Nos. 14-1418, 14-1453, 14-1505,
15-35, 15-105, 15-119 & 15-191

IN THE

# Supreme Court of the United States

DAVID A. ZUBIK, ET AL.

v.

SYLVIA BURWELL, ET AL.

PRIESTS FOR LIFE, ET AL.

v.

DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, ET AL.

v.

SYLVIA BURWELL, ET AL.

**On Writ of Certiorari to the United States Courts of Appeals for the Third & D.C. Circuits**

## BRIEF FOR PETITIONERS IN NOS. 14-1418, 14-1453 & 14-1505


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## QUESTIONS PRESENTED

1. Whether the Government violates the Religious Freedom Restoration Act ("RFRA") by forcing objecting religious nonprofit organizations to comply with the HHS contraceptive mandate under an alternative regulatory scheme that requires these organizations to act in violation of their sincerely held religious beliefs.

2. Whether the Government can satisfy RFRA's demanding test for overriding sincerely held religious objections in circumstances where the Government itself admits that overriding the religious objection may not fulfill its regulatory objective—namely, the provision of no-cost contraceptives to objectors' employees.

## PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners in No. 14-1418, who were Plaintiffs-Appellees below, are the Most Reverend David A. Zubik, the Roman Catholic Diocese of Pittsburgh, Catholic Charities of the Diocese of Pittsburgh, Inc., the Most Reverend Lawrence T. Persico, the Roman Catholic Diocese of Erie, St. Martin Center, Inc., Prince of Peace Center, Inc., and Erie Catholic Preparatory School. No Petitioner has a parent corporation. No publicly held corporation owns any portion of any of the Petitioners, and none of the Petitioners is a subsidiary or an affiliate of any publicly owned corporation.

Petitioners in No. 14-1453, who were Plaintiffs-Appellants below, are Priests for Life, Father Frank Pavone, Alveda King, and Janet Morana. Petitioner Priests for Life is a non-stock, nonprofit corporation. Consequently, it has no parent or publicly held company owning 10% or more of the corporation's stock

Petitioners in No. 14-1505, who were Plaintiffs-Appellants/Cross-Appellees below, are the Roman Catholic Archbishop of Washington ("the Archdiocese"); the Consortium of Catholic Academies of the Archdiocese of Washington, Inc.; Archbishop Carroll High School, Inc.; Don Bosco Cristo Rey High School of the Archdiocese of Washington, Inc.; Mary of Nazareth Roman Catholic Elementary School, Inc.; Catholic Charities of the Archdiocese of Washington, Inc.; Victory Housing, Inc.; the Catholic Information Center, Inc.; the Catholic University of America; and Thomas Aquinas College. No Petitioner has a parent corporation. No publicly held

corporation owns any portion of any of the Petitioners, and none of the Petitioners is a subsidiary or an affiliate of any publicly owned corporation.

Respondents, who were Defendants below, are Sylvia 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.

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## INTRODUCTION

Petitioners in these consolidated cases are Catholic nonprofits that are being forced to decide between taking actions that violate their sincerely held religious beliefs or incurring massive penalties. In accordance with their faith, Petitioners have been careful to craft their insurance plans to exclude coverage for abortifacients, contraceptives, and sterilization. The Government, however, has made it impossible for them to continue that religious exercise. It has promulgated regulations forcing Petitioners to both (1) sign and submit documentation that authorizes, obligates, and incentivizes their insurance companies to deliver religiously objectionable coverage to Petitioners' plan beneficiaries, and (2) maintain health plans and ongoing insurance relationships through which the objectionable coverage is provided. It is undisputed that taking either of these actions would violate Petitioners' religious beliefs. It is equally undisputed that if Petitioners refuse to take these actions, they will be subject to substantial penalties. That is the very definition of a substantial burden on religious exercise under the Religious Freedom Restoration Act ("RFRA").

Contrary to the Government's characterization, this case is not about a challenge to an "opt out." Quite the opposite: the Government is forcing Petitioners to take actions that cause the objectionable coverage to be delivered to Petitioners' own employees and students by Petitioners' own insurance companies in connection with Petitioners' own health plans. That is why the Government's

regulations describe the so-called "accommodation" for religious nonprofits as an alternative way to "comply" with the contraceptive mandate, 78 Fed. Reg. 39,870, 39,879 (July 2, 2013)—the same mandate this court struck down in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). While the Government may believe that its "accommodation" absolves Petitioners of moral responsibility for the objectionable coverage, it has "no business" making that determination. *Id.* at 2778. Rather, Petitioners themselves are entitled to "'dr[a]w'" a "'line'" regarding which actions are consistent with their religious beliefs. *Id.* (citation omitted). And here, the undisputed record establishes Petitioners' sincere belief that taking the actions required of them under the regulations would make them complicit in wrongdoing and create "scandal" in violation of Catholic moral teaching.

The Government has not remotely justified this substantial burden on religious exercise. Given the numerous exemptions it has already granted—for reasons as mundane as administrative convenience and arbitrary as the corporate structure of religious organizations—the Government cannot seriously contend that granting one more exemption for Petitioners would undercut any compelling interest. Moreover, it has failed to present any evidence—let alone prove—that it cannot deliver the mandated coverage through alternative means. It could, for example, employ the insurance exchanges established under the Affordable Care Act, the Title X family planning program, the Medicaid program, or other forms of tax subsidies. All of these alternatives—and presumably many others—would

remain available to the Government even if Petitioners prevail. Yet the Government has provided no evidence for why these alternatives are not workable. In fact, when offered the opportunity to present evidence that enforcing the regulations against Petitioners was the least restrictive means of furthering a compelling interest in the evidentiary hearing in the *Zubik* case, the Government pointed to nothing more than *ipse dixit* statements in the Federal Register.

Accordingly, the question presented here is whether the Government can force Petitioners to violate their sincerely-held religious beliefs under threat of massive penalties, without any evidence that such coercion is the least restrictive means to advance any compelling interest. Although Petitioners, as Roman Catholic entities, disagree with the Government's goal of providing the mandated coverage, they do not challenge the legality of this goal. Indeed, they have proposed less-restrictive alternatives where women could receive such coverage without involving Petitioners. Rather, Petitioners ask only that they not be forced to participate in this regulatory scheme in a way that violates their religious beliefs. This Nation's commitment to religious freedom, as embodied in RFRA, clearly accords them that right.

## OPINIONS BELOW

In No. 14-1418, the opinion of the district court (*Zubik* Pet.App.50a-130a) is reported at 983 F. Supp. 2d 576. The opinion of the Third Circuit (*Zubik* Pet.App.1a-49a) is reported at 778 F.3d 422, and its denial of rehearing en banc (*Zubik* Pet.App.137a) is unreported.

In No. 14-1453, the district court's opinion (*PFL* Pet.App.96) is reported at 7 F. Supp. 3d 88. In No. 14-1505, the district court's opinion (*RCAW* Pet.App.94a) is reported at 19 F. Supp. 3d 48. The appeals were consolidated, and the D.C. Circuit's opinion (*RCAW* Pet.App.1a) is reported at 772 F.3d 229. The order denying rehearing en banc and the accompanying dissents (*RCAW* Pet.App.222a) are reported at 2015 U.S. App. LEXIS 8326.

## JURISDICTION

In No. 14-1418, the Third Circuit entered judgment on February 11, 2015, and denied rehearing en banc on April 6, 2015. Certiorari was requested on May 29, 2015.

In Nos. 14-1453 and 14-1505, the D.C. Circuit entered judgment on November 14, 2014, and denied rehearing en banc on May 20, 2015. Petitions for certiorari were filed on June 9 and June 19, 2015.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are reprinted in an appendix hereto.

## STATEMENT

### A. The Mandate

The Patient Protection and Affordable Care Act ("ACA") requires "group health plan[s]" and "health insurance issuer[s]" to provide coverage, without "cost sharing," for a range of services, including women's "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4). Failure to comply with this requirement results in severe monetary penalties.

Providing a noncompliant health plan subjects employers to penalties of $100 per day per affected beneficiary. 26 U.S.C. § 4980D(b). And dropping health coverage exposes employers with more than fifty employees to penalties of $2,000 per year per employee after the first thirty employees. *Id.* § 4980H.[1]

"[Congress] did not specify what types of preventive care must be covered" under the mandate. *Hobby Lobby*, 134 S. Ct. at 2762. Instead, it left that "important and sensitive decision" to "the Health Resources and Services Administration" ("HRSA"), which is a "component" of the Department of Health and Human Services ("HHS"). *Id.* HRSA, in turn, outsourced the definition of preventive care to the Institute of Medicine ("IOM"), "a nonprofit group of volunteer advisors." *Id.*; 75 Fed. Reg. 41,726, 41,731 (July 19, 2010). HRSA provided the IOM with "a remarkably short time frame" to make its recommendations, with the "final report" due "barely six months from the time [a committee] was empanelled" to study the topic. J.A.579. According to a dissenting member of the IOM panel, this compressed time frame—coupled with a review process that "lacked transparency and was largely subject to the preferences of the committee's composition"—resulted in "a mix of objective and subjective determinations filtered through a lens of advocacy." J.A.580.

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[1] Colleges and universities need not provide coverage for their students, but if they make insured plans available to their students, those plans must comport with the regulations described below. 45 C.F.R. § 147.131(f).

Among those determinations was the recommendation that preventive care be defined to include "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." J.A.576. This included four FDA-approved contraceptive methods that Petitioners and many others consider to be abortifacients because they "may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus." *Hobby Lobby*, 134 S. Ct. at 2762-63 & n.7.

The Government took only days to adopt the IOM's recommended definition of preventive care, *see* 76 Fed. Reg. 46,621 (Aug. 3, 2011); HRSA, Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines (last visited Jan. 1, 2016), resulting in the mandate at issue in this litigation, 26 C.F.R. § 54.9815-2713(a)(1)(iv) (IRS Regulations); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (parallel Department of Labor Regulations); 45 C.F.R. § 147.130(a)(1)(iv) (parallel HHS Regulations).

### 1. Exemptions from the Mandate

While the mandate imposes draconian penalties for noncompliance, it has never applied uniformly to all health plans. In an effort to gain political support for the ACA, Congress created a broad "grandfathering" exemption. This exemption was intended to implement President Obama's pledge that individuals could maintain their existing healthcare coverage if they so desired—in the President's words: "if you like your health plan, you can keep it." J.A.956. The grandfathering exemption

thus allowed group health plans to remain in place as long as the plan's sponsor did not make certain, specified changes. *See* 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g). Moreover, "there is no legal requirement" that these "grandfathered plans" ever be "phased out." *Hobby Lobby*, 134 S. Ct. at 2764 n.7. To the contrary, in keeping with the President's promise, and to ensure that grandfathering remains a viable option in perpetuity, employers may add new employees to grandfathered plans and adjust certain costs based on medical inflation without losing grandfathered status. 42 U.S.C. § 18011(b)-(c); 45 C.F.R. § 147.140(a)-(b), (g). And while Congress chose to require grandfathered plans to comply with certain, "'particularly significant'" protections of the ACA—such as the elimination of lifetime limits and covering dependents up to age 26—it did not require those plans to include coverage for preventive services. *Hobby Lobby*, 134 S. Ct. at 2780; 42 U.S.C. § 18011(a)(4).

As a result of the grandfathering exemption, the "contraceptive mandate 'presently does not apply to tens of millions of people.'" *Hobby Lobby*, 134 S. Ct. at 2764 (citation omitted). The Government recently estimated that 37 percent of private employers in the country offer at least one grandfathered health plan, and 26 percent of employees nationwide are enrolled in a grandfathered plan. In total, at least 33.9 million people are on private-sector grandfathered plans, and 10.7 million people are on state- and local-government grandfathered plans. *See* 80 Fed. Reg. 72,192, 72,218 (Nov. 18, 2015).

Nor are employers with grandfathered plans the only entities exempt from the mandate. Either

because it recognized that it was legislating against the backdrop of RFRA, or because it did not contemplate that the federal bureaucracy would transform this seemingly innocuous provision into a controversial mandate for abortifacient and contraceptive services, Congress did not itself exempt religious organizations from the preventive services requirement. Upon adopting the IOM's definition of preventive services, however, the Government immediately recognized that some religious exemption would be necessary. But in a significant break from tradition, the Government crafted an unprecedentedly narrow religious exemption. Unlike RFRA, for example, the exemption does not apply to any "person" who objects to the mandate on religious grounds. 42 U.S.C. § 2000bb-1. Nor does it conform to other federal conscience protections in the healthcare context, such as the Church Amendment, which safeguards "entit[ies]" that oppose sterilization or abortion "on the basis of religious beliefs or moral convictions." 42 U.S.C. § 300a-7; *see also*, *e.g.*, *id.* § 1395w-22(j)(3)(B) (precluding Medicare plans from being forced to provide certain services to which sponsors object "on moral or religious grounds"); *id.* § 1396u-2(b)(3)(B) (same for Medicaid). Nor did the Government follow the well-established statutory exemption under Title VII, which allows any "religious corporation, association, educational institution, or society" to use religion as a criterion in employment decisions. *Id.* § 2000e-1(a).

Instead, the Government tethered the exemption to an obscure provision of the Tax Code that is not designed to protect organizations from being forced

to act in violation of their beliefs, but instead exempts a narrow class of entities from having to file informational tax returns. 26 U.S.C. § 6033(a)(3)(A)(i) & (iii). The exemption thus covers "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order." *Id.*; 45 C.F.R. § 147.131(a). Notably, all entities covered by this provision are categorically exempt from the mandate, regardless of whether they even object to compliance.

