)(4).

The following pertinent provisions are reproduced in the Petition Appendix ("Pet. App.") at 185a-237a: 42 U.S.C. §§ 2000bb-1, 2000bb-2, 2000cc-5, 300gg-13(a); 26 U.S.C. §§ 4980D, 4980H; 26 C.F.R. § 54.9815-2713AT; 29 C.F.R. § 2510.3-16; 29 C.F.R. § 2590.715-2713A; 45 C.F.R. § 147.131.

STATEMENT OF THE CASE

I. Factual Background

Petitioners Southern Nazarene University ("SNU"), Oklahoma Wesleyan University ("OKWU"), Oklahoma Baptist University ("OBU"), and Mid-America Christian University ("MACU) (collectively, the "Universities") are religious institutions of higher learning. The Universities require anyone seeking entry into and participation in their communities to hold certain Christian beliefs, including respect for the dignity and worth of human life from the moment of conception. Pet. App. 168a. The Universities' mission includes promoting their members' spiritual maturity by fostering obedience to, and love for, their understanding of God's laws, including condemnation of the taking of innocent human life. Pet. App. 167a.

As a matter of religious conviction, the Universities believe that it is sinful and immoral for them to participate in, facilitate, enable, or otherwise support access to abortion-inducing drugs and devices, and related counseling. Pet. App. 158a. They hold that the Ten Commandments' rule "thou

shalt not murder" prevents Christians from facilitating or enabling the use of drugs or devices that are capable of preventing the implantation of a fertilized egg. Pet. App. 158a. The Universities believe that engaging in such sinful behavior has a detrimental impact on their fundamental relationships with God. Pet. App. 167a. The government does not contest the sincerity of their religious beliefs. Pet. App. 57 n.24 & 60a.

Here, the Universities' religious objection to the Mandate is limited to facilitating or enabling access to Plan B (the "morning after pill"), ella (the "week after pill"), certain IUDs, and related counseling— the same items objected to in *Hobby Lobby*. Pet. App. 158a; 134 S. Ct. at 2765-66. The Universities do not object to covering the other sixteen, FDA-approved methods of birth control. *See Hobby Lobby*, 134 S. Ct. at 2766. They simply object, on religious grounds to including in, or enabling in connection with, their health plans drugs or devices—either directly under the Mandate or through the government's alternative-compliance mechanism— that may stop the implantation of fertilized eggs and thus have an abortifacient effect. Pet. App. 158a; *see also Hobby Lobby*, 134 S. Ct. at 2762 (recognizing that four FDA-approved contraceptives may inhibit an egg's "attachment to the uterus").

The Universities believe that they have a religious duty to care for their members' physical well-being by providing generous health insurance benefits. Pet. App. 158a. SNU and MACU have self-insured employee plans. Pet. App. 36a. MACU provides insurance to its employees through the

ERISA-exempt GuideStone church plan. *Id.* OKWU and OBU have insured employee plans. *Id.* SNU and OBU also have insured student plans. *Id.* Consistent with their religious beliefs, all of the Universities' current healthcare plans exclude the four methods of FDA-approved contraceptives that may have an abortifacient effect. Pet. App. 159a, 160a, 161a.

The Mandate prohibits the Universities from continuing to provide health plans that comport with their religious beliefs. Instead, they are faced with four untenable options: (1) include abortifacient coverage in their health plans in compliance with the Mandate and violate their religious faith, (2) violate the Mandate and incur penalties of $100 per day for each affected individual, (3) discontinue all health plan coverage, violate their religious beliefs, and pay $2,000 per year per employee (after the first thirty), or (4) self-certify their religious objection to the Mandate, which then includes abortifacient coverage in or under the auspices of their health plans in violation of their beliefs. Pet. App. 166a-167a.

The spiritual cost of violating the Universities' religious beliefs and participating in the provision of drugs and items they reasonably believe to have an abortifacient effect is incalculable. But the ruinous financial penalties the Universities would incur by violating the Mandate are not. Annually, refusing to comply with the Mandate would subject the Universities to fines totaling over $30 million: $11,497,000 for SNU, $4,088,000 for OKWU, $9,818,500 for OBU, and $5,073,500 for MACU. Br. of the Appellees 3, 23-24, 10th Cir. Case, No. 14-

6026. Dropping health insurance altogether would not only violate the Universities' religious beliefs, drive up costs, and seriously compromise the Universities' competitiveness in the marketplace, but also result in collective annual fines totaling almost $1.5 million: $570,000 for SNU, $164,000 for OKWU, $478,000 for OBU, and $218,000 for MACU. *Id.*; *Hobby Lobby*, 134 S. Ct. at 2776-77.

