No. __-___

IN THE

Supreme Court of the United States

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

v.

KATHLEEN SEBELIUS, 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 Before Judgment to the United States Court of Appeals for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTION PRESENTED

Whether the contraceptive-coverage Mandate of the Affordable Care Act violates the free exercise rights of nonprofit religious organizations under the Religious Freedom Restoration Act.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs 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., and the Catholic University of America. Thomas Aquinas College was also a Plaintiff in the proceeding below, but is not a Petitioner here. 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 Kathleen Sebelius, in her official capacity as Secretary of the United States Department of Health and Human Services; United States Department of Health and Human Services; Thomas E. Perez, in his official capacity as Secretary of the United States Department of Labor; United States Department of Labor; Jacob J. Lew, in his official capacity as Secretary of the United States Department of the Treasury; and United States Department of the Treasury.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit this petition for a writ of certiorari before judgment in a case pending before the United States Court of Appeals for the D.C. Circuit.

OPINIONS BELOW

The opinion of the district court is reported at 2013 WL 6729515 (Pet. App. 1a). The order of the D.C. Circuit granting an injunction pending appeal is attached as Appendix C (Pet. App. 127a).

JURISDICTION

The district court entered judgment on December 20, 2013. The notice of appeal (Pet. App. 228a) was filed on December 21, 2013. The case was docketed in the court of appeals on December 23, 2013, as No. 13-5371. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(e).

LEGAL PROVISIONS INVOLVED

The following provisions are reproduced in Appendix G (Pet. App. 230a): 42 U.S.C. §§ 2000bb-1, 2000bb-2, 2000cc-5, 300gg-13; 26 U.S.C. §§ 4980D, 4980H; 26 C.F.R. §§ 54.9815-2713, 54.9815-2713A; 29 C.F.R. §§ 2590.715-2713, 2590.715-2713A; 45 C.F.R. §§ 147.130, 147.131.

STATEMENT OF THE CASE

Petitioners are entities affiliated with the Catholic Church and, as such, sincerely believe that life begins at the moment of conception, and that certain "preventive" services that interfere with the transmission of life are immoral. Accordingly, Petitioners believe that they may not provide, pay for, and/or facilitate access to contraception, sterilization,

abortion, or related counseling in a manner that violates the teachings of the Catholic Church. *See* Pet. App. 142a–45a, 151a–53a, 160a–62a, 170a–73a, 179a–82a, 188a–90a, 197a–99a, 207a–09a, 213a.

Historically, Petitioners have exercised this religious belief by excluding coverage for such services from their health plans in a manner consistent with Catholic teaching. Pet. App. 207a, 214a. Petitioner Roman Catholic Archbishop of Washington (the "Archdiocese") operates a self-insured health plan that includes not only its own employees, but also the employees of Petitioners Consortium of Catholic Academies, Archbishop Carroll, Don Bosco, Mary of Nazareth, Catholic Charities, Victory Housing, and Catholic Information Center. Their plan year began on January 1, 2014. Pet. App. 213a–14a. Catholic University offers its employees insured health care plans provided by United Healthcare, and makes insurance available to its students through AETNA. Catholic University's employee plan year begins on December 1, and its student plan year begins on August 14. Pet. App. 206a–07a.

1. The mandate at issue was promulgated pursuant to the Government's statutory authority under the Affordable Care Act to require group health plans to include coverage for women's "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4) (the "Mandate"). By defining "preventive care" to include all "FDA-approved contraception," the Mandate requires group health plans to cover contraception, sterilization, abortion-inducing

products, and related services.[1] Failure to provide such coverage exposes employers to fines of $100 a day per affected beneficiary. 26 U.S.C. § 4980D(b). Dropping coverage altogether subjects covered employers to annual penalties of $2,000 per employee and/or other negative consequences. *Id.* § 4980H.

From its inception, the Mandate has exempted numerous health plans covering millions of people. For example, certain plans in existence at the time of the Act's adoption are "grandfathered" and exempt from the Mandate. 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g)(1)(v). Moreover, small employers—those with fewer than fifty employees—are exempt from the penalty for dropping coverage. 26 U.S.C. § 4980H(a). And in an apparent acknowledgment of the burden the Mandate places on religious exercise, the Government created a narrow exemption for plans sponsored by so-called "religious employers," though that definition is essentially restricted to "group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders." 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013); 45 C.F.R. § 147.131(a). All told, by the Government's own estimates, over 90 million individuals participate in health plans excluded from the scope of the Mandate. 75 Fed. Reg. 34,538, 34,552–53 (June 17, 2010); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012).