As the Government has explained, this exemption is designed to protect only "house[s] of worship," while excluding their nonprofit charitable and educational arms, 76 Fed. Reg. at 46,623; J.A.317-18. This new and constricted definition of what it means to be a "religious employer" denies full religious status and protection to clearly religious organizations such as Catholic Charities, the Catholic Information Center, and Priests for Life. They are effectively treated as "junior varsity" religious organizations. J.A.508-509, 721-22. By contrast, the "houses of worship" covered by the "religious employer" exemption are free to hire insurance companies and design insurance plans that will not deliver coverage for abortifacients, contraceptives, and sterilization. 78 Fed. Reg. at 39,873.

**2. Alternative Ways to Comply**

In the face of widespread criticism, a multitude of lawsuits, and rulings from this Court, the Government has steadfastly refused to expand the "religious employer" exemption to include objecting religious nonprofits such as Petitioners. As the

Solicitor General has explained, "nonprofit religious organizations don't get an exemption." Tr. of Oral Argument at 57, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354). Instead, the Government has offered them an alternative mechanism to "compl[y]" "with [the] requirement . . . to provide contraceptive coverage," which ensures that their own plan beneficiaries receive the mandated coverage from their own insurance companies in connection with their own health plans. 26 C.F.R. § 54.9815-2713A(b)-(c); 29 C.F.R. § 2590.715-2713A(b)-(c); 45 C.F.R. § 147.131(c). The Government has misleadingly labeled this requirement an "accommodation" because it does not allow the religious organization to be billed explicitly for the objectionable coverage. But as many comments pointed out in the rulemaking process, this does not actually "accommodate" the practices of many religious organizations—including Petitioners here—who object to providing or facilitating the mandated coverage even if they do not have to pay for it. *E.g.*, J.A.412-50, 504-38, 937-43.

The Government's illusory "accommodation" applies to "eligible" organizations, including "nonprofit entit[ies]" that hold themselves out as religious and have faith-based objections to offering coverage for "some or all" of the mandated services. 26 C.F.R. § 54.9815-2713A(a). The regulatory scheme functions in a slightly different fashion depending on whether the religious organization self-insures (and thus uses a third-party administrator ("TPA")) or

offers an insured health plan through an insurance issuer.[2]

To "compl[y]" with the mandate to provide contraceptive services, a religious organization must first "contract[] with one or more third party administrators" or "provide[] benefits through one or more group health insurance issuers." *Id.* § 54.9815-2713A(b)(1)(i), (c)(1). It must then either sign and submit a "self-certification" directly to its insurance company, or sign and submit a "notice" to the Government providing detailed information regarding its plan name and type, along with "the name and contact information for any of the plan's [TPAs] and health insurance issuers." *Id.* § 54.9815-2713A(a)(3), (b)(1), (c)(1).

The effect of either submission is the same. By signing and submitting the form, the religious organization authorizes and obligates its insurance company to arrange "payments for contraceptive services" for beneficiaries enrolled in the organization's health plan. *Id.* § 54.9815-2713A(b)-(c). Thus, "[i]f" and "[w]hen" the organization signs

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[2] "An employer 'self-insures' if it bears the financial risk of paying its employees' health insurance claims." *RCAW* Pet.App.9a n.1. Self-insured employers "hire [TPAs] to perform administrative functions, such as developing provider networks and processing claims." *RCAW* Pet.App.9a n.1. Conversely, employers with insured plans hire insurance issuers "to provide coverage and bear the associated financial risk." *RCAW* Pet.App.9a n.1. This brief uses the term "insurance companies" to refer to both TPAs and insurance issuers. When necessary to distinguish between the two, it will use "TPA" and "insurance issuer."

and submits the form—but only if and when it does so—its own insurance company becomes authorized and obligated to provide "payments for contraceptive services" to the organization's own plan beneficiaries in connection with the organization's own health plan. *Id.*[3] To remain in compliance after submitting the form, the organization must maintain the connection to the insurance company that provides the contraceptive "payments," while continuing to facilitate the coverage by updating the company with information about who is covered under the plan. Moreover, the contraceptive "payments" are available to the religious organization's plan beneficiaries only "so long as [they] are enrolled in [the religious organization's] plan," *id.* § 54.9815-2713A(d), and only so long as the organization maintains its "contract" with a TPA or continues to "provide[] benefits through" an insurance issuer, *id.* § 54.9815-2713A(b)-(c).

For self-insured organizations, signing and submitting the self-certification or notification also creates a unique incentive for their TPAs to deliver the objectionable coverage. If (and only if) an eligible organization submits either document, the Government will reimburse the organization's TPA for the cost of delivering the objectionable coverage, plus at least 10 percent. *Id.* § 54.9815-2713A(b)(3);

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[3] Because TPAs need not "enter into or remain in a contractual relationship with [an] eligible organization" upon receipt of either document, *id.* § 54.9815-2713A(b)(2), self-insured organizations must find and contract with a TPA willing to provide the objectionable coverage. *RCAW* Pet.App.98a-99a.

45 C.F.R. § 156.50(d)(3); 79 Fed. Reg. 13,744, 13,809 (Mar. 11, 2014) (authorizing 115% reimbursement for contraceptive services provided in 2014); J.A.1169 ("[I]f they receive the certification, they are eligible for reimbursement. They would not otherwise be eligible.").

Likewise, the Government has repeatedly conceded that in the self-insured context, "'the contraceptive coverage is part of the [objecting organization's health] plan.'" *RCAW* Pet.App.145a. This concession was unavoidable because TPAs have authority to administer only the coverage a plan sponsor includes in its health plan.[4] To make the mandate work, then, the regulations require self-insured religious organizations to effectively amend their health plans to "ensure[] that there is a party with legal authority to arrange for payments for contraceptive services." 78 Fed. Reg. at 39,880. Both the self-certification and the notification provided by the Government upon receipt of the eligible organization's submission are thus deemed to be "instrument[s] under which [a self-insured] plan is operated," 29 C.F.R. § 2510.3-16(b), and serve as the "designation of the [organization's TPA] as plan administrator and claims administrator for

[4] *See* 29 U.S.C. § 1002(16)(A) (defining plan administrator as "the person specifically so designated by the terms of the instrument under which the plan is operated"); *id.* § 1102(a)(1), (b)(3) (providing that self-insured plans must be "established and maintained pursuant to a written instrument," which must include "a procedure for amending [the] plan, and for identifying the persons who have authority to amend the plan").

contraceptive benefits," 78 Fed. Reg. at 39,879. Consequently, a religious objector's TPA is *barred* from providing contraceptive benefits to the objector's plan beneficiaries *unless* the sponsoring organization provides the self-certification or notification.

But whether offered in connection with self-insured or insured plans, the mandated "payments for contraceptive services" are inextricably tied to the eligible organization's health plan. The Government has stressed that these "payments" are *not* separate "contraceptive coverage policies," so that beneficiaries "do not have to have two separate health insurance policies"—they have a single policy, provided by the religious organization, which entitles them to receive "payments" for contraceptive services. *Id.* at 39,876-78.

### B. Petitioners

Petitioners are individuals and nonprofit Catholic organizations that exercise their common faith in a variety of different ways. Some, such as Catholic Charities of the Archdiocese of Washington, Inc. ("Catholic Charities D.C."); Catholic Charities of the Diocese of Pittsburgh, Inc.; St. Martin Center, Inc.; Prince of Peace Center, Inc.; and Victory Housing, Inc., provide charitable and social services to their local underserved communities. J.A.55-58, 63-66, 386-95. Others, like the Consortium of Catholic Academies of the Archdiocese of Washington, Inc.; Archbishop Carroll High School, Inc.; Don Bosco Cristo Rey High School of the Archdiocese of Washington, Inc.; Mary of Nazareth Roman Catholic Elementary School, Inc.; and Erie Catholic Preparatory School, offer high-quality, affordable

education, often to underprivileged inner-city populations. J.A.58-60, 105-11, 366-87. They are joined by institutes of higher learning, such as the Catholic University of America and Thomas Aquinas College, which provide their students a rigorous education while serving the larger community through research centers, intellectual offerings, and charitable outreach. J.A.401-11. Still other groups, such as the Catholic Information Center, Inc., distribute information and resources about the Catholic faith while providing a forum for intellectual and spiritual inquiry. JA.396-97. And Priests for Life and its officers, Father Frank Pavone, Alveda King, and Janet Morana, engage in public advocacy, passionately working to spread Catholic teaching regarding the value and inviolability of human life, including express advocacy against abortion and contraception. J.A.229-34, 272-87.

Finally, the Roman Catholic Archbishop of Washington (the formal name for the Archdiocese of Washington); the Roman Catholic Diocese of Pittsburgh; the Roman Catholic Diocese of Erie; and their bishops, Cardinal Donald Wuerl, the Most Reverend David A. Zubik, and the Most Reverend Lawrence T. Persico; offer pastoral care and spiritual guidance to over a million Catholics within their jurisdictions. They also provide many of the services detailed above through schools and social-service organizations that are not separately incorporated. J.A.53-54, 61-62, 504-05, 530-32. For example, the Archdiocese of Washington contains fifty-three elementary schools that, aside from their corporate structure, are indistinguishable from the separately

incorporated Petitioner Mary of Nazareth Elementary School, and the schools that are members of Petitioner Consortium of Catholic Academies. J.A.530-31. Likewise, the Diocese of Erie provides social services through its Catholic Charities, which is a department within the Diocese, that performs the same religious mission as its separately-incorporated counterparts in Pittsburgh and Washington. J.A.53-54, 63-66, 386-87.[5]

All of the activities described above—worship, education, charity, and advocacy—are carried out by Petitioners as part of the exercise of their faith. *E.g.*, J.A.53, 71-73, 110-11, 138-39, 151-55. 162-63, 229-30, 457-58, 508-09; *see also* J.A.168 ("[I]f we look at scripture, faith without good works is dead, so I don't see how we can separate it. It's essential. It's who we are as Christians." (testimony of Bishop Persico)). Petitioners' activities and experiences are thus flatly inconsistent with the Government's regulatory scheme, which assumes that the exercise of religion is and should be limited to activities within houses of worship—a constricted view of religious liberty that this Court has recently rejected in cases such as *Hobby Lobby* and *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012).

Petitioners' religious commitments also motivate them to provide health coverage for the spiritual and

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[5] There is also a separately incorporated "Catholic Charities of the Diocese of Erie, Inc.," that exists as a fundraising vehicle: it performs no social services and has no employees.

physical well-being of their students and employees. Petitioners believe that human life begins at conception, and that certain "preventive" services that interfere with conception or terminate a pregnancy are immoral. Additionally, Petitioners adhere to Catholic teachings regarding "material cooperation," which prohibits facilitating the wrongdoing of others, and "giving scandal," which prohibits tempting others, by words or actions, to engage in immoral conduct. *See* J.A.52-53, 74-140, 146-84, 226-87, 320-23, 359-411, 451-58; *see also* Catechism of the Catholic Church § 2284-86.

Petitioners have historically exercised their religion by working with insurance companies to make high-quality health coverage available to their employees and students in a manner consistent with these teachings. In particular, they have offered health plans through insurers and TPAs that would not provide or procure coverage for abortion, contraceptives, sterilization, or related education and counseling for their employees or students. *E.g.*, J.A.76, 86, 106-07, 114, 122-23, 227, 362, 367, 372, 377, 382, 387-88, 392, 397, 403, 409.[6] They have accomplished this goal using a combination of self-insured church plans,[7] self-insured plans, and insured plans.

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[6] Consistent with Catholic teaching, in certain circumstances Petitioners' plans cover products commonly used as contraceptives when prescribed for non-contraceptive, medically necessary purposes. *See id.*

[7] A church plan is an ERISA-exempt health plan "established and maintained . . . for its employees (or their beneficiaries) by a church or by a convention or association

*Self-Insured Church Plans:* The Archdiocese of Washington provides coverage through a self-insured church plan administered by a TPA. J.A.361. The Archdiocese also makes its health plan available to the employees of its affiliated corporations. Accordingly, Archbishop Carroll, Don Bosco, Mary of Nazareth, the Consortium of Catholic Academies, Catholic Charities D.C., Victory Housing, and the Catholic Information Center also offer health coverage to their employees through the Archdiocese's plan. J.A.362. The Dioceses of Pittsburgh and Erie have similar arrangements. Both offer coverage through self-insured church plans, administered by TPAs. J.A.85-86, 122. St. Martin's Center, Prince of Peace Center, and Erie Catholic Preparatory School offer coverage through the Diocese of Erie's health plan. J.A.122. Similarly, the Diocese of Pittsburgh—through its benefits trust—sponsors and manages the health plan for Catholic Charities of Pittsburgh. J.A.94.

*Self-Insured Plans:* Thomas Aquinas College offers its employees a health plan through a self-insurance trust, which is administered by a TPA. J.A.408, 495.

*Insured Plans:* The Catholic University of America and Priests for Life offer their employees insured health plans through insurance issuers. J.A.227, 402. The University also makes health coverage available to its students through an insured plan. J.A.402.

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(continued…)

of churches which is exempt from tax under section 501 of Title 26." 29 U.S.C. § 1002(33).

### C. The Mandate's Impact on Petitioners

The Government's regulatory scheme prohibits Petitioners from continuing to offer health coverage in a manner consistent with their Catholic faith. J.A.68-140, 147-184, 226-87, 320-23, 359-411, 451-91. It is undisputed that Petitioners sincerely believe that compliance with the mandate—either directly or through one of the alternative processes offered by the Government—would force them to act in violation of their religious beliefs. This is true regardless of the type of health plan they offer. Specifically, it is undisputed that Petitioners' religious beliefs prohibit them from signing or submitting the required "self-certification" or "notification," which authorizes, obligates, and incentivizes their insurance companies to deliver abortifacient and contraceptive coverage to their plan beneficiaries, Likewise, Petitioners' faith precludes them from contracting with or offering health plans through any company that is authorized, obligated, or incentivized to deliver such coverage to their plan beneficiaries in connection with their health plans.