II. Regulatory Background

In 2010, Congress passed the ACA. PUB. L. NO. 111–148, 124 Stat. 119 (2010). The ACA mandates that many health-insurance plans cover preventive care and screenings without requiring recipients to share the costs. 42 U.S.C. § 300gg–13(a)(4). Though Congress did not require contraceptive coverage in the ACA's text, the Department of Health and Human Services incorporated guidelines formulated by the private Institute of Medicine (IOM) into its preventive-care regulations. *See Hobby* Lobby, 134 S. Ct. at 2762. The IOM guidelines mandate that Petitioners include all FDA-approved contraceptives, sterilization procedures, and related counseling in their healthcare plan. *See id.*

The government's Mandate scheme makes enrollment in group health plans a prerequisite to the provision of objectionable contraceptives. Individuals have no right to contraceptive coverage under the Mandate absent group plan enrollment. *See* 29 C.F.R. § 2590.715-2713A(d) (explaining that contraceptives are available only "so long as [beneficiaries] are enrolled in [a] group health plan").

Employers that violate the Mandate face lawsuits under ERISA and fines of up to $100 per plan participant per day. 29 U.S.C. § 1132; 26 U.S.C. § 4980D; *Hobby Lobby*, 134 S. Ct. at 2762. These fines would quickly destroy the Universities' religious ministries and the hundreds of jobs that go with them, even though all members of the Universities' communities share their beliefs and opposition to the four forms of contraception in question. Pet. App. 168a.

The government completely exempts thousands of religious orders and churches and their integrated auxiliaries from the Mandate for exactly this reason, but it refuses to extend this "religious employer" exemption to Petitioners and other religious nonprofits. 78 Fed. Reg. 39,870, 39,874 (July 2, 2013); (opining that churches "are more likely than other employers to employ people of the same faith who share the same objection"). Religious entities that meet the government's narrow definition of a "religious employer" are not required to take any action to obtain an exemption from the Mandate. 45 C.F.R. § 147.131(a). Nor are these entities required to object to providing contraceptive coverage in connection with their healthcare plans. They simply exist outside of the Mandate's bounds.

The government exempts thousands of non-religious employers from the Mandate as well. Employers that hire fewer than fifty employees are not required to provide health insurance at all, and thus can avoid compliance with the Mandate that way. 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d). This is true despite the fact that such

small businesses employ approximately 34 million people. *Hobby Lobby*, 134 S. Ct. at 2764.

Employers with certain grandfathered healthcare plans that have only changed minimally since 2010 are also exempt from the Mandate. 42 U.S.C. § 18011; *see also Hobby Lobby*, 134 S. Ct. at 2763-64. Roughly 46 million people are enrolled in these healthcare plans. HHS, ASPE Data Point, *The Affordable Care Act is Improving Access to Preventive Services for Millions of Americans* 3 (May 14, 2015), *available at* http://aspe.hhs.gov/health/reports/2015/Prevention/ib_Prevention.pdf (last visited July 23, 2015). And "there is no legal requirement that grandfathered plans ever be phased out." *Hobby Lobby*, 134 S. Ct. at 2764 n.10.

Rather than exempting religious nonprofits from the Mandate as it did thousands of other religious and nonreligious organizations, the government created an alternative method of compliance with the Mandate. This so-called "accommodation" is merely a substitute form of compliance with the Mandate. *See* 45 C.F.R. § 147.131(c)(1) (noting that "an eligible organization ... complies with any requirement ... to provide contraceptive coverage if [it] furnishes a copy of the self-certification" to its insurance issuer); 78 Fed. Reg. 39,870, 39,879 (July 2, 2013) (explaining that "an eligible organization" that fulfills the alternative method of compliance "is considered to comply with section 2713 of the PHS Act"). Importantly, the government does not exempt religious nonprofits from the Mandate's scope as it does churches, their integrated auxiliaries, and even many for-profit employers.

If a religious organization with an insured or self-insured group health plan (1) has religious objections to providing some or all contraceptives required by the Mandate, (2) is organized and operates as a nonprofit entity, (3) holds itself out as a religious organization, and (4) self-certifies that it meets the first three criteria, it is eligible for this alternate means of compliance. *Id.* at 39,874-80. The self-certification requirement can be accomplished in two ways but both methods have the same result. *See* Dep't of Labor, EBSA Form 700, *available at* http://www.dol.gov/ebsa/healthreform/regulations/coverageofpreventiveservices.html (last visited July 23, 2015) (recognizing that the "form or a notice to the Secretary [becomes] an instrument under which the plan is operated").

First, a religious nonprofit may complete the Employee Benefits Security Administration's Form 700 ("EBSA Form 700" or the "Form") and provide the Form to its health insurance issuer, for insured plans, or TPA, for self-insured plans. *Id.* The Form clarifies that TPAs then bear a new burden to provide contraceptive coverage without cost sharing to religious nonprofits' plan beneficiaries if they voluntarily decide to continue administrating services for religious nonprofits' self-insured healthcare plans. *Id.*; *see also* 26 C.F.R. § 54.9815-2713A; 29 C.F.R. § 2510.3-16; 29 C.F.R. § 2590.715-2713A.