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[1] Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/ womensguide lines (last visited Dec. 18, 2013).

The Government, however, has steadfastly refused to create a broader religious exemption, either for individuals seeking to run their businesses in accordance with their faith or for nonprofit religious organizations beyond houses of worship. For for-profit corporations, the Government offered no relief, prompting the *Hobby Lobby* litigation this Court will hear later this Term. For nonprofit religious organizations, the Government offered a so-called "accommodation" that is the subject of this litigation and other similar lawsuits filed throughout the country. 78 Fed. Reg. 39,870 (July 2, 2013).

Under the "accommodation," eligible nonprofit organizations are forced to provide a "self-certification" to their insurance company or third-party administrator, which has the perverse effect of authorizing the insurance company or third-party administrator to provide or arrange "payments for contraceptive services" for the organization's students or employees. *See* 26 C.F.R. § 54.9815-2713A(a)-(c). These mandated "payments" last only as long as the students or employees remain on the religious organizations' health plans. 29 C.F.R. § 54.9815-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B). For self-insured organizations, moreover, the self-certification constitutes the religious organization's "*designation* of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879 (emphasis added). Absent this self-certification, insurance companies and third-party administrators have no authority to provide the contraceptive payments under the accommodation. "[T]hese final regulations apply to group health plans . . . for plan

years beginning on or after January 1, 2014." *Id.* at 39,870.

In short, under the accommodation, Petitioners must designate a third party to provide the very coverage they find morally objectionable. "The self certification is, in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects." *S. Nazarene Univ. v. Sebelius*, No. 13-1015, 2013 WL 6804265, at *8–9 (W.D. Okla. Dec. 23, 2013). "If the institution does not sign the permission slip, it is subject to very substantial penalties or other serious consequences." *Id.* at *8. "If the institution does sign the permission slip, and only if the institution signs the permission slip, the institution's insurer or third party administrator is obligated to provide the free products and services to the plan beneficiary." *Id.*

Suffice it to say, the "accommodation" does not resolve Petitioners' religious objection to participation in this regulatory scheme. *See infra* Part III.A.1. Indeed, the Government *knew* its so-called accommodation would not resolve Petitioners' concerns, because well before the regulations were finalized, Petitioners and the U.S. Conference of Catholic Bishops repeatedly informed the Government that the now-codified proposals were inadequate.[2] The Government, however, ignored Petitioners' concerns.

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[2] *E.g.*, Comments of Archdiocese of Washington at 2 (Apr. 4, 2013), *available at* http://www.becketfund.org/wp-content/uploads/2013/04/Comments-4-4-13-Archdiocese-of-Washington.pdf; Comments of U.S. Conference of

2. Left with no other alternative to avoid violating their sincerely held religious beliefs, Petitioners filed this suit on September 20, 2013, to enjoin application of the Mandate.[3] On December 20, 2013, twelve days before the Mandate was scheduled to go into effect, the district court, which had jurisdiction under 28 U.S.C. § 1331, issued its ruling. The court "determine[d that] compliance" with the Mandate does not "actually constitute[] compelled 'facilitation'" of immoral conduct, Pet. App. 35a, or "give rise to 'scandal . . . in a way inconsistent with church teachings,'" Pet. App. 40a. According to the district court, Petitioners do not really object to the actions the Mandate requires of them, but rather to the actions the Mandate requires of third parties. Therefore, the court held that the Mandate did not substantially burden Petitioner Catholic University's exercise of religion, and that the remaining Petitioners lacked standing to challenge the Mandate.[4] Pet. App. 37a–49a, 59a–66a.

3. Petitioners immediately noticed their appeal on December 21, 2013. The case was docketed in the

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Catholic Bishops at 3 (Mar. 20, 2013), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf.

[3] With the exception of the Archdiocese, Petitioners are subject to the so-called "accommodation."

