No. _____

IN THE

Supreme Court of the United States

UNIVERSITY OF NOTRE DAME,

Petitioner,

v.

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

Respondents,

v.

JANE DOE 1, JANE DOE 2, AND JANE DOE 3,

Intervenors.

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

PETITION FOR WRIT OF CERTIORARI

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October 3, 2014

QUESTION PRESENTED

In this case, the lower courts declined to protect the University of Notre Dame du Lac from being forced to violate its religious beliefs by participating in a regulatory scheme to provide its employees and students with coverage for abortion-inducing products, contraceptives, and sterilization. Subsequently, this Court struck down those regulations (the "Mandate") as applied to several for-profit corporations under the Religious Freedom Restoration Act (RFRA). *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). Days later, this Court entered an injunction pending appeal for a nonprofit plaintiff challenging the regulations at issue here (the "accommodation"). *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014). And shortly after that, the Government tacitly acknowledged that its regulations could not pass muster under RFRA and accordingly revised them for the seventh time. 79 Fed. Reg. 51,092, 51,092 (Aug. 27, 2014).

The question presented is whether the judgment below should be vacated and the case remanded for further consideration in light of *Hobby Lobby* and *Wheaton*.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, who was the Plaintiff below, is the University of Notre Dame. Petitioner does not have a parent corporation. No publicly held corporation owns any portion of the Petitioner, and the Petitioner is not a subsidiary or an affiliate of any publicly owned corporation.

Respondents, who were Defendants below, are Sylvia Mathews Burwell, in her official capacity as Secretary of the United States Department of Health and Human Services; the United States Department of Health and Human Services; Thomas E. Perez, in his official capacity as Secretary of the United States Department of Labor; the United States Department of Labor; Jacob J. Lew, in his official capacity as Secretary of the United States Department of the Treasury; and the United States Department of the Treasury.

Intervenors, who were initially permitted to intervene by the appellate court, are proceeding anonymously as Jane Doe 1, Jane Doe 2, and Jane Doe 3.

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PETITION FOR WRIT OF CERTIORARI

Petitioner University of Notre Dame respectfully petitions this Court to grant certiorari, vacate the judgment of the United States Court of Appeals for the Seventh Circuit, and remand for further consideration in light of this Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and its subsequent order in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014).

OPINIONS BELOW

The district court's opinion and order denying Petitioner's motion for a preliminary injunction (Pet. App. 1a-46a) is reported at 988 F. Supp. 2d 912. The district court's subsequent denial of Petitioner's motion for an injunction pending appeal (Pet. App. 47a-49a), as well as the Seventh Circuit's refusal to grant similar relief (Pet. App. 50a-52a) are unreported. The Seventh Circuit's opinion affirming the district court (Pet. App. 53a-98a) is reported at 743 F.3d 547. The Seventh Circuit's order denying Notre Dame's petition for rehearing en banc (Pet. App. 99a-100a) is unreported.

JURISDICTION

The judgment of the Seventh Circuit was entered on February 21, 2014. Pet. App. 53a-98a. That court denied rehearing en banc on May 7, 2014. Pet. App. 99a-100a. This Court issued an order extending the time to file a petition for certiorari until October 4, 2014, on June 16, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following provisions are reproduced in Appendix H (Pet. App. 128a-183a): 42 U.S.C.

§§ 2000bb-1, 2000bb-2, 2000cc-5, 300gg-13; 26 U.S.C. §§ 4980D, 4980H; 26 C.F.R. §§ 54.9815-2713, 54.9815-2713A, 54.9815-2713AT; 29 C.F.R. §§ 2510.3-16; 2590.715-2713, 2590.715-2713A; 45 C.F.R. §§ 147.130, 147.131.

STATEMENT OF THE CASE

A. The Mandate

Under the auspices of the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 300gg-13(a)(4), the Government enacted a Mandate requiring group health plans to cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," HRSA, Women's Preventive Services, http://www.hrsa.gov/womensguidelines (last visited Oct. 1, 2014); *see* 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv). FDA-approved contraceptive methods and sterilization procedures include intrauterine devices (IUDs), the morning-after pill (Plan B), and Ulipristal (Ella), all of which can induce an abortion. *See* Comments of U.S. Conference of Catholic Bishops (Mar. 20, 2013), http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf. If an employer's health plan does not include the required coverage, the employer is subject to penalties of $100 per day per affected beneficiary. 26 U.S.C. § 4980D(b). Dropping employee health coverage likewise subjects employers with more than fifty employees to penalties of $2,000 per year per employee after the first thirty employees. *Id.* § 4980H(a), (c)(1).

1. Exemptions from the Mandate

From its inception, the Mandate exempted numerous health plans covering millions of people. For example, certain plans in existence at the time of the ACA's adoption are "grandfathered" and exempt from the Mandate. 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g)(1)(v). Indeed, as of the end of 2013, by the Government's own estimates, over 90 million individuals participated in health plans excluded from the scope of the Mandate. 75 Fed. Reg. 34,538, 34,552-53 (June 17, 2010); *Geneva Coll. v. Sebelius*, 941 F. Supp. 2d 672, 684 & n.12 (W.D. Pa. 2013).

Acknowledging the burden the Mandate places on religious exercise, the Government also created an exemption for plans sponsored by so-called "religious employers." Under this exemption, religious employers are permitted to offer conscience-compliant employee health coverage through an insurance company or TPA that will not provide coverage for FDA-approved contraception. That exemption, however, 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); *see also* 77 Fed. Reg. 8725, 8727-28, 8730 (Feb. 15, 2012). For religious entities such as Notre Dame that do not qualify as a "house of worship," there is no exemption from the Mandate.

Despite sustained criticism, the Government refused to expand this "religious employer" exemption. *See* 45 C.F.R. § 147.131(a); 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013). Instead, it devised an inaptly named "accommodation" for nonexempt

religious organizations, which went into effect "for plan years beginning on or after January 1, 2014." 78 Fed. Reg. 39,870, 39,871 (July 2, 2013). Unlike the exemption, the "accommodation" does not allow religious objectors to provide conscience-compliant employee health coverage. Instead it forces them to contract with a third party that *will* provide coverage for FDA-approved contraception. After this Court temporarily enjoined enforcement of the "accommodation" under RFRA, the Government revised its regulations yet again, but still refused to expand the "religious employer" exemption. *See* 79 Fed. Reg. 51,092, 51,092 (Aug. 27, 2014).