Second, a religious nonprofit may mail or email the U.S. Department of Health and Human Services ("HHS") a notice that it objects to providing some or all contraceptive services required by the Mandate

(the "Notice"). 79 Fed. Reg. 51,092, 51,094-95 (Aug. 27, 2014). This notice must contain (a) the name of the organization and the basis on which it qualifies for an accommodation, (b) a description of its objection based on sincerely held religious beliefs to providing coverage of some or all contraceptives, (c) the name and type of group health plan it possesses, and (d) the name and contact information for its health insurance issuers or TPAs. *Id.* at 51,094-95. HHS then sends a notification to the religious nonprofits' insurers and/or TPAs on their behalf informing the insurers and/or TPAs of their new "obligations" to provide contraceptive coverage to plan participants. *Id.* at 51,095; 29 C.F.R. § 2510.3-16(b).

Both alternative methods of compliance with the Mandate have significant legal and practical effects. Legally speaking, they alter a nonprofit religious organization's health plan and become "an instrument under which that plan is operated." EBSA Form 700. For self-insured plans, submitting either the Form or Notice serves as a special designation of a religious nonprofits' TPA as "plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39,879; 29 C.F.R. § 2510.3-16(b)&(c). This written delegation is essential to "ensure[] that there is a party with legal authority" under ERISA to pay for contraceptive services under religious nonprofits' self-funded health care plans. 78 Fed. Reg. at 39,880; *see also* 29 U.S.C. § 1102(a)(1) (requiring, that self-funded health plans be modified in writing).

Practically speaking, religious nonprofits with self-insured plans normally pay their own claims. Only by virtue of a religious nonprofit's submission of the Form or Notice does a TPA become obligated and possess the authority to pay for abortifacient contraceptives that violate the organization's religious beliefs. 45 C.F.R. § 156.50(d)(1)-(3). Furthermore, the government incentivizes TPAs to continue servicing nonprofit religious organizations' health plans by reimbursing them at a rate of 115% of their costs. *Id.*

But if a religious nonprofit's existing TPA is unwilling to provide contraceptives to plan participants on their behalf, the TPA may decline to service their self-insured plans. 26 C.F.R. § 54.9815-2713A; 29 C.F.R. § 2510.3-16; 29 C.F.R. § 2590.715-2713A. In this situation, government regulations force a religious nonprofit to seek out a TPA that is willing to provide the very abortifacient contraceptives that violate its faith. *See* 78 Fed. Reg. at 39,880 (imposing no obligation on TPAs "to enter into or remain in a contract with" an objecting religious organization); 26 C.F.R. § 54.9815-2713AT(b)(1)(i) (requiring that a self-insured organization "contract[] with one or more third party administrators" to qualify for the alternative mechanism for complying with the Mandate).

The practical ramifications of executing and submitting the Form or Notice are equally significant in regard to insured plans. Under this Court's holding in *Hobby Lobby*, the government may not apply the Mandate to force closely-held for-profit religious employers or nonprofit religious

employers to cover religiously-objectionable contraceptives in their health plans. *See* 134 S. Ct. at 2785 ("[U]nder the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful"). The government's only means of Mandate enforcement against religious nonprofits is thus via the alternative methods of compliance outlined above. Absent the government's imposition of a Form or Notice requirement to ensure Mandate compliance, religious nonprofits would be as free as churches (and many secular employers) to offer health plans that comply with their religious beliefs and do not facilitate the provision of contraceptives with abortifacient effects.

III. Proceedings Below

Petitioners filed suit in the U.S. District Court for the Western District of Oklahoma, challenging the application of the Mandate under RFRA and seeking preliminary injunctive relief. They moved for a preliminary injunction before their health plans were set to renew in 2014. Pet. App. 159a, 160a, 161a.

The district court granted Petitioners' request for a preliminary injunction and enjoined and restrained Respondents "from any effort to apply or enforce, as to [Petitioners], the substantive requirements imposed by 42 U.S.C. § 300gg-13(a)(4) ... or the self-certification regulations related thereto, or any penalties, fines or assessments related thereto, until the further order of the court." Pet. App. 184a. It reasoned, like this Court in *Hobby Lobby*, that "[i]f the [religious] belief is sincere and

the pressure to violate that belief is substantial, the substantial burden test is satisfied." Pet. App. 176a.

Accordingly, the district court held that the Mandate imposed a substantial burden on Petitioners' free exercise of religion because the self-certification "is, in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects." Pet. App. 177a. It identified an impermissible "Hobson's Choice" under the regulatory scheme because, on one hand, "[i]f the institution does not sign the permission slip, it is subject to very substantial penalties or other serious consequences." *Id.* On the other hand, "[i]f the institution does sign the permission slip, and only if the institution signs the permission slip, [the] institution's insurer or third party administrator is obligated to provide the free products and services to the plan beneficiary." *Id.*

The district court squarely rejected the government's "belittling" argument that self-certification is simply "signing a piece of paper" as such logic is "belied by too many tragic historical episodes" to deserve credence. Pet. App. 177a. It explained that the substantial burden analysis under *Hobby Lobby* focuses "on the pressure exerted [on religious belief], not on the onerousness of the physical act that might result from yielding to that pressure." Pet. App. 176a. After all, "RFRA undeniably focuses on violation of conscience, not on physical acts." Pet. App. 177a. Because Petitioners faced "a choice of either acquiescing in a

government-enforced betrayal of sincerely held religious beliefs, or incurring potentially ruinous financial penalties, or electing other equally ruinous courses of action," the district court determined not only that the application of the Mandate burdened their religious beliefs, but also that this "burden [was] substantial." Pet. App. 178a.