[4] The district court also granted summary judgment for Thomas Aquinas College, Pet. App. 49a–59a, which is not a party to this Petition or the underlying appeal, and denied a motion for injunction pending appeal, Pet. App. 120a.

U.S. Court of Appeals for the District of Columbia Circuit on December 23, 2013, and that same day, Petitioners moved for an injunction pending appeal. That motion was granted by the D.C. Circuit on December 31, 2013. As of this filing, no briefing schedule or oral argument date has been set.

REASONS FOR GRANTING THE PETITION

The Government has promulgated a regulatory mandate that exposes Catholic and likeminded organizations to draconian fines unless they abandon their religious convictions and take actions they believe make them complicit in the provision of abortion-inducing products, contraceptives, and sterilization for their employees and students. Incredibly, the Government *concedes* both that Petitioners sincerely believe the regulations at issue force them to act in violation of their religious beliefs and that circuit precedent bars the conclusion that those regulations can satisfy strict scrutiny. Pet. App. 133a–40a. In other words, the Government has adopted the unprecedented position that it can force believers to violate their religious beliefs based on nothing more than its ipse dixit. This extraordinary conclusion violates the Religious Freedom Restoration Act ("RFRA") and flies in the face of this Court's clear precedent, which establishes that absent interests of the highest order, the Government cannot compel an individual "to perform acts undeniably at odds" with his religious beliefs. *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972); *see also Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717 (1981); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

The Government's "remarkable" position that it can force entities—much less religious organizations whose free exercise rights receive "special solicitude" in our constitutional system, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012)—to take actions contrary to their beliefs based on nothing more than its own say so makes this case "of such imperative public importance" that a "deviation from normal appellate practice" is justified, Sup. Ct. R. 11. Indeed, this Court has acknowledged the significance of the issues at stake in this litigation by granting certiorari in cases involving for-profit corporations challenging the Mandate. *See Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354; *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356. The ultimate question presented in those cases—whether the parties' free exercise rights "are violated by the application of the contraceptive-coverage Mandate of the [Affordable Care Act]"[5]—is the same question presented here and in numerous nonprofit cases currently dividing the lower courts. As this Court will already be addressing application of the Mandate to for-profit companies, Petitioners submit it would be appropriate to decide the rights of nonprofit entities at the same time. *See Gratz v. Bollinger*, 539 U.S. 244, 260 (2003).

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[5] Question Presented, *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356, *available at* http://www.supremecourt.gov/qp/13-00356qp.pdf.

I. THIS CASE INVOLVES ISSUES OF IMPERATIVE PUBLIC IMPORTANCE ALREADY PENDING BEFORE THIS COURT

It should go without saying that the issues at stake are of "imperative public importance." Quite literally, the question before this Court is whether the Government can force religious believers to take actions they believe to be immoral. It is hard to imagine a question closer to the heart of the guarantee of religious freedom embodied in both the First Amendment and RFRA. "The Framers of the Constitution clearly embraced the philosophical insight that government coercion of moral agency is odious," *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1216–18 (D.C. Cir. 2013), and absent interests of the highest order, this Court has never endorsed such a practice.

Indeed, this Court has already recognized the "imperative public importance" of the issues presented in this litigation by granting certiorari in *Hobby Lobby* and *Conestoga*. It is well established that the pendency of cases involving similar issues counsels in favor of a grant of certiorari before judgment. *See, e.g.*, *Gratz*, 539 U.S. at 260 (noting that certiorari before judgment was granted to enable the Court to address the question presented in *Grutter v. Bollinger* "in a wider range of circumstances"); *Taylor v. McElroy*, 360 U.S. 709, 710 (1959) (per curiam) (granting certiorari before judgment "because of the pendency here of *Greene v. McElroy*," a case involving similar issues); *Porter v. Dicken*, 328 U.S. 252, 254 (1946) (granting certiorari before judgment "by reason of the close relationship of the important question raised to the question

presented in *Porter v. Lee*").[6] The grant of certiorari before judgment in such cases "present[s] the Court with a broader spectrum and more substantial record within which to consider and rule upon the common principles [those cases] involve than if only one case is considered, or if they are resolved separately and at different times or in different terms." Pet. for Certiorari at 15, *Gratz*, 539 U.S. 244 (No. 02-516).