2. The "Accommodation," as Revised

To be eligible for the "accommodation," an entity must (1) "oppose[] providing coverage for some or all of [the] contraceptive services"; (2) be "organized and operate[] as a nonprofit entity"; (3) "hold[] itself out as a religious organization"; and (4) self-certify that it meets the first three criteria. 26 C.F.R. § 54.9815-2713A(a)(1)-(4). If an organization meets these criteria and wishes to avail itself of the "accommodation," it must either provide a "self-certification" directly to its insurance company or TPA, *id.* § 54.9815-2713A(a)(4), or, under newly-issued regulations, provide a notice to the Secretary of Health and Human Services stating its objection to providing contraceptive coverage based on sincerely held religious beliefs. This latter notice must include 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." *Id.* § 54.9815-2713AT(b)(1)(ii)(B), (c)(1)(ii).

The ultimate effect of either form of compliance is the same. If an "eligible organization" submits the self-certification form, its insurance company or TPA becomes authorized, obligated, and incentivized to arrange "payments for contraceptive services" for beneficiaries enrolled in the organization's health plan. *See id.* § 54.9815-2713A(a)-(c). If the organization instead submits the notice to the Government, the Government will use the contact information provided by the eligible organization to "send a separate notification" to the organization's insurance company or TPA "describing the[ir] obligations" under the accommodation. *Id.* § 54.9815-2713AT(b)(1)(ii)(B), (c)(1)(ii). In either scenario, payments for contraceptive coverage are available only "so long as [beneficiaries] are enrolled in [the organization's] health plan." 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B).

For organizations that offer self-insured health plans, such as Notre Dame, the accommodation has additional implications. Both the self-certification form and the notification provided by the Government upon receipt of the eligible organization's submission "designat[e] . . . the [organization's TPA] as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879. In fact, the Government concedes that "'in the self-insured [context], . . . the contraceptive coverage is part of the [self-insured organization's health] plan.'" *Roman Catholic Archbishop of Wash. v. Sebelius* ("*RCAW*"), No. 13-1441, 2013 WL 6729515, at *22 (D.D.C. Dec. 20, 2013) (citation and alteration omitted); 29 C.F.R. § 2510.3-16(b) (stating that the certification or the Government's notification to the TPA are

"instrument[s] under which the plan is operated"). Moreover, TPAs are under no obligation "to enter into or remain in a contract with the eligible organization." 78 Fed. Reg. at 39,880. Consequently, religious organizations must either maintain a contractual relationship with a TPA that will provide the objectionable coverage to their plan beneficiaries, or else find and contract with a TPA willing to do so. The accommodation further provides an incentive for TPAs to provide the mandated coverage by making them eligible to be reimbursed for the full cost of coverage plus fifteen percent. *See* 45 C.F.R. § 156.50; 79 Fed. Reg. 13,744, 13,809 (Mar. 11, 2014).

Under the accommodation, religious organizations must take actions that they believe make them complicit in the delivery of the very coverage they find objectionable: They must maintain an objectionable insurance relationship and submit a notice or self-certification that obligates, authorizes, and incentivizes their own TPA or insurance company to provide contraceptive coverage to their plan beneficiaries. The self-certification and notice to the Government are, "in effect, . . . permission slip[s] which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or [TPA], to the products to which the institution objects." *S. Nazarene Univ. v. Sebelius*, No. Civ-13-1015-F, 2013 WL 6804265, at *8 (W.D. Okla. Dec. 23, 2013). "If the institution does not sign the permission slip, it is subject to very substantial penalties or other serious consequences." *Id.* "If the institution does sign the permission slip, and only if the institution signs the permission slip, [the] institution's insurer or [TPA] is obligated to

provide the free products and services to the plan beneficiary." *Id.*

B. Notre Dame

Notre Dame is an academic community of higher learning, organized as an independent, national Catholic research university. Pet. App. 102a-103a. Despite the University's avowedly religious mission, the Government does not consider the University an exempt "religious employer."

Notre Dame offers health coverage to eligible employees through a series of self-insured health plans. Pet. App. 107a-108a. Notre Dame's self-insured health plans are administered by a TPA, Meritain Health, Inc. Pet. App. 107a. Notre Dame also offers health insurance to its students through a fully insured student health plan provided by Aetna, Inc. Pet. App. 107a.

Notre Dame strives to provide health coverage for its students and employees in a manner consistent with its Catholic faith. Among other things, Notre Dame's religious beliefs prohibit it from impermissibly facilitating immoral conduct and require it to avoid "scandal," which in the theological context is defined as encouraging by words or example other persons to engage in wrongdoing. Pet. App. 104a-106a. In particular, Notre Dame believes that it may not pay for, facilitate access to, and/or become entangled in the provision of coverage for abortion-inducing products, contraception, and sterilization, including by contracting with a third party that is obligated, authorized, or incentivized to provide or procure the objectionable coverage for its plan beneficiaries. *See* Pet. App. 104a-106a, 110a-118a.

Left with no alternative to avoid violating its beliefs, Notre Dame filed suit on December 3, 2013. On December 20, 2013, the district court denied the University's request for a preliminary injunction. Notre Dame sought an injunction pending appeal the same day, which the district court also denied. Notre Dame immediately filed a notice of interlocutory appeal, and sought an injunction pending appeal from the Seventh Circuit on December 23. That motion was denied on December 30. With its employer plan set to begin on January 1, Notre Dame was forced to choose between potentially ruinous fines and compliance with the Mandate. On December 31, Notre Dame submitted the self-certification (while noting on the form that it did so under protest), thereby violating its religious beliefs under duress. The Seventh Circuit affirmed on February 21, 2014, and joined Intervenors as parties. Notre Dame sought rehearing en banc, but its petition was denied on May 7, 2014. The sole basis for the Seventh Circuit's RFRA holding was that the regulations did not impose a "substantial burden" on Notre Dame's exercise of religion.