Despite their avowedly religious missions, none of Petitioners except the Archdiocese of Washington and the Dioceses of Pittsburgh and Erie qualifies under the Government's definition of an exempt "religious employer." But in this context, the exemption is illusory, since these Petitioners offer their health plans to the employees of their non-exempt religious affiliates. J.A.85-86, 94, 122, 361-62. Accordingly, the Government requires each non-exempt religious affiliate to file the "self-certification" or "notification" form, after which their

employees would receive the objectionable coverage through the diocesan health plans. This forces the dioceses to either drop coverage for their affiliates or else act in ongoing violation of their beliefs by facilitating the objectionable coverage for their affiliates' employees. J.A.87-90, 125-28, 363-65. Both of those options would interfere severely with the dioceses' religious practices. That is particularly true because the bishops who oversee these dioceses are charged with ensuring that affiliated entities within their jurisdictions operate in accordance with Catholic teaching. J.A.93-94, 132-33, 148-55, 164-69, 452-53.[8]

### D. The Proceedings Below

#### 1. The Third Circuit Proceedings

Petitioners in No. 14-1418 filed suit in October 2013 in the Western District of Pennsylvania. After a two-day evidentiary hearing—including 172 joint stipulations, testimony from six witnesses including one Roman Catholic Cardinal and two Bishops, and 64 exhibits (including only nine unique exhibits from the Government)—the Hon. Arthur J. Schwab granted a preliminary injunction in favor of Petitioners. *Zubik* Pet.App.130a.

The court determined that the Government had substantially burdened Petitioners' exercise of religion by requiring them to sign and submit a morally offensive self-certification under penalty of massive fines that would "gravely impact [their]

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[8] In that capacity, the bishops lead the governance of many of these entities. *E.g.*, *Zubik* Pet.App.70a, 74a; J.A.362-63.

spiritual, charitable and educational activities." *Zubik* Pet.App.96a. The court also held that the mandate, as applied to Petitioners, could not satisfy strict scrutiny. The court concluded that the Government's asserted interests in the "'promotion of public health'" and "'assuring that women have equal access to health care service'" were "so broadly stated" that they could not "'overbalance legitimate claims to the free exercise of religion.'" *Zubik* Pet.App.116-17a (citation omitted). In addition, the court explained that "[i]f there is no compelling governmental interest to apply the contraceptive mandate to the religious employers who operate the 'houses of worship,' then there can be no compelling governmental interest to apply (even in an indirect fashion) the contraceptive mandate to [Petitioners]." *Zubik* Pet.App.119a. The court further found that the Government failed to offer "any evidence" to prove that it utilized the least restrictive means of advancing its asserted interests. *Zubik* Pet.App.122a. The court subsequently converted its preliminary injunction into a permanent injunction "based on the Government's concession that it would not present additional evidence" on any of the relevant legal elements. *Zubik* Pet.App.132a.

The Government appealed to the Third Circuit, which held that the challenged regulations did not impose a substantial burden on Petitioners' religious exercise because complying with the mandate would "not make [Petitioners] 'complicit' in the provision of contraceptive coverage." *Zubik* Pet.App.36a. Accordingly, the Third Circuit did not reach the question of strict scrutiny.

Petitioners sought rehearing en banc, but the Third Circuit rejected their request. *Zubik* Pet.App.137a. Petitioners moved for a stay of the mandate, but the Third Circuit denied that motion and ordered the mandate to issue immediately. *Zubik* Pet.App.139a. Petitioners applied for emergency relief from Circuit Justice Alito, who directed the Third Circuit to recall and stay its mandate. *Zubik* Pet.App.148a. On June 29, 2015, the full Court converted the stay into an injunction pending certiorari on the condition that Petitioners "ensure that the Secretary of Health and Human Services is in possession of all information necessary to verify applicants' eligibility" for the so-called "accommodation." *Zubik v. Burwell*, 135 S. Ct. 2924 (2015).

**2. The D.C. Circuit Proceedings**

In August 2013, Petitioners in No. 14-1453 filed suit in the U.S. District Court for the District of Columbia. *PFL* Pet.App.16. The court granted the Government's motion to dismiss on December 19, 2013. *PFL* Pet.App.135. With the compliance deadline fast approaching, Petitioners appealed the same day and sought an injunction pending appeal.

Meanwhile, Petitioners in No. 14-1505 had filed suit in September 2013. On December 20, 2013, the district court issued a final judgment in favor of Petitioner Thomas Aquinas College, but rejected all other Petitioners' RFRA claims. *RCAW* Pet.App.211a. Again, facing looming compliance deadlines, Petitioners immediately appealed and sought an injunction pending appeal.

The D.C. Circuit granted Petitioners' motions for injunctions pending appeal on December 31, 2013, and consolidated these cases (along with the Government's appeal in No. 14-1505). *RCAW* Pet.App.213a. After oral argument and supplemental briefing on *Hobby Lobby*, the D.C. Circuit rejected all of Petitioners' claims. *RCAW* Pet.App.93a. The court found no substantial burden on Petitioners' religious exercise because the regulations "impose[] [only] a *de minimis* requirement" to submit "a single sheet of paper." *RCAW* Pet.App.34a. In the court's view, the actions required of Petitioners "do not," in fact, "facilitate contraceptive coverage." *RCAW* Pet.App.42a.

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

Petitioners sought rehearing en banc, which the court denied on May 20, 2015. Judge Brown dissented, joined by Judge Henderson, arguing that "Plaintiffs identif[ied] at least two acts that the regulations compel them to perform that they believe would violate their religious obligations: (1) 'hiring or maintaining a contractual relationship with any

company required, authorized, or incentivized to provide contraceptive coverage to beneficiaries enrolled in [Petitioners'] health plans,' and (2) 'filing the self-certification or notification.'" *RCAW* Pet.App.239a (citation omitted). And "[e]ven assuming for the sake of argument that the government possesses a compelling interest in the provision of contraceptive coverage," the Government had "pointed to no evidence in the record" to prove that the coverage must be provided "'seamless[ly]'" through the health plans of objecting religious nonprofits. *RCAW* Pet.App.246a.

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

The D.C. Circuit granted Petitioners' request for a stay of the mandate pending certiorari. *RCAW* Pet.App.279-80a.

## SUMMARY OF ARGUMENT

**I.** RFRA prohibits the Government from imposing a "substantial[] burden" on "the exercise of religion" unless doing so "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1. The Government imposes a substantial burden on religious exercise whenever it places substantial pressure on a religious adherent to act contrary to his sincere religious beliefs. Here, the challenged regulations substantially burden Petitioners' religious exercise by threatening them with ruinous penalties unless they take specific actions to comply with a regulatory mandate to provide abortifacient and contraceptive coverage in violation of their Catholic faith. In particular, the mandate forces Petitioners to submit a document that authorizes, obligates, and incentivizes Petitioners' own insurance companies to deliver the objectionable coverage to Petitioners' own employees and students by virtue of their enrollment in Petitioners' own health plans. It then forces Petitioners to act in ongoing violation of their faith by maintaining an objectionable insurance relationship and plan infrastructure through which the coverage is delivered.

**II.** Of course, "[t]he mere fact that [a] religious practice is [substantially] burdened by a governmental program does not mean that an exemption accommodating [that] practice must be granted." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981). Instead, RFRA requires an exemption only if the asserted religious belief is "sincere," and even then, the Government may force a plaintiff to violate his beliefs if it can prove a "compelling" need to do so.

Given the judgment Congress made regarding the "importance of religious liberty" in RFRA, however, *Hobby Lobby*, 134 S. Ct. at 2781, such coercion can be justified only if it is the least restrictive means of furthering an "overriding" public interest, *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 347 (1995).

**A.** The Government has not and cannot establish that granting a religious exemption for Petitioners here would undercut any "compelling" interest. It has granted numerous other exemptions covering millions of people for reasons such as administrative convenience and political expediency, which are far less "compelling" than the interest in religious liberty Congress chose to protect under RFRA. Indeed, the Government's exemption scheme is entirely irrational because it offers "religious" exemptions to many "religious employers" that have *no objection whatsoever* to complying with the mandate, while denying exemptions to religious nonprofits like Petitioners that *do* object. After granting all of these other exemptions, the Government cannot seriously claim that granting one more exemption for Petitioners would imperil any interest "'of the highest order.'" *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 433 (2006) (citation omitted).

**B.** The Government has also failed to proffer any evidence—let alone prove—that it cannot use some less-restrictive means to deliver free abortifacient and contraceptive coverage independently of Petitioners' health plans. Given its extensive powers and vast resources, the Government cannot seriously contend that forcing Petitioners to act in violation of their beliefs is necessary to provide the mandated

coverage. Instead, it could accomplish its goals through existing programs, such as the insurance exchanges established under the Affordable Care Act, the Title X family planning program, the Medicaid program, or other forms of tax subsidies. Even if Petitioners receive an exemption under RFRA, nothing precludes the Government from employing one of these alternatives to achieve its goals.

## ARGUMENT

### I. THE GOVERNMENT HAS SUBSTANTIALLY BURDENED PETITIONERS' EXERCISE OF RELIGION

This Court's substantial-burden analysis involves a straightforward, 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 abandon that exercise. *E.g.*, *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (stating that the plaintiff "bore the initial burden" of (1) showing that the government policy at issue "implicates his religious exercise," and (2) showing that the "policy substantially burdened that exercise of religion").

Under that test, a law that forces plaintiffs to "engage in conduct that seriously violates their religious beliefs" on pain of "substantial" penalties is the quintessential example of a law that substantially burdens religious exercise. *Hobby Lobby*, 134 S. Ct. at 2775-76. The regulations here do precisely that: First, they require Petitioners to "comply" with the contraceptive mandate by submitting documentation that authorizes, obligates,

and incentivizes Petitioners' own insurance companies to deliver the objectionable coverage to Petitioners' own employees and students in connection with Petitioners' own health plans; and second, they oblige Petitioners to violate their religious beliefs on an ongoing basis by offering health plans through companies that will "seamlessly" deliver the mandated coverage to Petitioners' plan beneficiaries.

The Government admits that the regulations compel Petitioners to take these actions; concedes that the actions violate Petitioners' religious beliefs; and does not dispute that the penalties for non-compliance are substantial. That is a clear "substantial burden" on Petitioners' religious exercise.

### A. Petitioners' Exercise of Religion Conflicts with the Government's Regulatory Scheme

This Court has long recognized that an "exercise of religion" is any act or omission motivated by religious belief. Here, Petitioners exercise their religion by "providing insurance coverage" to their students and employees "in accordance with their religious beliefs." *Id.* at 2779. As relevant here, this religious exercise has two components. First, Petitioners offer health plans through insurance companies that will not deliver coverage for abortifacients, contraceptives, or sterilization to their plan beneficiaries. And second, Petitioners refuse to "comply" with the contraceptive mandate by filing the "self-certification" or "notification," since the submission of either document would result in the objectionable coverage being delivered to their

employees and students in connection with their health plans. The Government has never disputed that these acts and omissions are motivated by Petitioners' sincere religious beliefs. Accordingly, there can be no doubt that they are protected exercises of religion.

**1.** RFRA protects "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000cc-5(7)(A), 2000bb-2(4) (emphasis added). An "exercise of religion," in turn, is any "religiously motivated conduct," which includes the "performance of (or abstention from) physical acts . . . for religious reasons." *Emp't Div. v. Smith*, 494 U.S. 872, 875, 877 (1990). This understanding of religious exercise has been established for at least the past fifty years. *See Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (describing religious exercise as "conduct prompted by religious principles"). And if there was any doubt about its scope, Congress explicitly stated that the "concept" of religious exercise must "'be construed in favor of a broad protection of religious exercise.'" *Hobby Lobby*, 134 S. Ct. at 2762 (quoting 42 U.S.C. § 2000cc-3(g)).

RFRA was plainly intended to protect religious organizations like Petitioners here from being forced to participate in the provision of healthcare benefits that conflict with their religious beliefs. For example, Nadine Strossen, then president of the ACLU, testified in support of RFRA, noting that the statute safeguarded "such familiar practices" as "permitting religiously sponsored hospitals to decline to provide abortion or contraception services" to others. The Religious Freedom Restoration Act: Hearing on S.

2969 Before the S. Comm. on the Judiciary, 102d Cong. 192 (1992) (statement of Nadine Strossen). Members of Congress made similar statements on the floor. 139 Cong. Rec. 9685 (1993) (statement of Rep. Hoyer) (noting that a "Catholic teaching hospital lost its accreditation for refusing to provide abortion services" to others and that RFRA provides "an opportunity to correct [this] injustice[]"); *id.* at 4660 (statement of Rep. Green) (same).

This Court has likewise recognized that religious exercise can take a variety of forms. In *Smith*, for example, the plaintiffs exercised their religion by ingesting hallucinogenic drugs. 494 U.S. at 874. In *Sherbert*, the plaintiff exercised her religion by refusing to work on a particular day of the week. 374 U.S. at 399-400. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the plaintiffs exercised their religion by engaging in animal sacrifice. 508 U.S. 520, 524-25 (1993). And in *Holt*, "the religious exercise at issue [wa]s the growing of a beard" and the refusal to shave it. 135 S. Ct. at 862.

