No. 14-1505

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

The Government does not dispute the exceptional importance of the controversy surrounding the Nonprofit Mandate, and concedes that this case presents the most "suitable vehicle" to address the variety of "potentially dispositive issues" raised in this and related petitions. Opp. 13 n.9, 30-31. The only question, then, is whether this issue is worthy of certiorari. It clearly is. Indeed, absent review by this Court, the Government *concedes* that religious organizations nationwide will be compelled to violate their religious beliefs. At the least, that unjust result should not be foisted upon these organizations before this Court weighs in. This case, therefore, easily satisfies the traditional grounds for certiorari.

As Petitioners have explained, the Government substantially burdens religious exercise whenever it forces plaintiffs to "engage in conduct that seriously violates their religious beliefs" on pain of "substantial" penalties. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775-76 (2014). The regulations here do precisely that: (1) they require Petitioners to submit documentation that makes them morally complicit in the provision of abortifacient and contraceptive coverage to their health-plan beneficiaries, and (2) they oblige Petitioners to maintain morally objectionable relationships with companies that will "seamlessly" provide that coverage.

The Government admits that the regulations compel Petitioners to take these actions; concedes that these actions violate Petitioners' religious beliefs; and does not dispute that the penalties for

non-compliance are substantial. That is the very definition of a "substantial burden" on religious exercise. Because the regulations at issue cannot survive strict scrutiny, that should end the matter.

Unable or unwilling to respond to the simple logic of this analysis, the Government resorts to sleight of hand. According to the Government—which apparently believes it has a better grasp of Catholic moral teaching than the Archbishop of Washington—Petitioners' *real* objections are not to actions they themselves must take, but rather to the actions of third parties. Opp. 14-20. Indeed, the Government goes so far as to contend that Petitioners seek to block "any attempt by the government … [to] ensur[e] that … affected women receive separate contraceptive coverage." Opp. 13, 20. Both assertions are false. Petitioners plainly object to actions required of *them*, and they have proposed a host of less-restrictive ways the Government could provide the objectionable coverage.

While the Government touts the fact that "[s]ix courts of appeals" have adopted its position, Opp. 13, this only underscores the need for this Court's intervention. In those circuits, the Government can now compel religious adherents to violate their beliefs without triggering *any* scrutiny, so long as a court concludes that the religious objection is insignificant, or conveniently recharacterizes the objection as an objection to third-party conduct. Pet.App.7a. This approach conflicts sharply with the standard articulated by this Court and other circuits in related contexts, which allows plaintiffs to "dr[a]w" a "line" between objectionable and unobjectionable conduct, and gives courts the limited

task of assessing the substantiality of the *pressure* placed on plaintiffs to cross that line. 134 S. Ct. at 2776-79.

Accordingly, this Court should grant certiorari to correct this grave misunderstanding of RFRA's substantial-burden test, and to ensure a proper application of the strict-scrutiny standard in these vitally important cases.

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

A. As Petitioners explained, the court below paid only lip service to the notion that courts may not second-guess private religious beliefs, dismissing Petitioners' objection as a quibble over a "bit of paperwork." Pet.App.7a. It ignored Petitioners' undisputedly sincere religious belief that complying with the Nonprofit Mandate would make them complicit in sin, and instead pronounced that compliance would allow them to "wash[] their hands of any involvement in [contraceptive] coverage." Pet.App.28a; Pet. 15-18.

The Government makes no real effort to defend these overt forays into moral theology. Instead, it attempts to convince this Court that Petitioners' religious objections are something other than what Petitioners say they are. Opp. 14-20. To that end, the Government insists that Petitioners object only to third-party conduct, and thus their claims are not cognizable under *Bowen v. Roy*, 476 U.S. 693 (1986) and *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). That is false.