C. *Hobby Lobby*

On June 30, 2014, almost two months after the Seventh Circuit denied Notre Dame's petition for rehearing en banc, this Court issued its decision in *Hobby Lobby*. There, this Court held that RFRA prohibited the Government from enforcing the Mandate against for-profit companies who asserted that complying with those regulations would violate their religious beliefs. This Court gave a concise explanation for why the Mandate substantially burdened the plaintiffs' exercise of religion: "If the

[plaintiffs] comply with the [regulations], they believe they will be facilitating abortions [in violation of their religious beliefs], and if they do not comply, they will pay a very heavy price—as much as $1.3 million per day . . . . If these consequences do not amount to a substantial burden, it is hard to see what would." 134 S. Ct. at 2759. *Hobby Lobby* thus held that a "substantial burden" on religious exercise arises when the Government "demands" that entities either (1) "engage in conduct that seriously violates their religious beliefs" or else (2) suffer "substantial" economic consequences. *Id.* at 2775-76.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit's "substantial burden" analysis is irreconcilable with this Court's decision in *Hobby Lobby,* which the Seventh Circuit had no opportunity to consider. The regulations at issue in this litigation—the so-called "accommodation" for nonprofit religious organizations—put Notre Dame to the exact choice that was put to the plaintiffs in *Hobby Lobby*. There is no dispute that Notre Dame sincerely believes it cannot, consistent with its religious beliefs, (a) hire or maintain a contractual relationship with any company authorized to provide contraceptive coverage to the beneficiaries enrolled in the University's health plans; or (b) submit the self-certification or notice required under the "accommodation." There is also no dispute that refusal to take these actions would subject Notre Dame to crippling consequences. Just as in *Hobby Lobby*, Notre Dame believes that if it "compl[ies] with the [regulations]," "[it] will be facilitating" immoral conduct in violation of its religious beliefs. 134 S. Ct. at 2759. And just as in *Hobby Lobby*, if the

University "do[es] not comply, [it] will pay a very heavy price." *Id.*

Faced with this impossible choice, the University sought relief from the courts, but its requests were rebuffed, in both the district court and the Seventh Circuit. In the wake of *Hobby Lobby* and *Wheaton*, it is apparent that the lower courts here were in error. While *Hobby Lobby* shows that RFRA requires courts to assess the "*consequences*" of noncompliance, i.e., the pressure placed on plaintiffs to violate their beliefs, 134 S. Ct. at 2759, 2775-76 (emphasis added), the Seventh Circuit focused instead on the *actions* Notre Dame was compelled to take, Pet App. 66a ("[s]igning the form and mailing it . . . could have taken no more than five minutes"). And while *Hobby Lobby* squarely held that it is left to plaintiffs to determine whether an act "is connected" to illicit conduct "in a way that is sufficient to make it immoral," 134 S. Ct. at 2798 (citation omitted), the Seventh Circuit confidently assured the University that the accommodation allowed it to "wash[] its hands of any involvement in contraceptive coverage," Pet. App. 72a.

Accordingly, Notre Dame respectfully requests that this Court grant certiorari, vacate the opinion of the Seventh Circuit, and remand ("GVR") the case for further consideration in light of *Hobby Lobby* and *Wheaton*. This Court often takes such action when subsequent authority is "sufficiently analogous and, perhaps, decisive to compel re-examination of the case," *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964), or where that authority creates a "'reasonable probability' that the Court of Appeals would reject a legal premise on which it relied and which may affect

the outcome of the litigation." *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) (quoting *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)); *Thomas v. Am. Home Prods., Inc.*, 519 U.S. 913, 915 (1996) (Scalia, J., concurring) (discussing Court's "routine[]" practice of GVR-ing even "'unimportant'" cases to allow consideration of intervening precedent). For reasons discussed below, this Court's decisions in *Hobby Lobby* and *Wheaton* "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence*, 516 U.S. at 167.

Moreover, as this Court is well aware, there are numerous cases pending throughout the country considering the validity of the accommodation. To date, courts have awarded injunctions in every case but this one, and the matter pending before the Sixth Circuit.[1] A GVR is particularly appropriate here, as

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[1] *See Wheaton*, 134 S. Ct. 2806; *Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs. ("EWTN"),* 756 F.3d 1339 (11th Cir. 2014); *Diocese of Cheyenne v. Burwell*, No. 14-8040 (10th Cir. June 30, 2014) (Doc. 27); *Archdiocese of St. Louis v. Burwell*, No. 4:13-CV-2300, 2014 WL 2945859 (E.D. Mo. June 30, 2014); *Brandt v. Burwell*, No. 14-CV-0681, 2014 WL 2808910 (W.D. Pa. June 20, 2014); *Colo. Christian Univ. v. Sebelius*, No. 13-CV-02105, 2014 WL 2804038 (D. Colo. June 20, 2014); *Catholic Benefits Ass'n v. Sebelius*, No. CIV-14-240-R, 2014 WL 2522357 (W.D. Okla. June 4, 2014); *Dordt Coll. v. Sebelius*, No. 5:13-cv-04100-MWB, 2014 WL 2115252 (N.D. Iowa May 21, 2014); *Fellowship of Catholic Univ. Students v. Sebelius*, No. 1:13-cv-03263 (D. Colo. Apr. 23, 2014) (Docs. 39, 40); *Dobson v. Sebelius*, No. 13-cv-03326, 2014 WL 1571967 (D. Colo. Apr. 17, 2014); *Roman Catholic Archdiocese of Atlanta v. Sebelius*, No. 1:12-CV-03489, 2014 WL 1256373 (N.D. Ga. Mar. 26, 2014), on reconsideration in part, 2014 WL 2441767 (N.D. Ga. May 30, 2014); *Ave Maria Found. v. Sebelius*,

the Seventh Circuit is the only court to have ruled on the merits of the accommodation without having the opportunity to consider the relevance of *Hobby Lobby* and *Wheaton*.[2]

(continued…)

991 F. Supp. 2d 957 (E.D. Mich. 2014); *Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-709, 2014 WL 31652 (E.D. Tex. Jan. 2, 2014); *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-314 (N.D. Tex. Dec. 31, 2013) (Doc. 99); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12 CV 92, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013); *Diocese of Fort Wayne-S. Bend, Inc. v. Sebelius*, 988 F. Supp. 2d 958 (N.D. Ind. 2013); *Grace Schs. v. Sebelius*, 988 F. Supp. 2d 935 (N.D. Ind. 2013); *E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743 (S.D. Tex. 2013); *S. Nazarene Univ.*, No. CIV-13-1015, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); *Geneva Coll. v. Sebelius*, 988 F. Supp. 2d (W.D. Pa. 2013); *Reaching Souls Int'l, Inc. v Sebelius*, No. 13-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Legatus v. Sebelius*, 988 F. Supp 2d 794 (E.D. Mich. 2013); *Roman Catholic Archdiocese of N.Y. v. Sebelius ("RCNY")*, 987 F. Supp. 2d 232 (E.D.N.Y. 2013); *Zubik v. Sebelius*, 983 F. Supp. 2d 576 (W.D. Pa. 2013); *Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13-cv-2611, 2013 WL 6839900 (D. Colo. Dec. 27, 2013), *injunction pending appeal granted*, 134 S. Ct. 1022 (Jan. 24, 2014) (mem.); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013), *injunction pending appeal granted*, No. 13-5368 (D.C. Cir. Dec. 31, 2013); *RCAW*, 2013 WL 6729515, *injunction pending appeal granted*, No. 13-5371 (D.C. Cir. Dec. 31, 2013). *But see Mich. Catholic Conf. v. Burwell* ("*MCC*"), 755 F.3d 372 (6th Cir. 2014).