This Court's cases also make clear that religious exercise can involve interactions with third parties. For example, in *Thomas*, the plaintiff exercised his religion by refusing to "participat[e] in the production of armaments" that might be used by others in war. 450 U.S. at 715. In *United States v. Lee*, the plaintiff exercised his religion by refusing to "pay[] Social Security taxes" that he believed would "threaten" the Amish practice of caring for each other without governmental assistance. 455 U.S. 252, 257 (1982). In *Hosanna-Tabor*, the plaintiff was a school that exercised its religion by refusing to employ a teacher who had acted contrary to the

tenets of its Lutheran "belief[s]." 132 S. Ct. at 701. And in *Hobby Lobby*, of course, the plaintiffs exercised their religion by refusing to provide their employees with health insurance that, if used by employees, might "result in the destruction of an embryo." 134 S. Ct. at 2775.

**2.** This Court's cases have thus established that the law cannot treat some instances of religious exercise as more important, significant, or substantial than others. "[C]ourts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887. Simply put, "the judicial process is singularly ill equipped to resolve" how important or substantial a religious practice is. *Thomas*, 450 U.S. at 715-16. Such matters are "not within the judicial function [or] judicial competence," because "[c]ourts are not arbiters of scriptural interpretation." *Id.* at 716. Accordingly, once a plaintiff draws a line between conduct that is "consistent with his religious beliefs" and conduct that is "morally objectionable," "it is not for [a court] to say that [his] religious beliefs are mistaken or insubstantial." *Hobby Lobby*, 134 S. Ct. at 2778-79.

Of course, courts can assess whether a person's asserted religious belief is "honest" or "sincere" in order to "weed out insincere claims" that are simply a pretext to avoid complying with the law. *Id.* at 2774 & n.28. As RFRA's legislative history explains, courts must be vigilant against "false religious claims that are actually attempts to gain special privileges." S. Rep. No. 103-111, at 11 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1900. If a claim is "nonreligious in motivation," then it is not entitled

to any protection. *Thomas*, 450 U.S. at 715. But where, as here, a claimant's sincerity is undisputed, courts must "accept" the claimant's view that a particular act or omission is "forbidden by [his] faith." *Lee*, 455 U.S. at 257.

**3.** It is equally clear that courts cannot second-guess religious objections that are based on a theory of moral complicity. If a religious adherent sincerely believes that taking a particular action would make him complicit in the sin of another, then courts must defer to that belief. The reason is straightforward: whether an act "is connected" to wrongdoing "in a way that is sufficient to make it immoral" is fundamentally a question of private religious belief. *Hobby Lobby*, 134 S. Ct. at 2778. This question "implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Id.* Courts cannot "[a]rrogat[e] the authority to provide a binding national answer to this religious and philosophical question." *Id.* This follows directly from the principle that secular courts have no business questioning whether a religious believer has "correctly perceived the commands of [his own] faith." *Thomas*, 450 U.S. at 716.

At least three of this Court's cases confirm that courts may not second-guess a plaintiff's sincere, complicity-based religious objection. In *Thomas*, the plaintiff had a religious objection to "participat[ing] in the production of armaments" that might be used by others in war. 450 U.S. at 715. Specifically, he

objected to working directly on "tank turret[s]," even though he did not object to working in a "roll foundry" on "sheet steel" that "may have found its way into tanks or other weapons." *Id.* at 711 & n.3. The lower court dismissed his claim because it found his beliefs to be logically "inconsistent." *Id.* at 715. This Court rejected that reasoning, emphasizing that the plaintiff was entitled to decide for himself which actions were "sufficiently insulated from producing weapons of war." *Id.* Once he "drew a line" as to the conduct he found religiously objectionable, a court could not "undertake to dissect [his] religious beliefs." *Id.* Because he had an "honest conviction that [certain] work was forbidden by his religion," his refusal to engage in such work was a protected exercise of religion. *Id.* at 716.

Similarly, in *Lee*, the Amish plaintiff objected to paying Social Security taxes because he believed that doing so would discourage other Amish from "provid[ing] for their fellow members the kind of assistance contemplated by the social security system." 455 U.S. at 257. The Government disagreed, arguing that "payment of social security taxes w[ould] not," in fact, "threaten the integrity of the Amish religious belief or observance." *Id.* Once again this Court rejected that argument, stating that "[i]t is not within the 'judicial function [or] competence' . . . to determine whether [the plaintiff] or the Government has the proper interpretation of the Amish faith." *Id.* (citation omitted). Because the plaintiff *himself* believed that paying the taxes was religiously forbidden, his refusal to do so was an exercise of religion, and "compulsory participation in

the social security system interfere[d] with [his] free exercise rights." *Id.*

Finally, in *Hobby Lobby*, the Government's main argument was that "the connection between what the objecting parties must do (provide [contraceptive coverage]) and the end that they find to be morally wrong (destruction of an embryo [through another's use of an abortifacient]) is simply too attenuated" to support a cognizable religious objection. 134 S. Ct. at 2777. This Court again rejected that argument, noting that it "dodge[d] the question that RFRA presents" and instead sought to address a "question that the federal courts have no business addressing," namely, "whether the religious belief asserted in a RFRA case is reasonable." *Id.* at 2778. Just as in *Thomas* and *Lee*, the relevant point was that the plaintiffs *themselves* believed that providing the mandated coverage would wrongfully "facilitat[e] the commission of an immoral act by another." *Id.* For that reason, their refusal to provide that coverage was a protected exercise of religion.

**4.** As *Hobby Lobby* reaffirmed, the exercise of religion also includes "[b]usiness practices that are compelled or limited by the tenets of a religious doctrine," and RFRA accordingly protects the right "to conduct business in accordance with [one's] religious beliefs." *Id.* at 2770, 2778. It is plainly an exercise of religion, therefore, when a religious organization chooses or refuses to work with a third party to provide services to the organization's own employees for religious reasons.

This is a matter of common practice and common sense. Every day, religious groups exercise their religion by hiring third parties to provide services in

a manner consistent with their religious beliefs. And frequently, this type of religious exercise includes forging voluntary agreements with service providers *not* to engage in certain conduct, or *not* to provide certain goods or services that are religiously offensive. Thus, for example, a school may exercise its religion by hiring a teacher on the condition that she not act contrary to its religious "belief[s]." *Hosanna-Tabor*, 132 S. Ct. at 701. A church may hire a construction company to build a structure to certain religious specifications—deliberately including some design elements and excluding others. Or a synagogue may hire a catering company only if it promises not to serve non-kosher food. Such selective contracting is a protected element of religious exercise for the simple reason that it is a form of "conduct prompted by religious principles." *Sherbert*, 374 U.S. at 403. Indeed, it would be a radical constriction of religious liberty to deny that this type of activity is a form of religious exercise.

**5.** Here, Petitioners exercise their religion by offering health insurance to their employees and students in a manner that comports with their religious faith. Just as in *Hobby Lobby*, that faith requires them to refuse to "comply with the HHS mandate." 134 S. Ct. at 2759. This refusal is not affected by the alternative regulatory mechanism that the Government has devised, which provides a slightly different way for nonprofit religious organizations to "comply" with the mandate. *Supra* pp.19-20. As relevant here, Petitioners' religious exercise has two components.

*First*, Petitioners exercise their religion by contracting with insurance companies that will not

deliver coverage for abortifacients, contraceptives, and sterilization to their employees and students. As noted above, Petitioners' Catholic religious principles motivate them to offer health coverage to their students and employees in order to foster both their physical and spiritual well-being. *Cf. Hobby Lobby*, 134 S. Ct. at 2776 (noting that the "companies" in that case had "religious reasons for providing health-insurance coverage"). At the same time, however, Petitioners believe that in order to stay true to their Catholic faith, they may hire an insurance company only if it will not provide their students and employees with coverage that may destroy human life or artificially prevent its creation. Stated another way, Petitioners exercise their religion by *refusing* to contract with or offer health plans through any company that will deliver the objectionable coverage to their students or employees in connection with their plans. Accordingly, in order to provide health coverage as an exercise of their religion, Petitioners must be left free to enter into such voluntary contracts without being penalized by the federal government.

*Second*, Petitioners exercise their religion by refusing to sign or submit either the "self-certification" or "notification" document. In either scenario, filing the document gives rise to a unique regulatory obligation, authorization, or incentive for Petitioners' own insurance companies to deliver the objectionable coverage to Petitioners' own students and employees in connection with Petitioners' own health plans. If Petitioners do not file the document, then their insurance companies will have no such authority, obligation, or incentive. *Supra* pp.11-14.

Because Petitioners have a sincere religious objection to filing the document, their refusal to do so plainly qualifies as an "exercise of religion." *Smith*, 494 U.S. at 877.

Ultimately, Petitioners believe that if they were to take these actions, they would be facilitating and encouraging wrongdoing on an ongoing basis in violation of Catholic teachings on "scandal" and "material cooperation." *Supra* pp.19-20. The Government has never disputed the sincerity of Petitioners' religious beliefs. Accordingly, there can be no dispute that these actions fall well within the scope of religious exercise protected by RFRA.

### B. The Challenged Regulations Substantially Burden Petitioners' Religious Exercise

The regulations substantially burden Petitioners' religious exercise by threatening them with severe penalties for offering health insurance in accordance with their religion. If Petitioners exercise their religion by refusing to submit the required "self-certification" or "notification" document, and instead offer health plans that do not come with what the Government calls "seamless" access to the objectionable coverage, then they will incur massive fines for offering non-compliant health plans. And if they try to avoid the mandate by dropping their coverage altogether, then they will be subject to a different but equally ruinous set of penalties. The mandate thus threatens Petitioners with substantial penalties unless they abandon the dictates of their conscience and act contrary to their religious beliefs. That is the very definition of a substantial burden on religious exercise.

**1.** The Government substantially burdens religious exercise whenever it imposes "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 719. Because courts cannot inquire into how "substantial" a religious practice is, the substantial-burden inquiry looks to the substantiality of the *penalty* imposed on a person for engaging in *any* religious exercise. In other words, the inquiry turns on the "sever[ity]" of the "consequences" of noncompliance. *Hobby Lobby*, 134 S. Ct. at 2775. The dispositive question is whether the challenged law has a "coercive impact" on the religious adherent by forcing him to make "a choice between" substantial punishment or "fidelity to religious belief." *Thomas*, 450 U.S. at 717.

This Court's cases recognize a wide variety of punishments that can qualify as a substantial burden on religious exercise. In *Holt*, for example, there was a substantial burden because the Muslim plaintiff faced "serious disciplinary action" if he refused to shave his beard. 135 S. Ct. at 862. In *Wisconsin v. Yoder*, there was a substantial burden because the plaintiffs "were fined" for their religious practice of refusing to send their children to school. 406 U.S. 205, 208 (1972). And in *Hobby Lobby*, the Government "clearly impose[d] a substantial burden" because it forced the plaintiffs "to pay an enormous sum of money" if they "insist[ed] on providing insurance coverage in accordance with their religious beliefs." 134 S. Ct. at 2779. Because the "sums" of the penalties were "surely substantial," they "clearly impose[d] a substantial burden." *Id.* at 2776, 2779.

In none of these cases did the Court ask whether the *religious exercises* involved were "substantial"

(i.e., refusing to shave a beard, refusing to send children to school, or refusing to provide objectionable health coverage). Instead, the Court looked to the substantiality of the *penalty* that would be imposed on the plaintiffs for engaging in the religious exercise.

**2.** Here, the mandate imposes a substantial burden on Petitioners' religious exercise because it requires them to abandon their religious practices and act in violation of their religious beliefs. "[I]f they do not comply, they will pay a very heavy price." *Id.* at 2759. Indeed, the penalties that will be imposed on Petitioners for failing to comply with the mandate here are exactly the same as the penalties this Court recognized as "substantial" in *Hobby Lobby*. *Id.* at 2775-79. Consequently, what this Court said in *Hobby Lobby* applies with equal force here: "Because the [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.* at 2779.

If Petitioners exercise their religion by refusing to comply with the mandate and instead offer health plans that do not come with the objectionable coverage, they will be subjected to penalties of "$100 per day for each affected individual." *Id.* at 2775 (citing 26 U.S.C. § 4980D). For example, Catholic Charities of Pittsburgh estimated that it could be subject to fines of $2 to $4 million per year if it refuses to comply with the mandate. J.A.160. Similarly, Erie Catholic Preparatory School "could face estimated annual fines of approximately $2.8 million against an annual budget of approximately

$10 million." *Zubik* Pet.App.69a. Because "[t]hese sums are surely substantial," *Hobby Lobby*, 134 S. Ct. at 2776, they impose a clear substantial burden.

Alternatively, if Petitioners drop their health coverage altogether to avoid complicity in providing the mandated coverage, they will face the same three penalties that this Court recognized in *Hobby Lobby*: (1) They will incur a "$2,000 per-employee penalty" for violating the employer mandate by failing to offer health coverage; (2) they will suffer a "competitive disadvantage" by not being able to offer health insurance, which is a "valu[able]" benefit necessary to attract quality students and employees; and (3) they will be forced to abandon their religious exercise of offering health coverage, which they do for "religious reasons." *Id.* at 2775-77. Just as in *Hobby Lobby*, these three penalties, alone or together, clearly impose a substantial burden on Petitioners' religious exercise. And just as in *Hobby Lobby*, it is unthinkable "that the Congress that enacted RFRA . . . would have believed it a tolerable result to put [nonprofit religious groups] to the choice of violating their sincerely held religious beliefs or making all of their employees [and students] lose their existing healthcare plans." *Id.* at 2777.

By any definition, the coercive impact of these penalties qualifies as substantial. What this Court held in *Hobby Lobby* is equally true here: "[i]f these consequences do not amount to a substantial burden, it is hard to see what would." *Id.* at 2759.