1. *Bowen* and *Lyng* hold that an individual cannot challenge the activity of a third party in which he plays "no role." *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008). Thus, 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 affected individuals … coerced by the Government's action into violating their religious beliefs." *Id.*

Here, however, Petitioners *themselves* are compelled to act in an objectionable manner. It is *Petitioners* who must submit the objectionable documentation, and it is *Petitioners* who must offer a health plan and maintain an objectionable relationship with the company that provides abortifacient and contraceptive coverage to their plan beneficiaries. It is these requirements to which Petitioners object, and it is these requirements that Petitioners seek to enjoin.[1] Petitioners make no claim that RFRA affords them the right to "dictate the conduct of the government or third parties.'" Opp. 17. But RFRA *does* afford them the right to refrain from acts that, in their religious judgment, "enabl[e] or facilitat[e] the commission of an immoral act by another." *Hobby Lobby*, 134 S. Ct. at 2778.

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[1] For example, were Petitioners fully exempt from the underlying obligation to provide contraceptive coverage, *e.g.*, 45 C.F.R. § 147.130(a)(1)(iv), they would likewise be exempt from the Nonprofit Mandate, which is merely an alternative way to "compl[y]" with that obligation, *id.* § 147.131(c)(1).

2. Perhaps recognizing that this case bears no resemblance to *Bowen* and *Lyng*, the Government goes one step further. Observing that Petitioners have no inherent objection to "notifying their insurers and TPAs" of their objections or to maintaining their "existing arrangements with" those entities, Opp. 15, 18, the Government argues that Petitioners cannot state a claim because their objections arise from "what *the government* and *third parties* will do" if plaintiffs take these actions. Opp. 18. This novel theory finds no support in this Court's jurisprudence.

As this Court has recognized, 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. For example, giving a neighbor a ride to the bank may not be morally problematic—unless one knows the neighbor intends to rob that bank. A Jewish school may not object to hiring a vendor to serve lunch to its students—unless the vendor was required to serve non-Kosher food. The same is true here. Petitioners have no inherent objection to hiring an insurance company or TPA. But they strongly object to hiring an insurance company or TPA that will provide abortifacient and contraceptive coverage to their plan beneficiaries.

Despite the Government's 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, facilitate others' immoral

conduct—most recently in *Hobby Lobby* itself, Pet. 18-19; *see also United States v. Lee*, 455 U.S. 252 (1982); *Thomas v. Review Bd.*, 450 U.S. 707 (1981). What the Government portrays as a "sweeping understanding of RFRA," Opp. 19, is in fact utterly routine.

Indeed, it is the Government's theory that is unprecedented. In *Thomas*, the pacifist plaintiff objected to "fabricat[ing] turrets for military tanks," *id.* at 710, because of "what *the government* and *third parties* w[ould] do" with them, Opp. 18. Likewise, the *Lee* plaintiff objected to paying Social Security taxes because it would "enable *other* Amish to shirk their duties toward the elderly." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1139 (10th Cir. 2013) (en banc) (emphasis added). This Court recognized a substantial burden in both cases, 455 U.S. at 257; 450 U.S. at 717, explaining that whenever plaintiffs are forced to act, "[t]he narrow function of a reviewing court" "is to determine whether" they have "an honest conviction" that the compelled act is "forbidden by [their] religion." *Id.* at 716.

Bowen itself recognized that plaintiffs can object to facilitating others' immoral conduct. 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, 701 n.7 (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).

3. The Government gains no ground by claiming that Petitioners object to an "independent" obligation on their TPAs and insurers. The Government maintains that this obligation is "'independent' because [it is] imposed by federal law, not by [Petitioners'] act[s]." Opp. 20-21. But federal law compels Petitioners' insurers and TPAs to provide contraceptive coverage to Petitioners' plan beneficiaries only *if* Petitioners maintain the objectionable relationship, and only *if* Petitioners submit the objectionable documentation. Pet. 19-22. To say Petitioners cannot object to these actions is akin to suggesting that Shinto religionists cannot object to filling out organ-donor cards, because "federal law" authorizes others to use the cards to initiate transplants.

Moreover, Petitioners would object even if their TPA or insurer's obligation were somehow "independent." Pet. 19-22. Petitioners object to being forced to hire companies that will provide the objectionable coverage to their plan beneficiaries, regardless of *why* they provide it. The Government apparently agrees, conceding that "Petitioners' RFRA claims do not depend on the details of the accommodation." Opp. 20.