Should this Court reach the merits in *Hobby Lobby* and *Conestoga*, it will undeniably have to resolve questions at issue in this litigation. For example, the Court will have to decide whether using threats of onerous fines to force entities to take actions that violate their religious beliefs imposes a substantial burden on religious exercise. The same question is at issue in this litigation. If the Court concludes that such action imposes a substantial burden, it will then have to determine whether that burden is the least restrictive means of furthering a compelling government interest. Again, the same question is at issue here.

This remains true despite the fact that the parties in *Hobby Lobby* and *Conestoga* are not eligible for the "accommodation," while the majority of Petitioners here are. Because RFRA protects "*any* exercise of religion," 42 U.S.C. §§ 2000bb-2(4),

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[6] *See also United States v. Booker*, 543 U.S. 220, 229 (2005); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 12 (1963); *United States v. Thomas*, 361 U.S. 950 (1960) (per curiam); *Reid v. Covert*, 354 U.S. 1, 5 (1957); *Graham v. Goodcell*, 282 U.S. 409, 411–12, 415 n.2 (1931).

2000cc-5(7)(A) (emphasis added), the precise nature of the religious exercise at issue is irrelevant to the substantial burden analysis. Thus the fact that the parties in the for-profit cases exercise their religion by refusing to themselves include contraceptive coverage in their health plans, while Petitioners exercise their religion by, *inter alia*, refusing to designate a third party to provide the objectionable coverage through self-certification is of no moment. The legal questions remain the same in both contexts: has the Government placed "substantial pressure on an adherent to modify his behavior and to violate his beliefs"? *Thomas*, 450 U.S. at 718. If so, is that substantial burden the least restrictive means of furthering a compelling government interest? 42 U.S.C. § 2000bb-1.

Indeed, this Court has recognized that certiorari before judgment is appropriate where, as here, the Government has attempted (but failed) to remove the alleged infirmities of a law pending before the Court in a related matter. In *United States v. Butler*, 297 U.S. 1 (1936), the Court considered the constitutionality of the Agricultural Adjustment Act of 1933. During the pendency of that litigation, Congress amended the Act in 1935. So as to decide the validity of the Act once and for all, this Court granted certiorari before judgment in *Rickert Rice Mills, Inc. v. Fontenot*, 297 U.S. 110 (1936), a case challenging the constitutionality the 1935 amendment. One week after striking down the Act in *Butler*, the Court held in *Rickert* that the 1935 amendment "do[es] not cure the infirmities of the original act which were the basis of the decision in [*Butler*]." *Id.* at 113. So too here. The Government apparently recognized the illegality of its initial

regulation and purported to fix the problem by amending the Mandate. The accommodation failed to "cure the infirmities of the original" Mandate, *id.*, and as in *Rickert*, certiorari before judgment is appropriate to resolve the validity of both the Mandate and the Government's subsequent amendment.

Ultimately, granting certiorari before judgment would allow this Court to resolve the core question of whether and how RFRA protects any employer—for-profit or nonprofit—from the Mandate. Should the Court rule in favor of *Hobby Lobby* and *Conestoga*, there can be little doubt that the Government will continue to argue that such a holding does not bind courts considering application of the Mandate to nonprofit entities (as it has done in this case, though the D.C. Circuit has enjoined application of the Mandate to for-profit entities, *Gilardi*, 733 F.3d 1208). Failure to decide the for-profit and nonprofit cases together thus creates the potential for an incongruous situation in which the free exercise rights of for-profit organizations are secure while the free exercise rights of nonprofit entities remain in doubt. *Cf. Bolling v. Sharpe*, 347 U.S. 497 (1954) (granting certiorari before judgment to allow the case to be heard with *Brown v. Board of Education*, 347 U.S. 483 (1954), preventing a situation in which the states would be required to integrate their schools while the District of Columbia would not).