### C. Lower Courts Have Badly Distorted the Substantial-Burden Inquiry

Appellate courts upholding the challenged regulations have badly distorted the substantial-burden inquiry contrary to this Court's precedent. Rather than asking whether Petitioners have been forced to violate their religion on pain of substantial penalty, these courts have improperly tried to assess the "substantiality" of the actions Petitioners are required to take. They have second-guessed Petitioners' views on moral complicity, questioned whether complying with the mandate is really so objectionable, and claimed that Petitioners misunderstand the regulatory scheme. All of these approaches are deeply misguided.

**1.** Some lower courts have erred by stating that the substantial-burden inquiry turns on the "nature of the action" the plaintiff is compelled to take. *Zubik* Pet.App.31a. These courts have relied on the truism that "[w]hether a burden is 'substantial' under RFRA is a question of law." *Zubik* Pet.App.43a. And from that uncontroversial premise, they have concluded that the Government does not substantially burden religious exercise as long as the compelled *conduct* does not involve substantial physical exertion or financial expense. They have thus dismissed Petitioners' religious objections to complying with the mandate, claiming that "[t]he regulatory requirement that [Petitioners file] a sheet of paper" "is not a burden that any precedent allows us to characterize as substantial." *RCAW* Pet.App.48a.; *id.* 38a (describing compliance as only a "de minimis administrative" burden); *Zubik* Pet.App.45a (claiming to have "dispelled the notion that the self-

certification *procedure* is burdensome" (emphasis added)).

But while the existence of a substantial burden is certainly "a question of law for courts to decide," *RCAW* Pet.App.29a, that inquiry is limited to the substantiality of the *pressure* the Government imposes on the plaintiff to violate his religious beliefs. *See Hobby Lobby*, 134 S. Ct. at 2775-76; *Thomas*, 450 U.S. at 719; *supra* pp.38-39. As this Court has repeatedly made clear, the inquiry does not and cannot turn on the "substantiality" of the compelled conduct, or the "substantiality" of the plaintiff's religious practice. RFRA expressly protects "*any* exercise of religion," *Hobby Lobby*, 134 S. Ct. at 2762 (emphasis added), and even if it did not, federal courts would have "no business" sorting through the various ways religious believers exercise their faith, *id.* at 2778, picking and choosing those they deem worthy of protection while dismissing those they find "objective[ly]" insubstantial, *Zubik* Pet.App.29a.

Indeed, this Court's precedent confirms that the "nature of the action" the plaintiff is required to take is irrelevant to the substantial-burden inquiry. In *Holt*, for example, the Court did not pause to consider whether forcing the plaintiff to shave would require only "de minimis" effort on his part. And in *Thomas*, the Court did not attempt to determine whether making steel tank turrets was more difficult than making rolled steel. Likewise, it is no less of a substantial burden to force an Orthodox Jew to violate the Sabbath by flipping a light switch than by plowing his field. After all, actions a federal judge considers "largely effortless, and essentially cost-free," *Catholic Health Care Sys. v. Burwell*, 796 F.3d

207, 220 (2d Cir. 2015), may have dire implications for the believer, *E. Tex. Baptist Univ. v. Burwell*, No. 14-20112, 2015 U.S. App. LEXIS 17281, at *18 (5th Cir. Sept. 30, 2015) (Jones, J., dissenting) ("Thomas More went to the scaffold rather than sign a little paper for the King.").

Here, what courts have dismissed as a "bit of paperwork," *RCAW* Pet.App.7a, is a grave violation of Petitioners' faith. As Bishop Persico testified, the self-certification form takes only "a few minutes to sign, but the ramifications are eternal." J.A.170. In short, whether the religious exercise involves refusing to shave one's beard, refusing to work on the Sabbath, or refusing to sign a form, "[t]he essential principle is crystal clear: When the Government forces someone to take an action contrary to his or her sincere religious belief . . . or else suffer a [substantial] penalty . . . , the Government has substantially burdened the individual's exercise of religion." *RCAW* Pet.App.267a (Kavanaugh, J., dissenting).

**2.** The lower courts have also been fundamentally mistaken to characterize the alternative compliance mechanism as an "opt out." *E.g.*, *RCAW* Pet.App.2a; *Zubik* Pet.App.36a. It is anything but, because it forces Petitioners to act in violation of their religion. Indeed, the Government itself concedes that the so-called "accommodation" is a way for religious organizations to "compl[y]" with the mandate, 45 C.F.R. § 147.131(c)(1), which is very different from a way to "opt out." Forcing Petitioners to offer health plans that come with "seamless" access to the objectionable coverage does not allow them to "opt out" of violating their religious beliefs.

In any event, labeling the Government's regulatory scheme an "opt out" does not answer the dispositive *legal* question of whether it imposes substantial pressure on Petitioners to act in a way that violates their religion. Instead, it purports to resolve a "very different question," *Hobby Lobby*, 134 S. Ct. at 2778, namely: "Does [the required act of compliance] 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). Or, in the words of the Third Circuit, does the mandated conduct make Petitioners "'complicit'" in wrongdoing. *Zubik* Pet.App.36a. This overtly *religious* inquiry has no place in the substantial-burden analysis.

Simply put, there is no dispute that federal law compels Petitioners (1) "to execute the self-certification or alternative notice," and then (2) "to maintain a relationship with an [insurance company] that will provide the contraceptive coverage" to their own employees and students in connection with their own health plans. *RCAW* Pet.App.240a (Brown, J., dissenting). Whether those required actions "amount[] to 'facilitating immoral conduct'" or instead allow Petitioners to "opt out" of violating their religion is an "inherently theological question[] which objective legal analysis cannot resolve.'" *RCAW* Pet.App.241a (Brown, J., dissenting) (citations omitted). To claim that compliance with the regulatory scheme "relieves [Petitioners] of any connection" to contraceptive coverage," *Zubik* Pet.App.44a, is nothing more than a retread of the "attenuation" argument rejected in *Hobby Lobby*. *Supra* p.34.

**3.** The lower courts have also erred by asserting that Petitioners object only to third-party conduct, like the plaintiffs in *Bowen v. Roy*, 476 U.S. 693 (1986), and *Lyng v. Northwestern. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). *Zubik* Pet.App.37a-40a; *RCAW* Pet.App.37a. According to the courts, Petitioners' "real objection," *Zubik* Pet.App.37a, is "not to any action that the government has required [Petitioners] themselves to take," *RCAW* Pet.App.37a, but rather to "what follows" from those actions, *Zubik* Pet.App.38a.

But that is clearly false. *Bowen* and *Lyng* simply hold that plaintiffs cannot challenge third-party action in which they play *no role*: the plaintiffs in *Bowen* could not object to the Government's use of their daughter's Social Security number to administer her benefits, 476 U.S. at 699-701, and the plaintiffs in *Lyng* could not prevent the Government from building a road on public land, 485 U.S. at 449. In neither case were the plaintiffs "coerced by the Government's action into violating their religious beliefs." *Id.* at 449.

Here, by contrast, Petitioners *are* coerced into taking actions that violate their religious beliefs. The regulations compel Petitioners *themselves* to submit objectionable documentation and maintain an objectionable insurance relationship, and Petitioners *themselves* will be subject to penalties if they refuse to comply. Petitioners' RFRA claim is thus not based on mere "unease" or "anguish" at the prospect of "third parties provid[ing Petitioners'] beneficiaries [with] products and services that [Petitioners] believe are sinful." *RCAW* Pet.App.27a, 37a. Petitioners do not seek to "dictate the conduct of the

government or of third parties," nor do they claim the right to exercise a "religious veto against [the] legally required conduct of others." *RCAW* Pet.App.28a, 37a. Instead, "the harm [they] complain of" is "their inability to conform *their own* actions and inactions to their religious beliefs without facing massive penalties from the government." *RCAW* Pet.App.236a (Brown, J., dissenting).

Moreover, nothing in *Bowen* or *Lyng* supports the lower courts' bizarre notion that a plaintiff cannot state a RFRA claim when he objects to taking an action due to its "effect[s]." *Zubik* Pet.App.37a-38a. To the contrary, this Court has acknowledged that the context and consequences of an action are obviously relevant to whether that action is morally objectionable. Thus, even "an act that is innocent in itself" may become objectionable depending on "the circumstances." *Hobby Lobby*, 134 S. Ct. at 2778; *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 143 (1987) (noting that after "the time of hire," "subsequent changes in the conditions of employment" or a person's "beliefs chang[ing] during the course of her employment" may "creat[e] a conflict between job and faith that had not previously existed"). For example, it is not morally objectionable to lend a neighbor a knife "to cut something on the barbecue," but it would be highly objectionable if the neighbor "request[ed] a knife to kill someone." *Zubik* Pet.App.109a. Similarly, giving a neighbor a ride to the bank is not morally problematic—unless he intends to rob the bank. The same is true here. Petitioners have no inherent objection to offering health plans to their employees and students. But they vigorously object when they are forced to

"comply" with the Government's regulatory scheme, which requires them to offer health plans that will come with "seamless" coverage for abortifacients and contraceptives.

Despite the lower courts' claims, this Court has never transformed complicity-based religious objections into challenges to third-party conduct. To the contrary, this Court has regularly recognized that plaintiffs may object to acts that, in their religious judgment, are immoral because they have the "effect" of facilitating the immoral conduct of others. *Supra* pp.32-34. In fact, *Bowen* itself recognized that plaintiffs can object to such acts. The plaintiffs there objected not only to the Government's use of their daughter's Social Security number, 476 U.S. at 699-701, but also to facilitating that use by submitting the number to the Government, *id.* at 701-12 (opinion of Burger, C.J.). While the Court did not rule on the second objection due to a dispute over mootness, "five justices . . . expressed the view that the plaintiffs '*were entitled* to an exemption' from [that] 'administrative requirement.'" *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting) (citation omitted), *vacated*, 135 S. Ct. 1528 (2015); *see also Lyng*, 485 U.S. at 453 (noting a distinction "between the Government's use of information in its possession and the Government's requiring an individual to provide such information").

**4.** Finally, the lower courts have asserted that Petitioners' objection rests on a simple misunderstanding of "how the challenged regulations operate." *RCAW* Pet.App.229a (Pillard, J., concurring). That assertion is based on Judge

Posner's mistaken view that Petitioners' "insurers and TPAs" have an "'independent obligation'" to deliver the objectionable coverage to Petitioners' beneficiaries, regardless of whether Petitioners comply with the regulations. *RCAW* Pet.App.41a. (quoting *Notre Dame*, 743 F.3d at 559 (Posner, J.)). That is doubly wrong.

As an initial matter, the supposed "independent obligation" is irrelevant because Petitioners object to hiring or maintaining a relationship with any insurance company that is authorized, obligated, or incentivized to deliver the objectionable coverage to Petitioners' own employees or students in connection with Petitioners' own health plans, regardless of how that authority, obligation, or incentive is "triggered." *Cf. Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 627 (7th Cir. 2015) (Flaum, J., dissenting) (stating that the existence of an independent obligation "really is of no moment here, because Notre Dame also believes that being driven into an ongoing contractual relationship with an insurer" that delivers the objectionable coverage would violate its beliefs). Thus, even if the regulatory scheme works exactly how some lower courts apparently believe, it would make no difference.

But regardless, it is mistaken to suggest that Petitioners' insurance companies somehow have an "independent" obligation to deliver the objectionable coverage to Petitioners' employees regardless of whether Petitioners comply with the mandate. The law is clear that no such obligation exists *unless* Plaintiffs (a) maintain an objectionable contractual relationship with their insurance companies and

then (b) submit the objectionable "self-certification" or "notice."

Most obviously, if Petitioners were willing to incur ruinous penalties by dropping their health plans, their insurance companies would have no authority or obligation to provide or procure the objectionable coverage for Petitioners' plan beneficiaries. *Supra* pp.10-14. The Government has never suggested otherwise. It is thus undeniable that the provision of the objectionable coverage by Petitioners' insurance companies is entirely contingent on actions Petitioners are compelled to take. Accordingly, Petitioners believe that offering health plans under the Government's regulatory scheme entangles them in wrongdoing and facilitates delivery of the objectionable coverage, making them complicit in sin and giving rise to "scandal" in violation of Catholic teaching.

In addition, even when Petitioners decide to offer health plans, their insurance companies cannot deliver the objectionable coverage unless Petitioners invoke the so-called "accommodation" by submitting the objectionable "self-certification" or "notice." In the self-insured context, the Government has *conceded* that compliance with the accommodation is necessary to "ensure[] that there is a party with legal authority" to provide the objectionable coverage, 78 Fed. Reg. at 39,880, and that a TPA's "duty" to provide such coverage "only arises by virtue of the fact that [it] has a contract with the religious organizations" and has "receive[d] the self-certification form," J.A.501. That conclusion is unavoidable because, in the ordinary course, a TPA merely administers the health plan established by

the employer—the content of that plan is determined entirely by the employer. The only way this changes is "if" an eligible organization invokes the "accommodation" by submitting the "self-certification" or "notice," which *then* triggers the TPA's obligation to "provide or arrange payments for contraceptive services." 26 C.F.R. § 54.9815-2713A(b)(2); Br. for the Respondents in Opp'n at 21 n.11 (Nos. 14-1453, 14-1505) (conceding that the "regulations designate an objecting employer's TPA as the entity legally responsible for complying with the contraceptive coverage requirement only after the organization itself" files the required form). The unequivocally conditional language of the regulations makes clear that a TPA "bears the legal obligation to provide contraceptive coverage *only* upon receipt of a valid self-certification" or notification. *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2814 n.6 (2014) (Sotomayor, J., dissenting) (emphasis added). Indeed, without the employer signing and submitting the form, the TPA is neither obligated nor authorized to provide the objectionable coverage. *Supra* pp.13-14.