B. The Government's strict-scrutiny arguments fare no better.

1. Petitioners demonstrated the lack of any "compelling" need to deny them the same exemption afforded to numerous entities. Pet. 23-26. The Government offers no substantive response, merely

repeating the interests this Court deemed inadequate in *Hobby Lobby*. Opp. 22-23. It also claims an interest in "filling the gaps" in coverage, Opp. 22, but that interest can hardly be compelling given the many other "gaps" left unfilled, Pet. 24-26. Finally, it incorrectly asserts that "five Justices" found a compelling interest in *Hobby Lobby*. Opp. 22. But Justice Kennedy joined the majority opinion, and neutrally observed that HHS "makes the case" for a compelling interest. 134 S. Ct. at 2785 (Kennedy, J., concurring).

2. The Government claims that Petitioners seek to block "any attempt … [to] ensur[e] that … affected women receive separate contraceptive coverage." Opp. 20, 23. But Petitioners have proposed a variety of less-restrictive means for the Government to provide coverage. Pet. 27, 33-34. Contrary to the Government's claims, Opp. 23, Petitioners have repeatedly stated that these alternatives would not "violate their beliefs" because they would allow the Government to "deliver free contraception," Joint Supp. Br. at 20-21, *Priests for Life v. HHS*, 772 F.3d 229 (D.C. Cir. 2014); Pet. 2, *outside* of Petitioners' "coverage administration infrastructure." 80 Fed. Reg. 41,318, 41,328 (July 14, 2015).

The Government appears to suggest that Petitioners' proposed alternatives are not workable because Congress has not yet enacted them. Opp. 24. But strict scrutiny requires plaintiffs' liberty interests to prevail if the Government *could* enact less-restrictive alternatives. *E.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1458 (2014). Indeed, *Hobby Lobby* held that "nothing … supports th[e] argument" that RFRA does not contemplate the

creation of alternative programs. 134 S. Ct. at 2781. And regardless, Petitioners' suggested alternatives require only "the modification of … existing program[s]," "which RFRA surely allows." *Id.*

The Government also argues that these alternatives would not "equally further" its interests, and accuses Petitioners of "dismiss[ing]" added "burdens" on women as "'minor' inconveniences." Opp. 24-25. It is not Petitioners, however, but *the court below* that found a compelling interest in eliminating these "minor" steps. Pet.App.68a. And like the court below, the Government offers *no evidence* that taking "minor steps" would "burden" women. Instead the Government cites the same ipse dixit from the Federal Register and inapposite pages of the IOM report discussing *cost-sharing burdens*, Opp. 25, which Petitioners' proposals likewise eliminate. Ultimately, forcing Petitioners to violate their religion to relieve women of the "minor effort[]" needed to "learn about" and sign-up for *free* contraceptive coverage, Pet.App.58a, "reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted [RFRA]." 134 S. Ct. at 2781.

II. THE CIRCUITS ARE DIVIDED OVER THE ISSUES PRESENTED

The circuits are divided on the nature of RFRA's substantial-burden test, and on whether this regulatory scheme can survive strict scrutiny. Pet. 29-35. That "[s]ix [courts]" have found the accommodation "consistent with RFRA," Opp. 26, 29, does not alter this reality.

The Government does not dispute that the circuits are divided on strict scrutiny. Pet. 33-35. Nor does the Government deny that the substantial-burden test used to uphold the Nonprofit Mandate conflicts with the test articulated by the Seventh Circuit in *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), the Tenth Circuit in *Hobby Lobby*, 723 F.3d 1114, the Eleventh Circuit, and this Court, Pet. 29-33. Instead of (1) accepting a plaintiff's undisputedly sincere religious objection to an act and then (2) determining whether the Government has substantially pressured the plaintiff to take that act, *id.*, these courts have undertaken freewheeling "objective" inquiries, either rewriting plaintiffs' objections, *supra* p,3-7, or making ad hoc determinations as to whether the plaintiff's *objection* is "substantial."

For example, the Second Circuit recently applied a so-called "objective test" that compared the Nonprofit Mandate with restrictions in other free-exercise cases. *Catholic Health Care Sys. v. Burwell*, No. 14-427, 2015 WL 4665049, at *7, *10 (2d Cir. Aug. 7, 2015). The court held that while "invasion[s of] bodily integrity" or prohibitions on "sacramental ritual[s]" were substantial burdens, being forced to "complet[e] a form" was not. *Id.* at *10.