[2] The Sixth Circuit had the opportunity to consider those decisions on a petition for rehearing en banc.

I. THE SEVENTH CIRCUIT'S DECISION CANNOT BE RECONCILED WITH *HOBBY LOBBY* AND *WHEATON*

The Seventh Circuit denied Notre Dame injunctive relief by applying a version of the "substantial burden" test that cannot be reconciled with *Hobby Lobby*. Rather than assessing the severity or substantiality of the "consequences" that would be imposed on Notre Dame if it refused to violate its religious beliefs, *Hobby Lobby*, 134 S. Ct. at 2759, 2775-76, the court below "purport[ed] to resolve the religious question underlying th[is] case[]: Does [complying with the regulations] impermissibly assist 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), *cert. denied*, 134 S. Ct. 2903 (2014). The Seventh Circuit's answer was "no," but "[n]o civil authority can decide that question." *Id.* Because the Seventh Circuit concluded that the regulations did not impose a "substantial burden" on Notre Dame's religious beliefs, it did not address the subsequent question of whether the regulations survived strict scrutiny.

After *Hobby Lobby*, the Seventh Circuit's focus on the *actions* the University must take to comply with the accommodation, rather than the severity of the *consequences* of noncompliance, was plainly erroneous. Rather than (a) accepting Notre Dame's undisputed assertion that self-certification would violate its religious beliefs and then (b) asking whether the Mandate substantially pressured Notre Dame to take that action, the Seventh Circuit reasoned that self-certification could not be a "substantial" burden because "[t]he form is two pages

long," and "[s]igning the form and mailing it . . . could have taken no more than five minutes." Pet. App. 66a. It added that while Notre Dame may believe "signing [its] name and mailing the signed form to two addresses" constitutes a substantial burden, "substantiality . . . is for the court to decide." Pet. App. 74a.

While "substantiality" is indeed a question for the courts, *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). There is no independent requirement that the act in question involve substantial physical exertion; to the contrary, RFRA protects "any exercise of religion." *Id.* at 2792 (citation omitted). The reason for this approach is obvious: what may seem like an "administrative" burden to a court may mean much more to a believer. Pet. App. 92a (Flaum, J., dissenting) (noting that in *Bowen v. Roy*, 476 U.S. 693 (1986), "five justices . . . expressed the view that the plaintiffs *were entitled* to an exemption from an analogous administrative requirement" that they submit a form containing their daughter's social security number (citation omitted)). Courts have no competence to determine whether a particular action violates a plaintiff's religious beliefs: instead, they must accept a plaintiff's "'honest conviction'" that what the Government is pressuring him to do conflicts with his religion. 134 S. Ct. at 2779.

Contrary to *Hobby Lobby's* clear command, the Seventh Circuit chose to conduct a lengthy analysis of whether Notre Dame was correct in its assertion

that the actions it must take to comply with the accommodation would "make[] the university an accomplice in the provision of contraception, in violation of Catholic doctrine." Pet. App. 66a. The Seventh Circuit failed to appreciate that whether a particular action makes the University complicit in the provision of contraceptive coverage is a *religious* judgment, rooted in Catholic teachings regarding the permissible degree of entanglement in illicit conduct. Pet. App. 92a (Flaum, J., dissenting) (noting that the objection is based not on principles "of legal causation but of religious faith"). As *Hobby Lobby* confirms, courts may not "[a]rrogat[e]" unto themselves "the authority" to "answer" the "religious and philosophical question" of "the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." 134 S. Ct. at 2778. Like the plaintiffs in *Hobby Lobby*, if Notre Dame does as the Government demands, it "believe[s] [it] will be facilitating" immoral conduct, *id.* at 2759, "and it is not for [courts] to say that [its] religious beliefs are mistaken or insubstantial," *id.* at 2779.

The Seventh Circuit's claim that it is "[f]ederal law, not the religious organization's signing and mailing the [self-certification] form," which "requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services" was both wrong and irrelevant. Pet. App. 67a. The Seventh Circuit apparently believed that Congress imposed an independent obligation on Notre Dame's TPA and insurer to provide contraceptive coverage to the University's employees and students, regardless of

whether Notre Dame submits the self-certification. Pet. App. 66a-67a. Not so. A TPA "bears the legal obligation to provide contraceptive coverage *only* upon receipt of a valid self-certification." *Wheaton*, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting) (emphasis added); Hr'g Tr. at 12-13, *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441 (D.D.C. Nov. 22, 2013) (Pet. App. 127a) (concession by Government that "[a TPA's] duty to [provide the mandated coverage] only arises by virtue of the fact that [it] has a contract with the religious organizations" and has "receive[d] the self-certification form"). Likewise, an insurance company can provide coverage under the accommodation only after the University self-certifies. 26 C.F.R. § 54.9815-2713A(c)(2); *Hobby Lobby,* 134 S. Ct. at 2763 ("When a group-health-insurance issuer receives [the form], the issuer *must then* . . . provide separate payments for contraceptive services." (emphasis added)).[3] Indeed, the Court need look no further than the Government's own arguments to