Moreover, all parties agree that complying with the so-called "accommodation" creates a unique incentive for an eligible organization's TPA to provide the objectionable coverage. Once an organization invokes the "accommodation," its TPA is eligible for at least 110% reimbursement of the cost of coverage. *Supra* pp.12-13. Again, the Government acknowledges this incentive is available *only if* an eligible organization invokes the "accommodation." *See* 26 C.F.R. § 54.9815-2713A(b)(3); 79 Fed. Reg. 51,092, 51,095 n.8 (Aug. 27, 2014).

Likewise, in the context of an insured plan, a religious organization's insurance issuer has no enforceable obligation to deliver the mandated coverage unless the organization submits the self-certification or notification form. Without the form, the regulations purport to require the religious organization *itself* to pay for the objectionable coverage, *e.g.*, 45 C.F.R. § 147.130(a)(1)(iv)—the very arrangement invalidated in *Hobby Lobby*. Thus, under existing law, the only way the Government can require a religious objector's insurer to deliver the objectionable coverage is if the objector invokes the "accommodation," which obligates Petitioners' insurer to pay for "contraceptive services" for beneficiaries enrolled on Petitioners' plan. *Id.* § 147.131(c). As explained above, Petitioners object *both* to paying for the objectionable coverage themselves (*Hobby Lobby*) *and* to facilitating its provision by providing the notice and maintaining a contract with the coverage provider (this case).

Ultimately, this Court need look no further than the Government's own arguments to confirm Petitioners' integral role in the regulatory scheme. If TPAs and insurers truly had an "independent" obligation to deliver the mandated coverage to Petitioners' beneficiaries, then the Government could not plausibly claim that exempting Petitioners "would deprive hundreds of employees" of abortifacient and contraceptive coverage. Br. in Opp'n at 36, *Wheaton*, 134 S. Ct. 2806 (No. 13A1284). And if the regulatory scheme were in fact completely "dissociated" and "separate" from Petitioners' actions, *RCAW* Pet.App.43-44a, the Government could not possibly have a "compelling interest" in coercing

Petitioners' compliance. "After all, if the form were meaningless, why would the Government require it?" *RCAW* Pet.App.264a (Kavanaugh, J., dissenting).

## II. THE GOVERNMENT HAS FAILED TO PROVE THAT ENFORCING THE MANDATE AGAINST PETITIONERS IS THE LEAST RESTRICTIVE MEANS OF FURTHERING A COMPELLING INTEREST

When a federal regulation substantially burdens a person's exercise of religion, RFRA entitles the person to an exemption unless the Government "demonstrates that application of the burden to the person . . . is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). This is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). It ensures that "only those interests of the highest order and those not otherwise served" can justify the Government's attempt to coerce its citizens to act in violation of their religion. *Yoder*, 406 U.S. at 215. Indeed, by imposing an explicit least-restrictive-means test, "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. Under this test, the Government cannot simply rely on the importance of a regulatory program in general, but instead must prove that it has a compelling need to deny a "specific exemption[] to [the] particular religious claimants" who have filed suit. *O Centro*, 546 U.S. at 431.

Here, granting an exemption for Petitioners would not undercut any compelling interest because the

mandate is already riddled with arbitrary exemptions covering millions of people for reasons of administrative convenience and political expediency. The Government has also already decided to exempt certain religious organizations, and it has no legitimate justification—much less a *compelling* justification—for forcing other equally religious organizations to comply. Moreover, even if the Government had a compelling need to provide abortifacient and contraceptive coverage to Petitioners' employees, it could use less-restrictive means to provide the coverage independently of Petitioners' health plans. Of all the ways in the world to provide such coverage, there is no need to hijack the health plans of religious nonprofits as the delivery vehicle. As this Court has recognized, "[t]he most straightforward" solution would be for the Government to simply provide the coverage itself for the relatively small fraction of employees who are "unable to obtain [it] under their health-insurance policies due to their employers' religious objections." *Hobby Lobby*, 134 S. Ct. at 2780. The Government could easily do so in any number of ways, including by simply allowing the employees and students of objecting religious nonprofits to obtain subsidized health plans (either for contraceptives alone, or full plans) on the existing network of ACA exchanges.

Nor is the mandate justified by the Government's argument that providing the mandated coverage without Petitioners' involvement would inflict harm on third parties. There is no evidentiary basis for this claim. Regardless, there is a sharp difference between preventing a religious group from inflicting harm and coercing it to provide benefits. In general,

the only way to prevent a religious group from inflicting harm is to prohibit it from engaging in harmful activity. But when the Government wants to provide benefits, it can almost always do so—and can certainly do so here—without forcing religious objectors to participate. At the very least, when the Government seeks to coerce religious groups to provide or facilitate benefits in violation of their conscience, it must have some exceptional justification for why it cannot provide the benefits through independent means. Here the Government has no such justification.

### A. Granting Petitioners an Exemption Would Not Undercut Any Compelling Government Interest

To demonstrate a compelling interest, the Government must prove that granting an exemption for Petitioners would imperil a public interest "of the highest order." *Lukumi*, 508 U.S. at 546 (citation omitted). That test is met only if an exemption would give rise to "the gravest abuses, endangering paramount interest[s]," or would pose a "substantial threat to public safety, peace or order." *Sherbert*, 374 U.S. at 403, 406 (citation omitted). In making this determination, courts must "look[] beyond broadly formulated interests justifying the general applicability of government mandates," and instead must "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S. at 430-31. In other words, a court must assess "the marginal interest in enforcing the contraceptive mandate in th[is] case[]." *Hobby Lobby*, 134 S. Ct. at 2779. Thus, even if the Government has a compelling interest in enforcing

the contraceptive mandate as a general matter, that "does not provide a categorical [justification]" for denying a specific exemption for the narrow category of nonprofit religious objectors. *O Centro*, 546 U.S. at 432.

Here, granting a religious exemption for Petitioners would not undercut any "compelling" interest because the mandate is already riddled with exemptions. For example, the mandate provides a full exemption for certain religious organizations—those that meet the narrow definition of "religious employer"—that are otherwise indistinguishable from Petitioners. Catholic Charities of Pittsburgh, for example, is indistinguishable from its counterpart in Erie, performing the same religious social-services role in all respects but one—the former is separately incorporated whereas the latter is part of the diocese itself. It cannot be that the Government has a compelling interest in requiring one to comply with the mandate while exempting the other. This underscores the larger problem with the Government's definition of "religious employer." It acts as if religious organizations such as the Catholic Church have a "religious" wing and a "charitable/educational" wing, when in fact they are all equally intrinsic to the exercise of the Catholic religion. The utter irrationality of the exemption, moreover, is demonstrated by the fact that it encompasses "houses of worship" that, unlike Petitioners here, do not even object to the mandated coverage.

The mandate likewise broadly exempts "grandfathered" health plans, which cover tens of millions of people. This exemption serves no purpose

other than to promote administrative convenience and fulfill the President's promise that individuals could maintain their existing health plans if they wanted to. If these interests merit an exemption, the Government cannot possibly deny similar relief to Petitioners. In short, the Government hardly has even a rational basis for discriminating against Petitioners by refusing to offer them the same exemption available to millions of others. It most assuredly does not have a "compelling" one.

### 1. The Mandate Is Riddled with Exemptions and Inconsistencies That Belie Any Compelling Need to Deny an Exemption Here

"It is established in [this Court's] strict scrutiny jurisprudence" that a religious exemption generally does not threaten "an interest 'of the highest order'" when the Government has already granted a significant number of *other* exemptions, thus "'leav[ing] appreciable damage to [its] supposedly vital interest unprohibited.'" *O Centro*, 546 U.S. at 433 (quoting *Lukumi*, 508 U.S. at 547). At the very least, when the Government "'provides an exception to a general rule for secular reasons (or for only certain religious reasons), [it] must explain why extending a comparable exception to a specific plaintiff for religious reasons would undermine its compelling interests.'" *Hobby Lobby*, 134 S. Ct. at 2783 n.41 (quoting Br. for United States as Amicus Curiae at 10, *Holt*, 135 S. Ct. 853 (No. 13-6827)); *O Centro*, 546 U.S. at 431 (same). If the Government's asserted interests are "'not pursued with respect to analogous nonreligious conduct'" elsewhere, that is strong evidence that granting a religious exemption

here would not truly undercut any "compelling" interest. *Holt*, 135 S. Ct. at 866 (quoting *Lukumi*, 508 U.S. at 546).

That principle is dispositive here. The Government cannot plausibly assert any "compelling" need to deny Petitioners an exemption from the mandate because the same mandate "'presently does not apply to tens of millions of people'" under its various exemptions. *Hobby Lobby*, 134 S. Ct. at 2764 (citation omitted). These other exemptions plainly do not serve any purpose more important than the right of religious liberty that Congress chose to protect under RFRA. And just as the Government was able to grant these other exemptions, so too it can grant an exemption for Petitioners without "endangering paramount interests" or posing a "substantial threat to public safety, peace or order." *Sherbert*, 374 U.S. at 403, 406.

**a.** The Government has already acknowledged that it does not have any compelling need to deny an exemption for at least *some* religious nonprofits: it has created a full exemption for entities it deems "religious employers," which are allowed to offer health plans that do not come with any access to abortifacient or contraceptive coverage. The category of exempt employers, however, is arbitrarily limited to "churches, their integrated auxiliaries, and conventions or associations of churches," as well as the "exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A)(i) & (iii); 45 C.F.R. § 147.131(a).

This exemption—which is lifted from a Tax Code provision exempting certain entities from filing informational tax returns—tethers religious freedom

*not* to an organization's religious beliefs or practices, but to the manner in which the organization is organized. Under this provision, if a "church" includes its religious, charitable, and educational operations under a single corporate entity, all parts of it are "exempt." But if it separately incorporates its "religious" wing from its equally religious "charitable/educational" one, then the latter is stripped of that protection.

The facts of this case illustrate the utter irrationality of this distinction. Compare, for example, the situation of two sets of virtually identical entities now before this Court. Petitioner Catholic Charities of Pittsburgh is, as a formal matter, operated and incorporated separately from the Diocese of Pittsburgh. Its counterpart, Catholic Charities of Erie, is formally operated and staffed as a department of Petitioner Roman Catholic Diocese of Erie. Because of these arrangements, Catholic Charities of Pittsburgh must comply with the mandate, while Catholic Charities of Erie is considered part of an "exempt" religious employer. In every meaningful respect, these organizations are identical: they operate in immediately adjacent counties, they employ the exact same type of people, and they perform the exact same religious mission. And yet Catholic Charities of Pittsburgh must comply with the mandate, whereas Catholic Charities of Erie is exempt.

Or consider St. Augustine Catholic School and its virtually identical sister school, St. Francis Xavier Academy, which is located a few miles down the road. Because St. Augustine Catholic School happens to be formally incorporated as part of the

Archdiocese of Washington, it is treated as an exempt "religious employer." But because St. Francis Xavier Academy happens to be part of the separately incorporated Consortium of Catholic Academies, it must comply with the mandate. Once again, these schools are indistinguishable in every material respect: they employ the same type of teachers and carry out the same mission, using the same archdiocesan–approved religion curriculum. J.A.530-31.

There are no meaningful distinctions between these organizations. "Everything th[at could be said] about [the exempt entities] applies in equal measure to" the non-exempt entities, who are equally religious nonprofit groups. *O Centro*, 546 U.S. at 433 (holding that the Government could not deny a religious exemption for *hoasca* when it had granted a virtually identical religious exemption for peyote). There is accordingly no basis for the Government to treat them differently—"burdening one while [exempting] the other—when it may treat both equally by offering both of them the same [exemption]." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

These examples are by no means unique, J.A.53, 61-62 (dioceses contain dozens of exempt and "accommodated" schools), and they illustrate that the Government's arbitrary religious exemption reflects the exact opposite of the narrow tailoring that is required to survive strict scrutiny under RFRA. There is no reason to think that RFRA provides more protection for some religious believers than others, much less based on irrelevancies such as corporate structure. Indeed, the Government's entire approach is badly flawed. By concluding that only "houses of

worship" but not religious charitable and educational institutions should be considered "religious employers," the Government betrays a distressingly narrow view of the proper place of religious faith and practice in our society.

These irrationalities alone should doom the Government's regulatory scheme. But there is more. Incredibly, the Government's "religious employer" exemption does not even take into account whether a covered employer has any religious objection to the mandate at all. Instead it applies to *all* entities that fall within the scope of the paperwork provision set forth in § 6033 (a)(3)(A)(i) & (iii) of the Internal Revenue Code. As a result, the exemption allows covered employers to withhold contraceptive coverage for any reason, or for no reason. The Government cannot explain why this "nonreligious conduct" is exempt, *Holt*, 135 S. Ct. at 865-66, while Petitioners' religious exercise is not. As *Hobby Lobby* noted, the decision to fully exempt this artificial category of "religious employers"—*regardless of whether they even object to providing contraceptive coverage*—is "not easy to square" with the refusal to exempt Petitioners, who actually *do* have religious objections. 134 S. Ct. at 2777 n.33.

**b.** The Government's claim of a "compelling" need to deny an exemption here is further undermined by the sweeping exemption for "grandfathered" health plans. By the Government's own estimate, this exemption currently affects at least 44 million people nationwide. *Supra* p.7. And in keeping with the President's promise that "if you like your health plan, you can keep it," J.A.956, there is no sunset on grandfathered status, which means that such plans

need not provide any access to abortifacient or contraceptive coverage as long as their sponsors do not make certain specified changes. *Supra* pp.6-7. In other words, because "there is no legal requirement that grandfathered plans ever be phased out," the Government's regulatory scheme leaves individuals on such plans with no guarantee of free "contraceptive coverage . . . at all" for the indefinite future. *Hobby Lobby*, 134 S. Ct. at 2764 n.10, 2780.