This reflects a fundamental confusion regarding the nature of the substantial-burden inquiry. This Court and other circuits have properly held that "substantial burden" refers to the *degree of pressure* placed on plaintiffs to violate their religious beliefs (i.e., the size of the penalties for noncompliance). *Hobby Lobby*, 134 S. Ct. at 2775-76; Pet. 29-33. By contrast, courts upholding the Nonprofit Mandate have assessed the substantiality of the *religious*

exercise at issue (i.e., the acts plaintiffs object to).[2] This approach cannot be reconciled with the prohibition against judicial inquiry into religious matters, 134 S. Ct. at 2778, or with RFRA's protection for "'*any* exercise of religion,'" *id.* at 2762 (emphasis added).

III. *WHEATON* AND *ZUBIK* DO NOT SUPPORT THE GOVERNMENT'S CLAIMS

Although this Court enjoined the Nonprofit Mandate in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014) and *Zubik v. Burwell*, 135 S. Ct. 2924 (2015), the Government now claims those cases somehow show the Nonprofit Mandate "is consistent with RFRA." Opp. 26. Not so.

First, the *Wheaton* and *Zubik* injunctions did not authorize, obligate, or incentivize plaintiffs' TPAs to provide the objectionable coverage to plaintiffs' plan beneficiaries. The injunctions did not purport to limit plaintiffs' freedom to contract with their TPA to provide coverage consistent with their beliefs. Forcing Petitioners to comply with the Nonprofit Mandate would eliminate that option.

Second, the Government highlights this Court's statement that it could "rely" on the plaintiffs' notice "'to facilitate the provision of full contraceptive coverage.'" Opp. 26 (citation omitted). But that is

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[2] The Government betrays the same confusion, referring to Petitioners' religious exercise as "the two asserted burdens imposed by the accommodation." Opp. 17. Under RFRA, however, the burden is not the objectionable *action* Petitioners must take, but the *penalties* they face for noncompliance. Pet. 15-16.

entirely consistent with Petitioners' argument here: an injunction protecting Petitioners would leave the Government free to *independently* provide contraceptives to Petitioners' plan beneficiaries. *Supra* p.8-9.

Finally, as the Government concedes, the Nonprofit Mandate differs from the *Wheaton* and *Zubik* injunctions because it forces Petitioners to "identify [their] insurers and TPAs" to facilitate delivery of the objectionable coverage. Opp. 27. The Government does not even *attempt* to explain why this requirement does not substantially burden Petitioners' religious exercise, relying instead on a strict-scrutiny argument that this is "the minimum information necessary" to "administer the accommodation." Opp. 28. But as noted above, the Government could provide the objectionable coverage independently of Petitioners' TPAs or insurers. *Supra* p.8-9. And if the Government somehow *must* use them as the conduit, it could identify them through other sources (i.e., notifications from employees who choose to work for religious nonprofits but still want free contraceptive coverage).

IV. THIS CASE PRESENTS THE IDEAL VEHICLE TO RESOLVE THIS EXCEPTIONALLY IMPORTANT ISSUE

The Government agrees that this case presents the most "suitable vehicle" to address challenges to the Nonprofit Mandate. Opp. 30-31. It "lacks [the] vehicle problems present in other pending petitions," "presents all of the health coverage arrangements that have given rise to RFRA challenges," and involves a decision below that "discusses all issues in the case." *Id.*

For example, while this case involves Petitioners with a self-insured church plan (the Archdiocese and its affiliates), other cases involve *only* self-insured church plans. The Government has repeatedly argued that the Nonprofit Mandate does not substantially burden plaintiffs with these ERISA-exempt plans. Petitioners disagree, but were this Court to side with the Government, that would leave unresolved the status of plaintiffs with self-insured plans that are not church plans (Thomas Aquinas College), fully-insured employer plans (Catholic University), and fully-insured student plans (Catholic University).

This case, therefore, allows this Court to cleanly resolve this exceptionally important controversy in all contexts in which it has arisen. Pet. 35-38.

CONCLUSION

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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