[3] To be sure, the Government separately requires insurance companies (but not TPAs) to include contraceptive coverage in health plans they offer. 45 C.F.R. § 147.130(a)(1). But this does not alter the analysis. As noted *infra* Part II.A.1, Notre Dame objects to maintaining a health plan through any third party (be it an insurance company or a TPA) authorized to provide the objectionable coverage. Moreover, if Notre Dame were to refuse to submit the self-certification for its insured student plans—some of which it subsidizes—it would be "providing contraceptive services to its [students] as part of [their] plan of benefits, *and paying for such services*." *Priests for Life*, 2013 WL 6672400, at *3 n.2 (emphasis added). Notre Dame can thus either violate it religious beliefs by filing the self-certification or the notice, in which case its insurer will provide coverage under the accommodation, or it can violate its religious beliefs by paying directly for the coverage.

confirm the integral role the self-certification plays in the regulatory scheme. After all, if TPAs and insurance companies have an "independent obligation" to provide contraceptive coverage to religious objectors' beneficiaries, then the Government could not plausibly claim that granting injunctive relief "would deprive hundreds of employees and students" of contraceptive coverage. Opp'n at 36, *Wheaton Coll. v. Burwell*, No. 13A1284 (U.S. July 2014). And if the regulatory scheme truly did impose an independent obligation, it is impossible to see how the Government has a "compelling interest" in forcing Notre Dame to act in violation of its beliefs.

Finally, even assuming the Seventh Circuit accurately interpreted the regulations, the accommodation would still impose a substantial burden because Notre Dame has a religious objection to maintaining a contractual relationship with any third party authorized to provide its plan beneficiaries with contraceptive coverage. *Infra* Part II.A.1. Whether the authorization arises from an "independent obligation" under federal law or is "triggered" by the self-certification is of no moment. The Government has effectively "poisoned" the insurance market for Notre Dame, making it impossible to offer health coverage consistent with its religious beliefs. Just as a Mormon might refuse to hire a caterer that insisted on serving alcohol to his wedding guests, or a Jew might refuse to hire a caterer determined to serve pork at his son's bar mitzvah, it violates Notre Dame's religious beliefs to hire or maintain a relationship with any third party that will provide contraceptive coverage to its plan beneficiaries. Notre Dame believes such actions are

"connected" to illicit conduct "in a way that is sufficient to make [them] immoral," and it is not for courts to "tell the [University] that [its] beliefs are flawed." 134 S. Ct. at 2778.[4]

[4] The Seventh Circuit was mistaken to suggest that granting Notre Dame an exemption would mean that a court must award an exemption to a pacifist who objects to his exemption from the military draft on the ground that the military will "draft[] another person in his place." Pet. App. 71a. As an initial matter, any force behind the analogy stems not from the question of whether the hypothetical regulation imposes a substantial burden on the objector's religious exercise, but from the government's compelling need to raise an army. After *Hobby Lobby*, there can be no dispute that compelling an individual to violate his religious beliefs imposes a substantial burden on religious exercise. *Supra* pp. 19-20. But that does not end the inquiry. A court must still evaluate that individual's sincerity, and then apply strict scrutiny before any exemption could be granted. *See* 42 U.S.C. § 2000bb-1. And while there may be a compelling interest in maintaining the conscription system, for the reasons articulated below, no comparable interest exists here. *Infra* pp. 28-30.

Moreover, the hypothetical is far afield from this case because the "accommodation" is not an "exemption," since it forces religious objectors to maintain an objectionable insurance relationship on a continuing basis. *See infra* pp. 21-22. The correct analogy would be to a rule excusing a pacifist from combat service but requiring him to work in a munitions factory—an occupation that would be an ongoing violation of his religious beliefs. *Cf. Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981). Needless to say, the Government cannot relieve a substantial burden on religious exercise by offering an alternative that also requires claimants to act contrary to their beliefs.

II. NOTRE DAME WOULD PREVAIL UNDER THE STANDARD SET FORTH IN *HOBBY LOBBY* AND *WHEATON*

If the substantial burden test set forth in *Hobby Lobby* were applied, there can be little doubt that it would "affect the outcome of the litigation." *Tyler*, 533 U.S. at 666 n.6. Indeed, as discussed below, Notre Dame is likely to prevail under that standard. This remains true even in light of the Government's recent revisions to the accommodation.[5]

A. The Mandate Substantially Burdens Notre Dame's Exercise of Religion

When, as here, a claimant's sincerity is not in dispute, *Hobby Lobby* makes clear that RFRA's substantial burden test involves a two-part inquiry: a court must (1) identify the religious exercise at issue, and (2) determine whether the government has placed substantial pressure—i.e., a substantial burden—on the plaintiff to abstain from that religious exercise. *See* 134 S. Ct. at 2775-76 (substantial burden arises when the Government

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[5] The fact that the Government revised the accommodation does not alter Notre Dame's religious objection or its entitlement to injunctive relief. Notre Dame must still maintain a contractual relationship with a third party authorized to deliver the mandated coverage to its plan beneficiaries, and Notre Dame must still submit a document that it believes impermissibly facilitates the delivery of such coverage under Catholic doctrine. Thus, the revised rule continues to force Notre Dame to violate its beliefs. *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 & n.3 (1993) (regulatory changes do not moot suit where "gravamen of [the] complaint" remains, and new rule "disadvantages [plaintiffs] in the same fundamental way").

"demands" that entities either (1) "engage in conduct that seriously violates their religious beliefs" or else (2) suffer "substantial" "consequences").

Under the first step, the court's inquiry is necessarily limited. After all, it is not "within the judicial function" to determine whether a belief or practice is in accord with a particular faith. *Thomas*, 450 U.S. at 716. Courts must thus accept a plaintiff's description of its religious exercise, regardless of whether the court, or the Government, finds the beliefs animating that exercise to be "acceptable, logical, consistent, or comprehensible." *Id.* at 714-15. In other words, it is left to the plaintiff to "dr[a]w a line" regarding the actions his religion deems permissible, and once that line is drawn, "it is not for [a court] to say [it is] unreasonable." *Thomas*, 450 U.S. at 715. Instead, a court's "narrow function . . . in this context is to determine whether the line drawn reflects an 'honest conviction.'" *Hobby Lobby*, 134 S. Ct. at 2779 (citation omitted).

Under the second step, the court "evaluates the coercive effect of the governmental pressure on the adherent's religious practice." *Korte*, 735 F.3d at 683. In short, it looks to the "sever[ity]" of the "consequences" of noncompliance. *Hobby Lobby*, 134 S. Ct. at 2775. Specifically, it must determine whether the Government is compelling an individual to "perform acts undeniably at odds" with his beliefs, *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972), or putting "substantial pressure on [him] to modify his behavior and to violate his beliefs," *Thomas*, 450 U.S. at 718.