To be sure, the mere existence of an exemption is not necessarily dispositive. "[A] compelling interest may be outweighed in some circumstances by another even weightier consideration." *Id.* at 2780. That is not the case here, however, because "the interest [the grandfathering exemption] serve[s] . . . is simply the interest of employers in avoiding the inconvenience of amending an existing plan," *id.*, and the interest of individuals in maintaining their current coverage. RFRA requires at least as much solicitude for Petitioners' religious exercise.

Moreover, Congress has demonstrated that it knows how to make exceptions to grandfathered status when it has a truly compelling need. As this Court noted in *Hobby Lobby*, while "[g]randfathered plans are required 'to comply with a subset of the Affordable Care Act's health reform provisions' that provide what HHS has described as 'particularly significant protections,'" "the contraceptive mandate is expressly excluded from this subset." *Id.* (citation omitted). The Government's own admission that the contraceptive mandate does not fall within the category of "significant protections" is fatal to its argument that granting Petitioners an exemption

would undercut any "vital interest." *O Centro*, 546 U.S. at 433.

### 2. Congress Has Not Indicated Any Compelling Interest in Forcing Nonprofit Religious Groups to Comply with the Mandate

The Government cannot claim any true "compelling" interest in requiring objecting nonprofit religious organizations to comply with the contraceptive mandate, because that mandate is purely a figment of administrative rulemaking. The architects of the ACA did not mandate abortifacient and contraceptive coverage in general, much less in connection with the health plans of religious nonprofits. Instead they drafted the law to require only the anodyne category of "preventive care," which is why the mandate was imposed through the federal bureaucracy. 42 U.S.C. § 300gg-13(a)(4). Because the contraceptive mandate for nonprofit religious groups is purely the result of administrative rulemaking, the same bureaucracy that created it could decide to revoke it at any time. And because Congress chose to "leave[] unprohibited" the option of eliminating that mandate altogether, it cannot possibly be considered necessary to protect "an interest 'of the highest order.'" *O Centro*, 546 U.S. at 433 (citation omitted). Giving administrative agencies such open-ended discretion "is not how [Congress] addresses a serious social problem" where it determines that there is a truly compelling interest at stake. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2740 (2011). This is especially true where the fundamental right to the free exercise of religion is implicated.

Mandating abortifacient and contraceptive coverage in connection with nonprofit religious health plans is a highly divisive and unsettled issue on which no national consensus has yet emerged and on which the legislative branch has yet to speak. In the absence of a policy judgment being made by Congress, mere discretionary *regulations* requiring such coverage cannot override RFRA's *statutory* protection for religious liberty.

### 3. The Government Has Wrongly Disregarded the Freedom of Association Among Nonprofit Religious Groups

In gauging the strength of the Government's asserted interest, it is important to take account of the freedom of association among nonprofit religious groups and their employees and students. Granting an exemption for Petitioners here would have no effect on anyone except for those who enroll in private health plans sponsored by a small minority of nonprofits that hold themselves out as devoutly religious, and the even smaller group that object to facilitating abortifacient and contraceptive coverage. The Government completely disregards that element of free association and instead seeks to enforce the mandate against Petitioners without any evidence of whether their plan beneficiaries even want the mandated coverage. *Cf. Brown*, 131 S. Ct. at 2741 (criticizing prohibition on the purchase of violent video games by minors for being based on "what the State thinks parents *ought* to want").

In practical effect, the mandate operates as a sword against minority religious groups, not as a shield to protect women. Instead of respecting the

choices of nonprofit Catholic entities and the women who associate with them, the mandate licenses people who reject Catholic teaching to go to private Catholic organizations and force them to provide health plans that violate their deeply held religious beliefs. This is akin to going to a kosher butcher and demanding a side of bacon. It does not protect anyone from harm, but instead licenses people to force a religious minority to abandon its unpopular religious practices in order to cater to the values and desires of the majority.

And indeed, that would appear to be the very purpose of the mandate. After all, the vast majority of employers have no objection to providing the mandated coverage. *See* 75 Fed. Reg. at 41,732 (stating that at the time the Government enacted the mandate, "over 85 percent of employer-sponsored health insurance plans" already provided contraceptive coverage). And the Government has repeatedly claimed that the provision of such coverage is "at least cost neutral, and may result in cost-savings." 78 Fed. Reg. 8456, 8463 (Feb. 6, 2013); J.A.333. Consequently, the only reason why a religious nonprofit would omit contraceptive coverage is because of a deep-seated religious belief. In such circumstances, the only conceivable purpose of applying the mandate to this small group of objecting religious nonprofits is to force these "religious hold-outs" to bend to the will of the prevailing majority.

RFRA was designed to prevent this type of governmental overreach. Under RFRA, individuals can decide for themselves whether to work for or obtain their health coverage through a Catholic

nonprofit, and Catholic nonprofits can decide for themselves whether to offer health plans that come with abortifacient and contraceptive benefits. Neither side can impose its beliefs or practices on the other. Unless the religious employer engages in "grave[] abuses" or poses a "substantial threat to public safety, peace or order," it must be left free to offer health benefits on voluntary terms according to its own conscience, without interference from the federal government. *Sherbert*, 374 U.S. at 403, 406.

Respecting this principle of mutual non-interference ensures that religious minorities enjoy a healthy sphere of autonomy, which fosters "the diversity we profess to admire and encourage" in a pluralistic society. *Yoder*, 406 U.S. at 226. That principle of pluralism is respected by statutes such as Title VII, which contains a religious exemption that allows all Petitioners here to require their employees to share their Catholic faith. *See* 42 U.S.C. § 2000e-1(a). By contrast, the Government's unyielding regulatory mandate would leave little room for diversity, pluralism, or freedom of choice. It would force virtually *all* Catholic nonprofit health plans to come with abortifacient and contraceptive coverage regardless of whether the plan beneficiaries want it or not, and without exceptions even for some of the most devoutly religious groups. Under the Government's regulatory regime, then, Petitioners are perfectly free to require their employees to *be* Catholic under Title VII, but they cannot offer them health plans that comport with their Catholic moral principles. That cannot possibly be the law.

### 4. The Interests Asserted by the Government and the Lower Courts Are Woefully Inadequate

**a.** In the administrative record and in the district courts below, the Government asserted nothing more than the same two highly abstract interests that it asserted in *Hobby Lobby*—namely "public health'" and "gender equality." *See Zubik* Doc. No. 23, at 20-21 (J.A.3); *Persico* Doc. No. 28, at 20 (J.A.17); *PFL* Doc. 13, at 24 (J.A.194); *RCAW* Doc. 26, at 21, 24 (J.A.342); 78 Fed. Reg. at 39,872, 39,887. In *Hobby Lobby*, however, this Court warned that these two "very broadly framed interests" were inadequate to satisfy strict scrutiny. 134 S. Ct. at 2779. Because public health and gender equality are so amorphous, and can be advanced in so many different ways, they cannot withstand the "more focused" scrutiny that RFRA requires. *Id.* This alone is reason enough to conclude that the Government cannot carry its burden under strict scrutiny.

Strict scrutiny does not allow the Government to rely on evidence that the mandate serves abstract interests in society at large, but instead requires the Court to "scrutinize[] the asserted harm of granting specific exemptions to *particular religious claimants*." *O Centro*, 546 U.S. at 430-31 (emphasis added). Thus, the Court must look to the Government's "marginal interest in enforcing the contraceptive mandate in th[is] case[]." *Hobby Lobby*, 134 S. Ct. at 2779. Although the Government has disputed the workability of a case-by-case approach in the courts below, this Court has repeatedly reaffirmed "the feasibility of case-by-case consideration of religious exemptions to generally

applicable rules," which can be "'applied in an appropriately balanced way' to specific claims for exemptions as they ar[i]se." *O Centro*, 546 U.S. at 436 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)). Indeed, by enacting RFRA, "Congress determined that [this] 'is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.'" *Id.* (quoting 42 U.S.C. § 2000bb(a)(5)).

Here, the Government has not even tried to investigate whether granting an exemption for Petitioners would undermine its interests. For example, the Government has set an employee's "likel[ihood]" of "shar[ing]" her employer's religious objection to abortion and contraception as the benchmark for whether that employer should qualify for an exemption. 78 Fed. Reg. at 39,874. But the Government has taken no steps to determine whether its interests would be better served by enforcing the mandate against Petitioners as compared to the "religious employers" it has already exempted. *Cf. Hobby Lobby*, 134 S. Ct. at 2780-81 (criticizing the Government for failure to provide relevant statistics). For example: Among women enrolled in health plans sponsored by nonprofit groups such as Petitioners that hold themselves out as devoutly Catholic, how many want to avail themselves of abortifacient and contraceptive services? Of this subset, how many are currently unable to use such services because Petitioners' health plans do not provide coverage for it? And of this subset, what percentage would likely start using such services if the mandate were enforced against Petitioners? "Without some sort of field survey, it is

impossible to know." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 821 (2000); *cf. Brown*, 131 S. Ct. at 2740 ("California cannot show that the Act's restrictions meet a substantial need of parents who wish to restrict their children's access to violent video games but cannot do so.").

Indeed, the Government has *conceded* that it has "no [such] evidence," and instead insists on excluding Petitioners from the "religious employer" exemption based solely on what it believes to be "just logic and common sense." J.A.1111; *Zubik* Pet.App.120a (finding the Government's position "speculative, and unsubstantiated by the record and, therefore, unpersuasive"). This evidentiary void is fatal, because to the extent Petitioners' plan beneficiaries do not want the mandated coverage or would not change their behavior because of it, enforcing the mandate against Petitioners would have no impact on the Government's asserted interests. For example, there is no reason to believe that Priests for Life—an organization created to oppose abortion and contraceptives—is less "likely" than a church to employ people who oppose abortion, contraception, and sterilization. As one commentator has observed, "women have a true variety of reasons for not using contraception that the law cannot mitigate or satisfy simply by" mandating it. Helen M. Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 Vill. L. Rev. 379, 380 (2013). The Government therefore has not even come close to proving that it has a greater interest in enforcing the mandate against Petitioners as compared to the "religious employers" and millions of others it has already exempted.

**b.** Although the Government did not raise the argument in the district court, the D.C. Circuit held that the Government has a "compelling" interest in ensuring that women have "seamless[]" coverage for abortifacients and contraceptives as part of a single health plan. *RCAW* Pet.App.5a, 51a-66a. In the D.C. Circuit's view, this interest is "compelling" because asking women to take what that court characterized as "minor added steps" to receive contraceptive coverage apart from their primary health plans "would dissuade [them] from obtaining contraceptives." *RCAW* Pet.App.68a.

The Government forfeited this argument by failing to raise it in the district court. Strict scrutiny does not allow appellate courts to rely on interests the Government did not even *assert*, much less substantiate below. *See O Centro*, 546 U.S. at 429. But even if the Government were allowed to assert a "compelling" interest in "seamless" coverage for the first time on appeal, it could not possibly succeed.

Whatever speculative benefit may be attributed to the convenience of what the Government now calls "seamless" coverage, it cannot possibly qualify as a compelling interest that satisfies the "the most demanding test known to constitutional law." *Boerne*, 521 U.S. at 534. A compelling interest means an interest "of the highest order." *O Centro*, 546 U.S. at 433 (citation omitted). This is the type of interest that is implicated when the Government is combating "substantial threat[s] to public safety, peace or order," or when it is legislating against "grave[] abuses" that "endanger[] paramount interests." *Sherbert*, 374 U.S. at 403, 406 (citation omitted). The alleged interest in "seamlessness" does

not meet this threshold. It does not rest on the Government's much-touted need to *provide* free contraceptive coverage, but instead on its desire to force religious objectors to help provide the coverage in a marginally more convenient way. The Government, however, "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown*, 131 S. Ct. at 2741 n.9. Indeed, given that the Government has decided not to mandate contraceptive coverage *at all* in connection with grandfathered plans and "religious employer" plans, it cannot claim a compelling interest in mandating "seamless" coverage in connection with Petitioners' plans.

At a minimum, the Government would need to provide evidence for the counterintuitive notion that it has a "compelling" interest in forcing Petitioners to violate their religion to avoid (in the D.C. Circuit's words) the "minor effort[]" needed to "learn about" and sign up for free contraceptive coverage from another source. *RCAW* Pet.App.58a. But the record contains no such evidence. The D.C. Circuit relied on a bald assertion in the Federal Register that "requiring [women] to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women." 78 Fed. Reg. at 39,888; *RCAW* Pet.App.68a. This is nothing more than the agencies' "mere say-so." *Holt*, 135 S. Ct. at 866. The actual evidence in the record does not address so-called "seamlessness," but the issue of "cost" and how "[s]tudies have . . . shown that even moderate *copayments* for preventive services" can "deter patients from receiving those services."

J.A.556 (emphasis added). [9] By contrast, "the Government has pointed to no evidence in the record demonstrating that its purported interest in providing contraceptive coverage without cost-sharing is harmed when women must undergo additional administrative steps to receive the coverage." *RCAW* Pet.App.246a (Brown, J., dissenting). The notion that "'additional steps' would be so burdensome as to hinder women's access to contraception is pure speculation." *RCAW* Pet.App.247a (Brown, J., dissenting).

Because the Government "bears the risk of uncertainty" on these questions, even "ambiguous proof" would "not suffice" to carry its burden. *Brown*, 131 S. Ct. at 2739. But here the Government has not even offered "ambiguous" proof of a need for "seamless" access to contraceptive coverage. It has offered *no* proof. As a result, the Government and the Court are left to guess whether enforcing the mandate against Petitioners would provide any real-world "benefit" to anyone, and if so, how significant the benefit would be. Petitioners cannot be compelled to violate their religious beliefs based on nothing more than unsubstantiated assertions that some unknown number of women might otherwise suffer (in the D.C. Circuit's words) "minor" inconvenience in receiving free contraceptive coverage.