Respondents appealed. The court of appeals subsequently consolidated the Universities' case with two other challenges to the Mandate filed by nonprofit religious groups.[1] A divided panel of the court of appeals then reversed the district court's grant of a preliminary injunction to the Universities. Pet. App. 121a-122a. The panel majority held that the alternative mechanism of compliance with the Mandate for religious nonprofits does not impose a substantial burden on Petitioners' insured or self-insured health plans.

Rather than asking whether the Mandate imposed substantial pressure on Petitioners not to follow their religious beliefs, which the government conceded are sincere, the panel majority inquired "how the law or policy being challenged actually operates and affects religious exercise." Pet. App. 57a. But the panel majority largely sidestepped

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[1] The court of appeals consolidated the Universities' case with that of Little Sisters of the Poor, Little Sisters of the Poor Home for the Aged, Christian Brothers Services, and Christian Brothers Employee Benefit Trust, as well as that of Reaching Souls International, Inc., Truett-McConnell College, Inc., and GuideStone Financial Resources of the Southern Baptist Convention. None of these additional organizations are parties to this petition for writ of certiorari.

considering how the alternative means of complying with the Mandate operates in practice and instead focused on the supposed "purpose of religious accommodation." Pet. App. 77a.

According to the panel majority, the purpose of religious accommodation is not to provide exemptions that relieve burdens on objectors' sincerely held beliefs but "to permit the religious objector both to avoid a religious burden and to comply with the law." Pet. App. 77a. The panel majority consequently held that if Petitioners "wish to avail themselves of ... an accommodation ... to be excused from compliance with [the Mandate], they cannot rely on the possibility of their violating [the Mandate] to challenge the accommodation." *Id.*

The panel majority thus insulated the alternative mechanism for complying with the Mandate from RFRA scrutiny by holding that the very "point of an accommodation" is "shifting a responsibility from an objector to a non-objector." Pet. App. 78a. Regardless of Petitioners' central role in causing not only that legal shift, but also the real-world provision of objectionable contraceptives, which even the panel majority acknowledged in the self-insured contexts amounts to but-for causation, Pet. App. 69a, the court declined to consider Petitioners' RFRA claim. It held instead that Petitioners "fail[e]d to establish any burden on [their] religious exercise," Pet. App. 66a, because it viewed the provision of objectionable contraceptives—in some overarching sense—as not attributable to any private actor but to "the framework established by federal law," Pet. App.

73a. *See also* Pet. App. 81a ("Opting out does not cause the coverage itself; federal law does ....").

The panel majority also dismissed any consideration of Petitioners' sincere religious beliefs and the substantial fines the Mandate imposes for sticking by them because it considered the Universities to have "misstate[d] their role in the accommodation scheme." Pet. App. 90a. It held that "RFRA does not require us to defer to [Petitioners'] erroneous view about the operation of the ACA and its implementing regulations." *Id.* The correct view, according to the panel majority, is that "[h]aving to file paperwork or otherwise register a religious objection ... does not alone substantially burden religious exercise." Pet. App. 92a.

Petitioners' religious view of "the moral significance of their involvement" with this paperwork was irrelevant to the panel majority. Pet. App. 98a. It concluded that only secular costs matter for purposes of RFRA's substantial burden analysis, such as "the time, cost, or energy required to comply" with the alternative mechanism for Mandate compliance. Pet. App. 97a-98a. Because the estimated cost of preparing and providing the Form or Notice amounted to "'approximately 50 minutes for each eligible organization with an equivalent cost burden of approximately $53.00,'" the panel majority concluded that no substantial burden exists. Pet. App. 98a n.49 (quoting 79 Fed. Reg. at 51,097).

Judge Baldock dissented in part. He recognized that "[s]everal learned judges have argued

compellingly that, under ... *Hobby Lobby* ..., the amount of coercion the government uses to force a religious adherent to perform an act she sincerely believes is inconsistent with her understanding of her religion's requirements is the only consideration relevant to whether a burden is 'substantial' under RFRA." Pet. App. 128a. But, in order to show "an even deeper problem lurking within the self-insured accommodation scheme," he assumed that a burden on religious exercise is not substantial unless Petitioners could show "how their compelled act causes that coverage." Pet. App. 130a.

Because "the self-insured accommodation renders any duty to provide, and any entitled to receive, contraceptive coverage wholly unenforceable and thus illusory—unless and until the self-insured plaintiffs opt out," Judge Baldock concluded that the self-insured plaintiffs had established but-for causation. Pet. App. 135a. He recognized that "*Hobby Lobby* forbids the government placing [the Mandate directly] on the nonprofits themselves. So if opting out is necessarily a but-for cause of someone else providing the coverage, it is necessarily a but-for cause of providing the coverage *at all*." Pet. App. 136a. And he questioned how the panel majority could "concede[] but-for cause and then turn[] around and den[y] the existence of any causation." Pet. App. 137a.