1. Declining to Comply with the Accommodation Is a Protected Exercise of Religion

Hobby Lobby confirms that the "exercise of religion" protected under RFRA "involves not only belief and profession but the performance of (or abstention from) physical acts that are engaged in for religious reasons." 134 S. Ct. at 2770 (citation omitted). Significantly, RFRA protects "'*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief'" and "mandate[s] that this concept 'be construed in favor of a broad protection of religious exercise.'" *Id.* at 2762 (quoting 42 U.S.C. §§ 2000cc-3(g), 2000cc-5(7)(A)) (emphasis added).

Here, Notre Dame seeks to exercise its religious beliefs by "abst[aining] from" specific "acts" that continue to be required under the Government's new regulations. *First*, Notre Dame believes that maintaining a contractual relationship with any third party that is obligated, authorized, or incentivized to provide contraceptive coverage to the beneficiaries enrolled in its health plans would make it complicit in the provision of that coverage in a manner contrary to Catholic doctrine. Even under the revised regulatory scheme, Notre Dame's TPA and insurance company will provide the objectionable coverage to the University's employees and students only by virtue of their enrollment in Notre Dame's health plans and only "so long as [they] are enrolled in [those] plan[s]." 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B). Indeed, the Government has conceded that once a self-insured organization provides the self-certification, "'the contraceptive

coverage is part of the [self-insured organization's health] plan.'" *RCAW*, 2013 WL 6729515, at *22 (citation omitted).[6]

In this sense, Notre Dame is akin to Muslims or Mormons who refuse to hire a caterer that will serve alcohol to their guests at a social function. A law forcing them to hire such a caterer would substantially burden their religious exercise, regardless of whether they would have to pay for the alcohol. Here, the same is true. It makes no difference whether Notre Dame must pay for the contraceptive coverage; what matters is that, in its religious judgment, it would be immoral for it to maintain a relationship with any company that will provide the offending coverage to its plan beneficiaries.

Second, Notre Dame separately objects to submitting either the self-certification required by the original accommodation or the notification required by the revised accommodation, because either action would impermissibly facilitate immoral conduct. These objections should hardly be surprising. The self-certification form is far more than a simple statement of religious objection. To the

[6] The Seventh Circuit wrongly asserted that Notre Dame conceded this point at oral argument. Pet. App. 72a-73a. To the contrary, Notre Dame has consistently objected to offering or maintaining health plans that serve as conduits for contraceptives. As counsel explained, Notre Dame would have no cognizable objection to a system in which its employees or students *themselves* coordinated with an *independent* insurer to provide coverage that "would not involve Notre Dame." Oral Argument at 1:31:00-1:32:31, *University of Notre Dame v. Sebelius*, No. 13-3853 (7th Cir. Feb. 12, 2014), *available at* http://media.ca7.uscourts.gov/sound/2014/rs.13-3853.13-3853_02_12_2014.mp3.

contrary, it (i) "designat[es]" Notre Dame's "third party administrator[] as plan administrator and claims administrator for contraceptive benefits," 78 Fed. Reg. at 39,879; (ii) serves as "an instrument under which [Notre Dame's health] plan[s are] operated," 29 C.F.R. § 2510.3-16(b); and (iii) "notifies the TPA or issuer of their obligations to provide contraceptive-coverage benefits to [Notre Dame's] employees [and to inform them] of their ability to obtain these benefits." *E. Tex.*, 2013 WL 6838893, at *11.[7] In addition, once the self-certification is filed, Notre Dame's TPA is incentivized to provide contraceptive coverage because it becomes eligible for reimbursement of 115% of the cost of providing that coverage. 79 Fed. Reg. at 13,809; 45 C.F.R. § 156.50(d)(3)(ii). In other words, filing the self-certification authorizes and incentivizes Notre Dame's TPA to provide or procure coverage for the objectionable products and services.

Notre Dame equally objects to submitting the required notification under the revised accommodation. That "notice must include," among other things, "[1] the name of the eligible organization . . . , [2] the plan name and type; . . . and [3] the name and contact information for any of the plan's [TPAs] and health insurance issuers." 79 Fed. Reg. at 51,094-95. This notice has exactly the same effect as the self-certification: by submitting it, Notre Dame impermissibly facilitates a scheme to (a) oblige or authorize its own insurance company or TPA to

[7] Far from forfeiting this argument, Pet. App. 67a-68a, Notre Dame repeatedly made this point. Appellant's Br. at 8-11, 14-15, 17, 25-26, 33-34; Reply Br. at 7-9.

engage in conduct it believes is immoral,[8] and (b) incentivize its TPA to engage in immoral conduct by rendering the TPA eligible for reimbursement of 115% of their costs. 79 Fed. Reg. at 13,809; 45 C.F.R. § 156.50(d)(3)(ii). To be sure, because Notre Dame is no longer forced to submit the self-certification directly to its insurance company or TPA, the new regulations insert one additional link into the causal chain. But under Notre Dame's religious views, that does not alter the moral calculus. Consequently, as with the self-certification, Notre Dame believes that submitting this notification impermissibly assists the Government in carrying out the regulatory scheme.

In this respect, the Government has placed Notre Dame 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

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[8] Under the revised accommodation, if—and only if—Notre Dame offers insurance and submits a notification, the Government "will send a separate notification" to its insurance company or TPA "describing the[ir] obligations" under the accommodation. 26 C.F.R. § 54.9815-2713AT(b)(1)(ii)(B); *id.* § 54.9815-2713AT(c)(1)(ii)(B). Whether it receives the self-certification from Notre Dame or a "separate notification" from the Government, Notre Dame's insurance company or TPA "shall provide or arrange payments for contraceptive services" to "participants and beneficiaries" in Notre Dame health plans. *Id.* § 54.9815-2713AT(b)(2); *id.* § 54.9815-2713AT(c)(2). Thus, providing either document makes Notre Dame complicit in the Government's scheme.

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).