II. THIS ISSUES PRESENTED IN THIS CASE HAVE DIVIDED THE LOWER COURTS

The courts below have already issued a number of diverging opinions on the validity of the accommodation. *See United States v. Mistretta*, 488

U.S. 361, 371 (1989) (identifying "disarray among the Federal District Courts" as a reason for granting certiorari before judgment). At the time of this filing, thirteen district courts have granted permanent or preliminary relief to plaintiffs challenging the Mandate, and five have declined to do so. [7] Those five cases have been appealed, and the

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[7] *Compare Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-709, 2014 WL 31652 (E.D. Tex. Jan. 2, 2014) (enjoining Mandate); *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-314 (N.D. Tex. Dec. 31, 2013) (Doc. 99) (same); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.,* No. 2:12 CV 92, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013) (same); *Diocese of Fort Wayne-S. Bend v. Sebelius*, No. 1:12-CV-159, 2013 WL 6843012 (N.D. Ind. Dec. 27, 2013) (same)*; Grace Schs. v. Sebelius*, No. 3:12-CV-459, 2013 WL 6842772 (N.D. Ind. Dec. 27, 2013) (same); *E. Tex. Baptist Univ. v. Sebelius*, No. H-12-3009, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013) (same); *S. Nazarene*, 2013 WL 6804265 (same); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 6835094 (W.D. Pa. Dec. 23, 2013) (same); *Reaching Souls Int'l, Inc. v Sebelius*, No. 13-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013) (same); *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013) (same); *Roman Catholic Archdiocese of N.Y. v. Sebelius ("RCNY")*, No. 12-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013) (same); *Zubik v. Sebelius*, No. 2:13-cv-01459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013) (same); *Ave Maria Found. v. Sebelius*, No. 2:13-cv-15198 (E.D. Mich. Dec. 31, 2013) (granting temporary restraining order) (Doc. 12), *with Little Sisters of the Poor v. Sebelius*, No. 13-cv-2611, 2013 WL 6839900 (D. Colo. Dec. 27, 2013) (denying injunction); *Mich. Catholic Conf. v. Sebelius*, No. 1:13-CV-1247, 2013 WL 6838707 (W.D. Mich. Dec. 27, 2013) (Doc. 40) (same); *Catholic Diocese of Nashville v. Sebelius*, No.

circuits have split with respect to whether injunctive relief pending appeal is warranted. The D.C. Circuit and the Sixth Circuit issued injunctions, while the Seventh and Tenth declined to do so.[8] This Court, in turn, has temporarily enjoined the case arising out of the Tenth Circuit.[9] Meanwhile, numerous additional cases are pending.[10]

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3:13-01303, 2013 WL 6834375 (M.D. Tenn. Dec. 26, 2013) (same); *Univ. of Notre Dame v. Sebelius*, No. 3:13-cv-01276, 2013 WL 6804773 (N.D. Ind. Dec. 20, 2013) (same); *Priests for Life v. U.S. Dep't of Health & Human Servs.,* No. 13-1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013).

[8] *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-5371 (D.C. Cir. Dec. 31, 2013) (granting injunction pending appeal); *Priests for Life v. U.S. Dep't of Health & Human Servs.,* No. 13-5368 (D.C. Cir. Dec. 31, 2013) (same); *Mich. Catholic Conf. v. Sebelius*, No. 13-2723 (6th Cir. Dec. 31, 2013) (same); *Catholic Diocese of Nashville v. Sebelius*, No. 13-6640 (6th Cir. Dec. 31, 2013) (same), *with Univ. of Notre Dame v. Sebelius*, No. 13-3853 (7th Cir. Dec. 30, 2013) (denying injunction); *Little Sisters of the Poor v. Sebelius*, No. 13-1540 (10th Cir. Dec. 31, 2013) (same).

[9] *Little Sisters of the Poor v. Sebelius*, No. 13A691, 2013 WL 6869391 (U.S. Dec. 31, 2013).

[10] *E.g.*, *Ave Maria v. Sebelius*, No. 2:13-cv-630 (M.D. Fla.); *Belmont Abbey v. Sebelius*, No. 1:13-cv-01831 (D.D.C.); *Colo. Christian Univ. v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-02105 (D. Colo.); *Archdiocese of St. Louis v. Sebelius*, No. 4:13-cv-02300 (E.D. Mo.); *Roman Catholic Archdiocese of Atlanta v. Sebelius*, No. 1:12-cv-03489 (N.D. Ga.); *Louisiana Coll. v. Sebelius*, No. 12-cv-463 (W.D. La.); *Dordt Coll. v. Sebelius*, No. 5:13-cv-04100 (N.D. Iowa); *Fellowship of Catholic Univ. Students*

In short, the issues presented in this case will eventually arrive at this Court. There is no advantage, however, to waiting for those issues to percolate. The questions here are legal ones virtually identical to those in *Hobby Lobby* and *Conestoga*. This Court, moreover, already has the benefit of appellate decisions addressing the application of the Mandate to for-profit entities, as well as numerous district court opinions on file in the nonprofit context. Granting certiorari now will save parties from the significant time and expense of additional litigation and uncertainty and relieve the courts of protracted battles over legal issues ripe for consideration.