Judge Baldock thus concluded that, even applying the majority's standard, "the accommodation foists upon the self-insured plaintiffs a Hobson's choice and thus a substantial burden on their exercise of religion." Pet. App. 139a. In his

view, this Court's orders in *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 134 S. Ct. 1022 (2014), *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), and *Zubik v. Burwell*, No. 14A1065, __ S. Ct. __, 2015 WL 3947586 (June 29, 2015), which "do not require religious non-profits to identify related third parties for the government" establish a "less-restrictive means of facilitating access to contraception." Pet. App. 148a. Hence, Judge Baldock concluded that "the current accommodation scheme" for self-insured religious nonprofits was "doom[ed] ... under strict scrutiny." Pet. App. 149a n.64.

REASONS FOR GRANTING THE WRIT

This Court demonstrated significant regard for the crisis of conscience religious nonprofits face in light of the Mandate in *Little Sisters*, *Wheaton College*, and *Zubik*. The courts of appeals, including the Tenth Circuit below, have failed to do likewise. Instead, they have disregarded the Court's teachings in *Hobby Lobby* concerning RFRA's substantial-burden analysis and substituted their own moral judgments regarding the Mandate's significance for those of sincere religious objectors. This Court's intervention is needed to restore the balance and ensure that RFRA provides the "very broad protection for religious liberty" that Congress intended. *Hobby Lobby*, 134 S. Ct. at 2760.

I. Whether the Mandate's Application to Religious Nonprofits Violates RFRA is a Question of Exceptional Importance.

Petitioners and hundreds of religious nonprofits like them claim the right to provide health insurance to their employees without including or facilitating the provision of contraceptives to which they religiously object. This is similar to the question this Court granted review to decide in *Hobby Lobby*, which asked whether the government could "demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners." 134 S. Ct. at 2759. This Court held "that the HHS mandate is unlawful" as applied to those for-profit entities. *Id.* Whether RFRA grants religious nonprofits this right is an "important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R. 10(c); *see Hobby Lobby*, 134 S. Ct. at 2782 (reserving the question of whether the government's alternative compliance mechanism for nonprofits "complies with RFRA for purposes of all religious claims").

Religious nonprofits' moral crisis results from the government's decision not to exempt them from the Mandate. Instead, the government exempted only a small subset of religious employers that consists of religious orders, churches, and their integrated auxiliaries. 78 Fed. Reg. at 39,874; 26 C.F.R. § 1.6033-2(h). The government's rationale for providing this narrow exemption is that churches and like organizations "that object[] to contraceptive coverage on religious grounds are more likely than

other [religious] employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874.

This unsubstantiated assertion fails to account for religious universities, like Petitioners, whose community members subscribe to the same beliefs and thus share the same religious objections. As a result, some religious nonprofit employers (*e.g.*, integrated auxiliaries of churches, some of which are educational institutions) are completely exempt from the Mandate, whereas other similarly-situated religious nonprofit employers are not (*e.g.*, religious universities). *See Hobby Lobby*, 134 S. Ct. at 2777 n.33 (recognizing that "churches[] that have the very same religious objections" as Petitioners are exempt from the Mandate); *id.* at 2786 (Kennedy, J., concurring) ("RFRA is inconsistent with ... an agency such as HHS ... distinguishing between different religious believers ... when it may treat both equally"); *Larson v. Valente*, 456 U.S. 228, 246 (1982) (prohibiting "favoritism among sects"); *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (recognizing the dangers of "preferring some religious groups over" others).

Most religious employers accordingly faced a crisis of conscience after the Mandate took effect and their health plans were set to renew. The Mandate precludes religious employers like Petitioners from keeping their existing health plans, which comply with their religious beliefs and do not include or facilitate the provision of objectionable

contraceptives. What remains are four untenable options: (1) comply with the Mandate directly by offering health plans that include abortifacients, (2) comply with the Mandate through the alternative compliance mechanism, which includes abortifacients in or under the auspices of religious nonprofits' health plans, (3) refuse to comply with the Mandate and offer health plans that exclude abortifacients and incur $100-per-employer-per-day fines, or (4) drop health coverage altogether and incur annual fines of $2,000 per employee (after the first thirty).

The first and second options equally violate Petitioners' religious beliefs because the Mandate makes it impossible for them to provide health care and avoid providing abortifacient contraceptives in or under the auspices of their health plans. Pet. App. 167a; *cf. Hobby Lobby*, 134 S. Ct. at 2759 ("If the owners comply with the HHS mandate, they believe they will be facilitating abortions ...."). As the district court recognized, the self-certification "is, in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects." Pet. App. 177a. Religious nonprofits with sincere religious objections to facilitating abortifacient contraceptives, like Petitioners, cannot sign that permission slip and comply with their faith.