After *Hobby Lobby*, there can be no dispute that the required actions described above—maintaining an objectionable insurance relationship or submitting an objectionable form—fall well within the scope of religious exercise protected by RFRA. They are clearly "physical acts" from which Notre Dame believes it must "abst[ain]" "for religious reasons." 134 S. Ct. at 2770 (citation omitted). Thus, as in *Hobby Lobby,* the University "believe[s]" the actions "demanded by the HHS regulations [are] connected to" illicit conduct "in a way that is sufficient to make it immoral for [the University] to" take those actions. *Id.* at 2778. In other words, Notre Dame has "dr[a]w[n] a line" "between [actions it] found to be consistent with [its] religious beliefs" and actions it "found morally objectionable." *Id.* It is not for a court "'to say that the line [it] drew was an unreasonable one.'" *Id.*

2. The Mandate Places Substantial Pressure upon Notre Dame to Violate Its Religious Beliefs

In *Hobby Lobby*, this Court held that the Mandate substantially burdened the plaintiffs' exercise of religion because "the economic consequences [would] be severe" if the plaintiffs "[did] not yield" to the Government's "demand[] that they engage in conduct that seriously violates their religious beliefs." 134 S. Ct. at 2775. Notably, this Court did not consider whether complying with the regulations would be a "substantial" violation of the plaintiffs' religious

beliefs, or whether it would require "substantial" physical exertion. Instead, the Court simply noted that the plaintiffs "object[ed] on religious grounds" to complying with the regulation, and proceeded to ask whether the plaintiffs would incur a substantial *penalty* if they did not comply. *Id.* at 2775-79. The Court answered that question in the affirmative: if the plaintiffs refused to comply, they would pay millions of dollars in fines. Because those "sums [we]re surely substantial," *id.* at 2776, the Court found a "substantial burden" on the plaintiffs' exercise of religion, *id.* at 2779.

Here, Notre Dame faces the same "consequences" for noncompliance as the plaintiffs in *Hobby Lobby*. *Id.* at 2776. Just as in *Hobby Lobby*, failure to comply with the regulations at issue subjects Notre Dame to potentially fatal fines of $100 a day per affected beneficiary. *See id.* at 2775 (citing 26 U.S.C. § 4980D(b)). And just as in *Hobby Lobby*, if Notre Dame drops its health plans, it will be subject to fines of $2,000 a year per full-time employee after the first thirty employees, *see id.* at 2776 (citing 26 U.S.C. § 4980H), and/or will incur ruinous practical consequences due to its inability to offer a healthcare benefit to employees and students, including "competitive disadvantage." *Hobby Lobby*, 134 S. Ct. at 2777; *see* Pet. App. 117a-118a. Moreover, Notre Dame's provision of health coverage is itself an exercise of religion, motivated by the Catholic social teaching that health care is among those basic rights which flow from the sanctity and dignity of human life. Dropping coverage would inhibit the University's ability to follow those teachings. *See Hobby Lobby*, 134 S. Ct. at 2776 (concluding that the claim that plaintiffs could drop coverage to avoid the mandate

"entirely ignores the fact that the [plaintiffs] have religious reasons for providing health-insurance coverage"). Consequently, as this Court held in *Hobby Lobby*, "[i]f these consequences do not amount to a substantial burden, it is hard to see what would." *Id.* at 2759.

In short, because the Seventh Circuit's "substantial burden" analysis is inconsistent with *Hobby Lobby,* this Court should grant the petition, vacate the decision below, and remand for reconsideration in light of *Hobby Lobby.*

B. The Mandate Cannot Survive Strict Scrutiny

As noted, the Seventh Circuit did not address the separate question whether the revised regulations satisfy strict scrutiny. If, on remand, the Seventh Circuit were to find that the regulations do substantially burden Notre Dame's exercise of religion, the "burden is placed squarely on the Government" to show that they satisfy strict scrutiny. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 429 (2006). This Court need not resolve this issue in order to enter the relief requested; the Seventh Circuit, rather, can address it in the first instance after properly applying *Hobby Lobby*'s "substantial burden" analysis. On this question as well, however, *Hobby Lobby*—along with the decisions of every court to have ruled on the question—confirms that Notre Dame is entitled to relief.[9]

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[9] *See Korte*, 735 F.3d at 685-87; *Gilardi v. HHS*, 733 F.3d 1208, 1219-24 (D.C. Cir. 2013), *vacated on other grounds*, 134 S. Ct. 2902 (2014); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1143-45 (10th Cir. 2013) (en banc), *aff'd*, 134 S. Ct. 2751; *supra* note 1.

1. The Mandate Does Not Further a Compelling Government Interest

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." *Hobby Lobby*, 134 S. Ct. at 2779 (citation omitted). "[B]roadly formulated" or "sweeping" interests are inadequate. *O Centro*, 546 U.S. at 431; *Yoder*, 406 U.S. at 221. Rather, the Government must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption." *Yoder*, 406 U.S. at 236. In other words, a court must "look to the marginal interest in enforcing the contraceptive mandate in th[is] case[]." *Hobby Lobby, 134 S. Ct. at 2779.* Here, the Government has failed to establish a compelling interest for at least four reasons.

First, the Government here 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. But *Hobby Lobby* rejected these "very broadly framed" interests, noting that RFRA "contemplates a 'more focused' inquiry." 134 S. Ct. at 2779. Indeed, "[b]y stating the public interests so generally, the government guarantee[d] that the mandate will flunk the test." *Korte*, 735 F.3d at 686.

Second, "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. Here,

the Government cannot claim an interest of the "highest order" because, as of the end of 2013, its regulations exempted health plans covering 90 million employees through, among other things, "grandfathering" provisions. *Korte*, 735 F.3d at 686; *Geneva Coll.*, 941 F. Supp. 2d at 684 & n.12.

Third, at best, the Mandate would only "[f]ill[]" a "modest gap" in contraceptive coverage. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). The Government acknowledges that contraceptives are widely available at free and reduced cost and are also covered by "over 85 percent of employer-sponsored health insurance plans." 75 Fed. Reg. 41,726, 41,732 n.21 (July 19, 2010). In such circumstances, the Government cannot claim to have "identif[ied] an 'actual problem' in need of solving." *Brown*, 131 S. Ct. at 2738. After all, the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9.

Finally, RFRA requires the Government to identify a compelling need for enforcement against the "particular religious claimants" filing suit, not among the general population. *Hobby Lobby*, 134 S. Ct. at 2779. The Government has not even attempted to make this showing, relying instead on the general proposition that "lack of access to contraceptive services" may "have serious negative health consequences." 78 Fed. Reg. at 39,887. But this does not establish a significant lack of access among Notre Dame's plan beneficiaries or that the Mandate would significantly increase contraception use among those

individuals.[10] The Government provides no evidence on these points and thus cannot show that enforcing the Mandate against Notre Dame is "actually necessary" to achieve its aims. *Brown*, 131 S. Ct. at 2738.