III. THE MANDATE VIOLATES RFRA

Petitioners' right to relief under RFRA is readily apparent. In short, Petitioners believe compliance with the Mandate violates their religious beliefs. The district court said it does not. As such determinations are for individuals and religious institutions, not courts, and because the Mandate cannot survive strict scrutiny, Petitioners have standing and will prevail on their RFRA claim.

A. The Mandate Substantially Burdens Petitioners' Religious Exercise

When, as here, a claimant's sincerity is not in dispute, RFRA's substantial burden test involves a straightforward, two-part inquiry: a court must (1)

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v. Sebelius, No. 1:13-cv-03263 (D. Colo.); *Right to Life of Mich. v. Sebelius*, No. 1:13-cv-01202 (W.D. Mich.); *Dobson v. Sebelius*, No. 1:13-cv-03326 (D. Colo.).

identify the religious exercise at issue, and (2) determine whether the government has placed substantial pressure—i.e., a substantial burden—on the plaintiff to abstain from that religious exercise. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 428 (2006) ("prima facie case under RFRA" exists when a law "(1) substantially burden[s] (2) a sincere (3) religious exercise").[11]

Under the first step, the court's inquiry is necessarily limited. The nature of a plaintiffs' religious exercise is "not to turn upon a judicial perception of the particular belief or practice in question." *Thomas*, 450 U.S. at 714. Instead, courts must accept plaintiffs' description of their beliefs, regardless of whether the court, or the Government, finds them "acceptable, logical, consistent, or comprehensible." *Id.* at 714–15 (refusing to question the moral line drawn by plaintiff); *United States v. Lee*, 455 U.S. 252, 257 (1982) (same). "Courts are not arbiters of scriptural interpretation" and it is not "within the judicial function and judicial competence" to determine whether a belief or practice is in accord with a particular faith. *Thomas*, 450 U.S. at 716; *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) (same). It is thus left to plaintiffs to "dr[a]w a line" regarding the actions their religion deems permissible, and once that line is drawn, "it is

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[11] This articulation of the substantial burden test has been reaffirmed by every appellate court to consider the question in the context of the Mandate. *Korte v. Sebelius*, 735 F.3d 654, 682–85 (7th Cir. 2013); *Gilardi*, 733 F.3d at 1216–18; *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137–41 (10th Cir. 2013) (en banc).

not for [a court] to say [it is] unreasonable." *Thomas*, 450 U.S. at 715.

Under the second step, the court "evaluates the coercive effect of the governmental pressure on the adherent's religious practice." *Korte*, 735 F.3d at 683. Specifically, it must determine whether the Government is compelling an individual to "perform acts undeniably at odds" with his beliefs, *Yoder*, 406 U.S. at 218, or putting "substantial pressure on [him] to modify his behavior and to violate his beliefs," *Thomas*, 450 U.S. at 717–18.

Here, Petitioners exercise their religion by, *inter alia*, refusing to take certain actions that facilitate access to abortion-inducing products, contraceptives, sterilization, or related education and counseling. By threatening Petitioners with onerous penalties unless they take precisely those actions their religious beliefs forbid, the Mandate substantially pressures Petitioners to act contrary to their religious beliefs.

1. Petitioners Exercise Their Religion by Refusing to Comply with the Mandate

The "exercise of religion" includes "the performance of (or abstention from) physical acts." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). Significantly, RFRA protects "*any* exercise of religion . . . whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (emphasis added). In this case, Petitioners exercise their religion by refusing to participate in a regulatory scheme to provide their employees with access to abortion-inducing products, contraceptives, sterilization, and related education and counseling. Most obviously, Petitioners believe

they cannot submit the required self-certification, because doing so would render them "complicit in a grave moral wrong." *Gilardi*, 733 F.3d at 1218. The Mandate, however, requires Petitioners both to authorize provision of the objectionable coverage, and also to take numerous additional steps in furtherance of this regulatory scheme.