By requiring religious nonprofits to sign the self-certification anyway, the government exerts substantial pressure on Petitioners to forego three

singular forms of religious exercise: (a) the religious duty to live out their belief in the dignity of human life by providing health insurance to their members, (b) the religious duty to advance their members' spiritual maturity by fostering obedience to God's commands, including the ban on taking innocent human life, and (c) the religious duty to avoid materially cooperating with sinful behavior or immoral conduct. Pet. App. 158a. 167a-168a.

Although the third option is not religiously objectionable, the Mandate renders it financially impossible. Religious employers that are subject to the Mandate incur $100 per-employee-per-day fines for refusing to provide abortifacient contraceptives. This penalty would result in Petitioners incurring annual collective fines totaling more than $30 million, a ruinous sum that would quickly force the Universities to shut their doors. Br. of the Appellees 3, 23, 10th Cir. Case, No. 14-6026; *cf. Hobby Lobby*, 134 S. Ct. at 2775-76 (recognizing that fines for violating the Mandate ranging from $15 to $475 million per year "are surely substantial").

The fourth option is both religiously objectionable and financially implausible. It would deny Petitioners the ability to fulfill their religious obligation to live out their beliefs concerning the value of human life by providing health care to their members. Pet. App. 158a; *cf. Hobby Lobby*, 134 S. Ct. at 2776 ("[T]he Hahns and Greens and their companies have religious reasons for providing health-insurance coverage for their employees."). Moreover, it would subject Petitioners to collective fines totaling almost $1.5 million annually, Br. of the

Appellees 3, 24, 10th Cir. Case, No. 14-6026, and put them at "a competitive disadvantage" in the marketplace by forcing employees to obtain their own health insurance, which is generally more expensive than participating in a group health plan, *Hobby Lobby*, 134 S. Ct. at 2777. It would also lead to an increase in employees' salaries designed to defray the costs of individual health plans, but any such payment would have to account for employees' increased exposure to personal income tax. *Id.*

Whether RFRA allows the government to force religious nonprofits, like Petitioners, to choose one of these untenable options is a question of exceptional importance. Our nation was founded on freedom of religion and Congress mandated that RFRA "'be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the [statute's terms] and the Constitution.'" *Id.* at 2762 (quoting 42 U.S.C. § 2000cc-3(g)). This Court should decide whether religious nonprofits' claim to freedom to offer health insurance in accordance with their faith exceeds these expansive bounds.

The question is particularly important in the context of the ACA, one of the most sweeping and intrusive federal laws ever enacted. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2649 (2012) (joint dissent) (noting the threat the individual mandate posed to "our constitutional order" by subjecting "*all* private conduct (including failure to act) ... to federal control"). As this Court recognized in *Hobby Lobby*, the Mandate raises important concerns over the power of the ACA to trump even the most fundamental of rights. It

would be incongruous for this Court to consider the religious freedom of for-profit corporations like Hobby Lobby and Conestoga Wood but leave religious nonprofit corporations like Petitioners without recourse.

Critically, the Mandate is already in effect, imposing fines and lawsuits on plans that offer employee coverage but omit required items. 26 U.S.C. § 4980D ($100/plan participant/day fines); 29 U.S.C. § 1132 (government lawsuits). More than a hundred religious nonprofits have filed over fifty cases seeking relief from the religious coercion that flows from the Mandate.[2] Religious nonprofits urgently need the Court to settle this Term whether RFRA exempts them from the Mandate or whether they are legally prohibited from "striving for a self-definition shaped by their religious precepts." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring).

II. The Court of Appeals' Substantial-Burden Analysis Conflicts with *Hobby Lobby.*

This Court's review is also warranted because the court of appeals conducted its substantial-burden analysis under RFRA in a manner "that [squarely] conflicts with" *Hobby Lobby*. SUP. CT. R. 10(c). In that case, this Court considered "whether the challenged HHS regulations substantially burden[ed] the exercise of religion" and held "that they do." *Hobby Lobby*, 134 S. Ct. at 2759. Religious objectors in *Hobby Lobby* sincerely believed that "[i]f

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[2] *See* Becket Fund for Religious Liberty, *HHS Mandate Information Central, available at* http://www.becketfund.org/hhsinformationcentral/ (last visited July 23, 2015).

[they] compl[ied] with the HHS mandate, ... they [would] be facilitating abortions, and if they [did] not comply, they [would] pay a very heavy price" in the form of ruinous fines. *Id.* This Court reasoned that "[i]f these consequences do not amount to a substantial burden, it is hard to see what would." *Id.*

No daylight exists between *Hobby Lobby* and the present case.[3] Petitioners, like the religious objectors in *Hobby Lobby*, believe that by complying with the Mandate either directly or through the alternative mechanism for compliance they would be facilitating abortions. Pet. App. 167a; *cf. Hobby Lobby*, 134 S. Ct. at 2775 ("[T]he HHS mandate demands that [religious objectors] engage in conduct that seriously violates their religious beliefs."). The sincerity of those religious beliefs is uncontested. Pet. App. 57 n.24 & 60a; *cf. Hobby Lobby*, 134 S. Ct. at 2779 (noting "HHS [did] not question [the religious objectors'] sincerity"). If Petitioners refuse to comply with the Mandate, they will incur the same ruinous annual fines, ranging from $4,088,000 for OWU to $11,497,000 for SNU. Br. of the Appellees 3, 23, 10th Cir. Case, No. 14-6026; *cf. Hobby Lobby*, 134 S. Ct. at 2775-76 (noting the