2. The Mandate Is Not the Least Restrictive Means of Furthering the Government's Asserted Interests

The Government must also show that the regulation "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Under that "exceptionally demanding" test, *Hobby Lobby*, 134 S. Ct. at 2780, "if there are other, reasonable ways to achieve those [interests] with a lesser burden on constitutionally protected activity, [the Government] may not choose the way of greater interference." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). A regulation is the least restrictive means if "no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights.'" *Sherbert*, 374 U.S. at 407. This test is particularly demanding here, because "RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions." *Hobby Lobby*, 134 S. Ct. at 2761 n.3 (citation omitted).

It bears emphasizing that the Government has the burden of proof here. As the Solicitor General

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[10] In fact, recent scholarship suggests otherwise. Helen M. Alvare, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 Vill. L. Rev. 379, 380 (2013).

recently explained in the analogous RLUIPA context, the Government cannot satisfy its burden through "unsubstantiated statement[s]." Br. for the U.S. as Amicus Curiae at 17, *Holt v. Hobbs*, No. 13-6827 (U.S. May 2014), 2014 WL 2329778. Rather, it must "offer evidence—usually in the form of affidavits from [government] officials—explaining how the imposition of an identified substantial burden furthers a compelling government interest and why it is the least restrictive means of doing so, with reference to the circumstances presented by the individual case." *Id.* Indeed, such "explanation[s must] relate to the specific accommodation the plaintiff seeks." *Id.* at 18. In short, to prevail, the Government must rely on *evidence* that the accommodation is the only feasible way to distribute cost-free contraceptives to women employed by religious objectors.

The Government has not remotely met this burden—indeed, in the courts below, it barely tried. As every court to consider the question has held, "[t]here are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty" than forcing religious organizations to participate in the delivery of free contraception in violation of their beliefs. *Korte*, 735 F.3d at 686; *supra* note 1. Indeed, as this Court explained in *Hobby Lobby*, "[t]he most straightforward way of doing this would be for the Government to assume the cost of providing the . . . contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." 134 S. Ct. at 2780.

There are any number of ways the Government could provide free contraceptive coverage without using Notre Dame's plans as a conduit: it "could provide the contraceptive services or insurance coverage directly to [Notre Dame's] employees, or work with third parties—be it insurers, health care providers, drug manufacturers, or non-profits—to do so without requiring [Notre Dame's] active participation. It could also provide tax incentives to consumers or producers of contraceptive products." *RCNY*, 987 F. Supp. 2d at 255-56; *see also Korte*, 735 F.3d at 686 (same). This could be accomplished through the vast federal machinery that already exists for providing health care subsidies on a massive scale—whether through adjusting the eligibility requirements of the Title X family planning program 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, the Government has recently established a network of insurance exchanges under the ACA, and nothing prevents the Government from permitting employees of religious objectors to purchase fully subsidized coverage (either for contraceptives alone, or full plans) on those exchanges. While Notre Dame opposes many of these alternatives on policy grounds, all of them are "less restrictive" than the "accommodation" because these alternatives would deliver free contraception without forcing Notre Dame to violate its beliefs.

The Government has not even attempted to show why these "alternative[s]" are not "viable." *Hobby Lobby,* 134 S. Ct. at 2780. Among other things, it "has not provided any estimate of the average cost per employee of providing access

to . . . contraceptives." *Id.* Nor has it "provided any statistics regarding the number of employees who might be affected because they work for [organizations] like [Notre Dame]." *Id.* Nor has the Government asserted "that it is unable to provide such statistics." *Id.* at 2780-81. Indeed, it has submitted *no* evidence to show that its interests would be negatively impacted by extending the religious employer exemption to Notre Dame. "[F]or all [this Court] know[s], a broader religious exemption would have so little impact on so small a group of employees that the argument cannot be made." *Gilardi*, 733 F.3d at 1222; *supra* p. 29.

Even had the Government attempted to shoulder its burden, it would not be able to meet this test. The Government cannot plausibly assert that the cost of providing contraceptive coverage independently of non-profit religious objectors would be prohibitive, especially because it is *already* paying TPAs 115% of their costs under the accommodation. 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.

Moreover, providing free contraceptive coverage independently of religious objectors could be achieved through minor tweaks to existing programs. *Supra* pp. 31-32.[11] Even if a new regulatory program were

[11] This remains true even if legislative action would be necessary. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1458 (2014) (describing less restrictive alternatives requiring congressional action).

necessary, the Government can hardly object, as it has shown its willingness to create (and repeatedly modify) such programs—by, among other things, establishing the infrastructure by which TPAs are compensated under the accommodation. 45 C.F.R. § 156.50; *Hobby Lobby*, 134 S. Ct. at 2781 (stating that "nothing in RFRA" suggests that a less restrictive means cannot involve the creation of a new program). The Government may attempt to claim that it is more *convenient* to commandeer Notre Dame's private health plans, but administrative convenience cannot justify forcing religious organizations to violate their beliefs, particularly where the Government has no evidence of any need to do so.

Finally, any suggestion that *Hobby Lobby* approved of the "accommodation" as a viable least-restrictive means in all cases is mistaken. In fact, this Court expressly did "not decide" that question. 134 S. Ct. at 2782 & n.40; *id.* at 2763 n.9. It simply found the accommodation acceptable for plaintiffs who *did not object* to it. *See id.* at 2782 & n.40; *id.* at 2786 (Kennedy, J., concurring) (noting that "the plaintiffs have not criticized [the accommodation] with a specific objection"). While the accommodation may "effectively exempt[]" such plaintiffs, *id.* at 2763 (majority op.), it does no such thing for plaintiffs who *do* object to compliance. Indeed, if there was ever any suggestion that *Hobby Lobby* somehow blessed the accommodation, this Court dispelled that notion in *Wheaton*. Far from foreclosing challenges to the accommodation, the dissenters in *Wheaton* confirmed that the order "entitle[d] hundreds or thousands of other [nonprofits]" to relief. 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting).

CONCLUSION

The petition for certiorari should be granted, the decision of the Seventh Circuit should be vacated, and the case should be remanded for further consideration in light of *Hobby Lobby* and *Wheaton*.

Respectfully submitted,

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