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[9] At times, the IOM relied on studies addressing the effect of requiring co-payments for "preventive services" generally, and in some cases the studies did not even consider contraceptive services. *E.g.*, J.A.556 (citing Robertson, et al., *Women at Risk*, *in* Realizing Health Reform's Potential (2011)).

It is certainly true that in "applying [RFRA], courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries," *Cutter*, 544 U.S. at 720, but it is equally clear that "[n]othing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit"—however minor—"on other individuals." *Hobby Lobby*, 134 S. Ct. at 2781 n.37. Thus, just as the Government cannot mandate that "all supermarkets must sell alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets)," *id.*, it cannot mandate that all health plans must come with "seamless" access to abortifacient and contraceptive coverage, and thereby exclude Catholic nonprofits from offering health insurance. The Government's unsubstantiated interest in administrative convenience is simply insufficient to override RFRA's strong protection for religious liberty.

### B. Forcing Petitioners to Comply with the Mandate Is Not the Least Restrictive Means of Providing the Objectionable Coverage

The Government has many less restrictive ways of delivering abortifacient and contraceptive coverage without forcing Petitioners' health plans to serve as the delivery vehicle. As this Court emphasized in *Hobby Lobby*, the least-restrictive means test is "exceptionally demanding." 134 S. Ct. at 2780. The Government must show a "'serious, good faith consideration of workable . . . alternatives.'" *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2420 (2013) (citation

omitted). Based on that good-faith consideration, the Government must then "prove" that forcing religious objectors to violate their beliefs "is the least restrictive means of furthering a compelling governmental interest." *Holt*, 135 S. Ct. at 864. "[M]ere[] . . . expla[nations]" and assertions without evidence do not suffice. *Id.*; *see also Playboy*, 529 U.S. at 824 ("It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.").

Under that "exceptionally demanding" standard, the Government has not remotely proved that hijacking the health plans of religious objectors is the only feasible way to ensure their employees and students receive access to abortifacient and contraceptive coverage. To the contrary, "the Government can readily arrange for other methods of providing contraceptives, without cost sharing, to employees" of religious objectors. *Hobby Lobby*, 134 S. Ct. at 2781 n.37. In *Hobby Lobby*, this Court recognized that "[t]he most straightforward way of doing this would be for the Government to assume the cost" of providing them "to any women who are unable to obtain them *under their health-insurance policies* due to their employers' religious objections." *Id.* at 2780 (emphasis added). This plainly contemplates that the Government could provide the objectionable coverage independently of the health plans offered by religious objectors. And yet the Government has not engaged in any "good faith

consideration" of such alternatives, much less carried its burden to "prove" that they are unworkable. *Holt*, 135 S. Ct. at 864.

Indeed, on this issue too, the Government has submitted no evidence at all. When faced with this issue in the district court in the *Zubik* case, the Government conceded that its only evidence was a single page in the Federal Register with the conclusory statement that certain "proposals were considered, and it was determined that they were not feasible and/or would not advance the government's compelling interests as effectively" as enforcing the mandate against religious objectors. *Zubik* Pet.App.124a (quoting 78 Fed. Reg. at 39,888); J.A.188-91. The Government then conceded that it had no further evidence on this issue. *See Zubik* Pet.App.132a. As the district court found, that is wholly inadequate evidence to establish that the Government employed the least restrictive means. *Zubik* Pet.App.121a-24a.

There is a simple reason the Government did not provide any least-restrictive-means evidence: it could not. The mandate at issue here is one of the many different mechanisms the Government uses to provide free contraceptives to women throughout the country. First, for the millions of women whose employers do not offer health coverage or who are unemployed, the Government has spent billions of dollars to establish and subsidize exchanges where they can purchase health plans that include the full range of FDA-approved contraceptive coverage. Second, for many uninsured women nationwide who cannot afford contraceptives, the Government operates a program called Title X, which has an

annual budget of over $280 million, to distribute free contraceptives. And third, for the remaining portion of women who receive coverage through private group health plans like that of Petitioners, the Government generally requires the plans to provide access to contraceptive coverage (except, of course, for the roughly 45 million people on grandfathered plans or plans sponsored by "religious employers").

This last option—the contraceptive mandate for group health plans—is thus only one of many different mechanisms the Government currently uses to deliver contraceptive coverage. The Government has not explained why it cannot exempt Petitioners' health plans and instead deliver contraceptive coverage to their employees and students using one of the other "mechanism[s] for doing so [that are] already in place," *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring), or one of numerous other alternatives.

**1.** Perhaps the most obvious solution would be for the Government to offer women enrolled in Petitioners' health plans the opportunity to sign up for separate, contraceptive-only health plans on the ACA exchanges. This option would involve nothing but a de minimis administrative burden for women—taking a few minutes to sign up on HealthCare.gov for a separate insurance card—that would avoid the crushing burden of forcing religious objectors to act in violation of their conscience. It would not be burdensome for the beneficiaries of this program to keep two insurance cards in their wallets instead of one. Indeed, it is commonplace for people to use separate insurance cards to pay for prescription drugs, doctor's visits, dental care, and vision care.

And signing up and using a contraceptive-only health policy would be no more burdensome than the ordinary administrative tasks associated with obtaining and using health insurance. This solution could be implemented through the existing network of ACA exchanges, and it would cost the Government nothing more than it is already paying under the so-called "accommodation," which already guarantees TPAs federal reimbursement of at least 110% of the cost of providing contraceptives. *Supra* pp.12-13.

The Government has failed to offer any evidence that this alternative would not be workable. Instead, it has relied on the abstract legal argument that RFRA's less-restrictive-means test does not require it to create new programs to accommodate religious exercise. But the ACA has already created a massive new bureaucracy for delivering healthcare. The relatively minor adjustments necessary to safeguard one of this Nation's most precious freedoms pale in comparison. Moreover, *Hobby Lobby* squarely rejected the Government's sweeping claim: "nothing in RFRA that supports this argument, and drawing the line between the 'creation of an entirely new program' and the modification of an existing program (which RFRA surely allows) would be fraught with problems." 134 S. Ct. at 2781. As a result, there is no basis for the Government to categorically rule out "the option of a new, government-funded program" as a possible less-restrictive means, *id.* at 2781-82, particularly where, as here, it would work within the "established framework" of ACA exchanges, *id.* at 2786 (Kennedy, J., concurring). RFRA requires case-by-case determinations on the basis of actual evidence about whether a proposed alternative would

be workable and affordable. And here, the Government has simply failed to provide any evidence on these questions at all. Accordingly, because the Government "bears the risk of uncertainty" under strict scrutiny, *Brown*, 131 S. Ct. at 2739, it cannot possibly prevail.

**2.** Another way for the Government to provide the objectionable coverage independently would be to "treat employees whose employers do not provide [the mandated] coverage for religious reasons the same as it does employees whose employers provide no coverage," such as employees of small businesses: namely, by allowing them to sign up for subsidized health plans on the existing network of ACA exchanges, which include "seamless" access to contraceptive coverage. *RCAW* Pet.App.249a (Brown, J., dissenting). This would be an "existing, recognized, workable, and already-implemented framework" to avoid infringing on Petitioners' religious liberty. *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

The Government has already admitted that allowing employees to obtain abortifacient and contraceptive coverage through the ACA exchanges would equally further its interests. In *Hobby Lobby*, the Government argued that small businesses that object to contraceptive coverage should simply drop their health plans, thus allowing their employees to "obtain coverage on a health insurance exchange," which "w[ould] provide contraceptive coverage without cost sharing." Br. for the Pet'rs at 56, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354) (citing 26 U.S.C. § 36B), 2014 WL 173486; 78 Fed. Reg. at 39,887 & n.49. If the exchanges are good enough for the

employees of small businesses, they are good enough for the employees of objecting religious nonprofits.

Under this compromise, Petitioners' employees who want abortifacient and contraceptive coverage could still "receive [it] without cost sharing" through their independent exchange-based plans. *Hobby Lobby*, 134 S. Ct at 2782. They would "face minimal logistical and administrative obstacles," *id.* (citation omitted), because all they would have to do is sign up for their health insurance on HealthCare.gov instead of on the website of their religious employer or university. At the least, they would face nothing more than "the same administrative burdens as those who [currently] find complete coverage—including contraceptive services coverage—on the exchanges." *RCAW* Pet.App.249a (Brown, J., dissenting). By comparison, enforcing the mandate against religious nonprofits would likely have a far harsher impact on employees (and be more costly for the Government), because it "would effectively compel" many religious objectors to "drop health-insurance coverage altogether." *Hobby Lobby*, 134 S. Ct. at 2783. This would leave *all* of their plan beneficiaries—not just those who want abortifacient or contraceptive coverage—"to find individual plans on government-run exchanges or elsewhere," which would require federal subsidies on a much larger scale. *Id.*

The Government could also use the existing subsidy mechanism to ensure that exchange-based plans would be affordable for employees and students of nonprofit religious objectors. The Government has provided no evidence to show that it would be unduly expensive to use subsidized

exchange plans as a less-restrictive-means to avoid burdening Petitioners' religious exercise. Indeed, the Government's own estimates suggest that the number of employees who might avail themselves of this alternative is small. At present, the Government is aware of only 122 nonprofits nationwide who object to compliance with the so-called "accommodation" on religious grounds. 80 Fed. Reg. 41,318, 41,332 (July 14, 2015). Even assuming that estimate is low, it is likely that many of the employees and students who choose to associate with those entities will not want or need contraceptive coverage. *Supra* pp.63-65. And for the subset who do, the cost of subsidizing such plans pales in comparison to the potential cost of subsidizing the health plans of the "34 million workers" employed by small businesses that are not covered by the employer mandate, *Hobby Lobby*, 134 S. Ct. at 2764, a cost the Government has indicated it is more than willing to bear, *supra* pp.77-78. In any event, the cost of any subsidies would certainly "be minor when compared with the overall cost of [the] ACA," which is projected to "cost the Federal Government more than $1.3 trillion through the next decade." *Hobby Lobby*, 134 S. Ct. at 2781.

Given the Government's position that "providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand [the] argument that it cannot be required" to pay this relatively minor cost. *Id.* Indeed, any argument that RFRA cannot "require the Government to spend [such] a small amount reflects a judgment about the

importance of religious liberty that was not shared by the Congress that enacted that law." *Id.*

**3.** Another option would be for the Government to make minor adjustments to the existing Title X program, which was established in 1970 to create community-based programs throughout the country to increase access to contraceptives. Under Title X, the Department of Health and Human Services "is authorized to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." 42 U.S.C. § 300(a). The Government could use its authority under Title X to "make grants to and enter into contracts with public or nonprofit private entities," *id.*, to ensure free contraceptive services would be available for "any women who are unable to obtain them under their health-insurance policies due to their [nonprofit] employers' religious objections." *Hobby Lobby*, 134 S. Ct. at 2780.

As currently structured, Title X is a clinic-based program focused on "low income" women, 42 C.F.R. § 59.5(a), but the broad statutory language does not require the program to be so limited. Although the statute requires that "priority be given . . . to persons from low-income families," it also provides that "the term 'low-income family' shall be defined by the Secretary in accordance with such criteria as he may prescribe so as to insure that economic status shall not be a deterrent to participation." 42 U.S.C. § 300a-4. The administration could thus issue regulations stating that women who do not receive free

contraceptive benefits due to their employer's religious objection have an "economic status" entitling them to priority under Title X. And in any event RFRA "surely allows" the Government to "modif[y]" the existing Title X program as necessary to accommodate religious exercise. *Hobby Lobby*, 134 S. Ct. at 2781.

**4.** Alternatively, the Government could use some other "public option" to provide "contraception insurance." *Korte*, 735 F.3d at 686. The Government relies on a whole host of federal programs to provide even the most critical health services, with Medicaid and Medicare the most prominent examples. If these programs are good enough to provide vital cancer treatment and cardiovascular care for the poor and elderly, there is no reason similar programs cannot be used to provide contraceptives for the employees and students of religious objectors who desire such services. Again, RFRA "surely allows" the Government to "modif[y]" these existing programs if necessary to accommodate religious exercise. *Hobby Lobby*, 134 S. Ct. at 2781. And if for some reason these programs cannot be modified, then the Government could enact a new statute to establish the necessary programs. Because "Congress could" achieve the Government's asserted interest through less-restrictive means, "the more restrictive option . . . c[an]not survive strict scrutiny." *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004).

**5.** Finally, the Government could "give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers" or "give tax incentives to consumers" so they would not have to bear the cost of contraceptives. *Korte*, 735

F.3d at 686. The simplest version of this approach would be to grant refundable tax credits for the cost of contraceptive services purchased by people enrolled in religious objectors' health plans. Or, alternatively, the Government could grant credits to a network of large insurance companies to incentivize them to provide an independent, national program with easy online enrollment for people enrolled in religious health plans. The Government cannot simply dismiss this possibility out of hand without providing any evidence why it would not be feasible. The Government's refusal even to entertain such alternatives "reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law." *Hobby Lobby*, 134 S. Ct. at 2781.

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In short, there are numerous ways that the Government can provide Petitioners' employees and students with contraceptive coverage. Petitioners do not seek to prevent the Government from doing so. Instead, they ask only that they not be forced to take actions that offend their religious beliefs and to act as conduits for the delivery of such coverage in violation of those religious beliefs. This Nation's commitment to religious liberty demands no less.

## CONCLUSION

For the foregoing reasons, the decisions of the courts below should be reversed, and Petitioners should be granted an exemption from complying with the mandate.

Respectfully submitted,

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