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[3] Notably, this Court has twice granted review, vacated judgments against religious nonprofits challenging the Mandate, and remanded these cases to lower courts for reconsideration in light of *Hobby Lobby* because there was a "reasonable probability" that those decisions rest on "a premise" that should now be "reject[ed]." *Lawrence ex rel. Lawrence v. Charter*, 516 U.S. 163, 167 (1996); *see Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015); *Mich. Catholic Conference v. Burwell*, 135 S. Ct. 1914 (2015).

religious objectors faced $15 to $475 million in annual fines).

As in *Hobby Lobby*, by requiring Petitioners to comply with the Mandate, "HHS ... demands that they engage in conduct that seriously violates their religious beliefs." *Id.* at 2775. This Court's holding that RFRA's substantial-burden standard is readily satisfied under these circumstances thus applies in full force. *Id.* at 2759. The court of appeals evaded this straightforward conclusion by accepting arguments that are indistinguishable from those *Hobby Lobby* rejected.

The government in *Hobby Lobby* sought to preclude relief from the Mandate under RFRA by arguing that "the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated." *Id.* at 2777. But this Court recognized that such an "argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)." *Id.* at 2778.

The court of appeals adopted this attenuation argument below under the guise of determining "how the law or policy being challenged actually operates

and affects religious exercise," Pet. App. 57a, and thus answered the wrong question under RFRA. Pinning the consequences of the Mandate on "federal law" and dismissing Petitioners' religious understanding of "their role" in the Mandate scheme, Pet. App. 73a, 90a, is simply shorthand for the government's argument in *Hobby Lobby* that facilitating the provision of objectionable contraceptive "coverage would not itself result in the destruction of an embryo." 134 S. Ct. at 2777. But this Court made clear in *Hobby Lobby* that RFRA's substantial-burden standard is not a but-for causation test. *See id.* at 2779 ("[T]he Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial.").

Petitioners, like the religious objectors in *Hobby Lobby*, believe that complying with the Mandate "is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide [health] coverage." *Id.* at 2778. Answering this "difficult and important question of religion and moral philosophy" with one "binding national answer" and telling Petitioners "that their [religious] beliefs are flawed," as this Court explained in *Hobby Lobby*, is not a job for HHS or the courts. *Id.* The only relevant question under RFRA is whether Petitioners' asserted religious beliefs "reflect 'an honest conviction' and there is no dispute that it does." *Id.* at 2779 (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981)). Under *Hobby Lobby*, "[b]ecause the contraceptive

mandate forces [Petitioners] to pay an enormous sum of money ... if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs." *Id.*

Though RFRA does not require that religious objectors draw a moral line that is "'[]reasonable,'" *id.* at 2778 (quoting *Thomas*, 450 U.S. at 715), Petitioners' religious objections surely are. The government's Mandate scheme makes enrollment in their health plans a prerequisite to the provision of objectionable contraceptives. Members have no right to contraceptive coverage absent plan enrollment. *See* 29 C.F.R. § 2590.715-2713A(d) (explaining that contraceptives are available only "so long as [beneficiaries] are enrolled in [a religious nonprofits'] group health plan"). Absent an exemption from the Mandate, Petitioners' decision to provide group health insurance thus causes an entitlement to abortifacient contraceptives that violate their faith.

In addition, fulfilling the alternate form of compliance with the Mandate by submitting the Form or Notice makes either document "an instrument under which [a health plan] is operated" and thus changes Petitioners' health plans. EBSA Form 700. For religious nonprofits like SNU and MACU that have self-insured employee plans, the Form or Notice officially designates their TPA as a special "plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39,879; 29 C.F.R. § 2510.3-16(b)&(c). If SNU and MACU refuse to

submit the Form or Notice, no party has "legal authority" to pay for objectionable contraceptive on their behalf. 78 Fed. Reg. at 39,880. SNU's and MACU's execution and submission of the Form or Notice thus fundamentally changes their health plans and directly causes the provision of abortifacient contraceptives to their employees. It is not difficult to see why forcing SNU and MACU to authorize an agent to provide abortifacients on their behalf would seriously violate their religious beliefs, particularly when even the government agrees that these abortifacients would be otherwise unavailable.

Religious nonprofits with self-insured health plans also normally pay their own claims. Only executing and signing the Form or Notice gives SNU's and MACU's TPAs authority to pay for drugs and items (*i.e.*, religiously objectionable forms of abortifacient contraceptives) on their behalf. 45 C.F.R. § 156.50(d)(1)-(3). The Form or Notice thus requires SNU and MACU to alter their contracts with their TPAs and fundamentally change the nature of these relationships to provide the abortifacients to which they religiously object. Rather than simply giving notice of SNU's and MACU's religious beliefs, the Form or Notice works contractual changes that authorize the TPAs to violate them on SNU's and MACU's behalf.

Moreover, if SNU's and MACU's TPAs ever prove unwilling to provide abortifacient contraceptives on their behalf, the government's regulations require SNU and MACU to hire TPAs that will. 78 Fed. Reg. at 39,880; 26 C.F.R. § 54.9815-2713AT(b)(1)(i). In these circumstances,

forcing SNU and MACU to seek out third parties to engage in what they regard as sinful behavior on their behalf is obviously a severe burden on their exercise of religious faith. And it renders SNU and MACU complicit in the provision of abortifacient contraceptives in the clearest sense.

Executing and submitting the Form or Notice is not less significant for religious nonprofits like OKWU and OBU that have insured employee plans. Under this Court's holding in *Hobby Lobby*, RFRA precludes the government from applying the Mandate directly to religious nonprofit employers. *See* 134 S. Ct. at 2785 ("[U]nder the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful."). The government's only functional means of providing abortifacient contraceptives to OKWU's and OBU's employees is thus compelling them to submit the Form to their insurance issuers or the Notice to HHS. Either action requires OKWU and OBU to facilitate the provision of otherwise unavailable abortifacients to its employees by identifying related third parties for the government.

In this way, the Form or Notice functions as "a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from [OKWU's and OBU's] insurer ..., to the products to which [they] object." Pet. App. 177a. Requiring OKWU and OBU to facilitate the provision of abortifacient contraceptives to their employees in this manner understandably burdens their religious beliefs. They are, after all, religious nonprofits who absent the Mandate would be free to scrupulously follow the

moral convictions on which they were founded. And this Court has made clear that even an "indirect consequence" of a law can amount to a "substantial burden" on objectors' free exercise of religion. *Thomas*, 450 U.S. at 717.

The Tenth Circuit was thus wrong to hold that the Mandate does not substantially burden Petitioners' free exercise of religion. As a number of esteemed court of appeals judges have recognized, *Hobby Lobby* compels the opposite conclusion. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5368, slip op. at 17-22 (D.C. Cir. May 20, 2015) (Brown, J., dissenting from denial of rehearing en banc, joined by Henderson, J.); *id.* at 35 (Kavanaugh, J., dissenting from denial of rehearing en banc); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 628 (7th Cir. 2015) (Flaum, J., dissenting); *Eternal Word Television Network, Inc. v. Sec'y, Dep't of Health & Human Servs.*, 756 F.3d 1339, 1340 (11th Cir. 2014) (Pryor, J. specially concurring). This Court's review is needed to realign the courts of appeals with *Hobby Lobby* and restore the "very broad protection for religious liberty" that Congress intended in enacting RFRA.[4] 134 S. Ct. at 2767.

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[4] Recognizing that the Mandate substantially burdens Petitioners' free exercise of religion would plainly invalidate its application to them under RFRA. "The least-restrictive-means standard is exceptionally demanding." *Hobby Lobby*, 134 S. Ct. at 2781, and the government has "many ways to increase access to free contraception without doing damage to the religious liberty rights of conscientious objectors." *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013). Perhaps "[t]he most straightforward way of doing this would be for the [g]overnment to assume the cost of providing the four

III. This Case is a Clean Vehicle.

This case presents an ideal vehicle for resolving the question presented. The relevant facts have never been disputed by either side, and no judge below suggested any deficiencies in the record. All the elements of a RFRA claim were briefed and argued below. The court of appeals' decision below definitively resolved the RFRA claim against Petitioners and left nothing to be determined on remand. Though the Tenth Circuit affirmed the denial of a preliminary injunction, its legal ruling on the merits forecloses Petitioners' pursuit of their RFRA claim as a matter of law.

In addition, because the various Petitioners sponsor different kinds of health plans, this case would enable the Court to address a number of scenarios in a single case.

Insured Plans: Oklahoma Baptist University and Oklahoma Wesleyan University offer insured plans to their employees.

Self-insured Plans: Southern Nazarene University offers a self-insured plan to its employees.

Self-insured Church Plan: Mid-America Christian University offers employee health benefits through a self-insured church plan provided by

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contraceptives at issue," *Hobby Lobby*, 134 S. Ct. at 2780, by providing subsidized contraceptive coverage for employees of religious objectors on government health care exchanges.

GuideStone Financial Resources of the Southern Baptist Convention.

Student plans: Southern Nazarene University and Oklahoma Baptist University offer student health plans. *See* 45 C.F.R. § 147.145. Student plans, like church plans, are not subject to ERISA.

Although Petitioners contend that application of the Mandate to *all* these types of health plans substantially burdens their sponsors' religious exercise, both the Tenth Circuit majority and partial dissent distinguished among them in conducting their RFRA analysis. Pet. App. 66a-88a, 132a-139a. The accommodation's alternative compliance mechanism operates differently with respect to various plan types. *See supra* Part II. Consequently, granting review in a case that does not involve a variety of health plan types risks leaving the claims of certain categories of religious nonprofits unresolved.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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