In particular, Petitioners' undisputed affidavits establish that their Catholic faith prohibits them from, among other things: (1) providing contraceptive coverage directly, (2) authorizing or designating someone else to provide the coverage by completing and filing the self certification, (3) maintaining or entering into an arrangement with an insurance company or third-party administrator where such entities are authorized to provide the objectionable coverage to Petitioners' employees and students, and (4) identifying benefits-eligible employees or providing other information to their insurance company or third-party administrator that will facilitate coverage for the objectionable products and services.[12] Each of these actions or forbearances constitutes an exercise of religion, *Smith*, 494 U.S. at 877, because, again, Petitioners sincerely believe that, under the Catholic doctrines of material cooperation and "scandal," taking these actions would make them "complicit in a grave moral wrong." *Gilardi*, 733 F.3d at 1218.

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[12] Pet. App. 142a–45a, 147a–48a, 151a–54a, 156a–57a, 160a–63a, 165a–67a, 170a–73a, 175a–77a, 179a–82a, 184a–86a, 188a–91a, 193a–94a, 197a–200a, 202a–03a, 207a–209a.

Critically, there is no dispute as to whether Petitioners sincerely believe they may not take the specific actions necessary to comply with the "accommodation." As the Government conceded below: "[W]e understand the plaintiffs believe that participating in the accommodation requires facilitation of contraceptive coverage and that that's a violation of their religious beliefs. We don't question that. We're not asking Your Honor to question that either." Pet. App. 135a. That being the case, to determine whether the Mandate imposes a substantial burden on Petitioners' religious exercise, the only question is whether Petitioners face "substantial pressure" to take these actions.

2. The Mandate Places "Substantial Pressure" upon Petitioners to Violate Their Religious Beliefs

Once Petitioners' refusal to facilitate contraception is identified as a protected religious exercise, the "substantial burden" analysis is straightforward. As this Court has held, the Government "substantially burdens" the exercise of religion if it compels an individual "to perform acts undeniably at odds with fundamental tenets of [his] religious beliefs," *Yoder*, 406 U.S. at 218, or otherwise "put[s] substantial pressure on [him] to modify his behavior and to violate his beliefs," *Thomas*, 450 U.S. at 717–18. In *Yoder*, for example, this Court found that a $5 penalty imposed a substantial burden on Amish plaintiffs who refused to follow a compulsory secondary-education law. 406 U.S. at 208, 218. Likewise, in *Thomas*, the denial of unemployment compensation substantially burdened the pacifist convictions of a Jehovah's Witness who

refused to work at a factory manufacturing tank turrets. 450 U.S. at 713–18.

Here, the Mandate plainly imposes a "substantial burden" on Petitioners' religious exercise. Failure to take the actions required by the Mandate will subject Petitioners to potentially fatal fines of $100 a day per affected beneficiary. 26 U.S.C. § 4980D(b). If Petitioners drop health coverage altogether, they will be subject to annual fines of $2,000 per full-time employee after the first thirty employees, *id.* § 4980H(a), (c)(1), and/or face ruinous practical consequences due to their inability to offer a crucial healthcare benefit.[13] These penalties, which could involve millions of dollars in fines, clearly impose the type of pressure that qualifies as a substantial burden.

In short, Petitioners are faced with a stark choice: violate their religious beliefs or pay potentially crippling fines. This Court has repeatedly held that compelling a plaintiff to act in violation of his religious beliefs is the very definition of a substantial burden. *Thomas*, 450 U.S. at 717 (stating that the inquiry "begin[s]" with an assessment of whether a law "compel[s] a violation of conscience"); *Sherbert*, 374 U.S. at 404 (same); *see also Yoder*, 406 U.S. at 218. As the Seventh Circuit explained: "[t]he contraception mandate forces [Petitioners] to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise, properly understood." *Korte*, 735 F.3d at 685.

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[13] Pet. App. 145a, 153a–54a, 162a–63a, 167a, 173a, 182a, 190a–91a, 199a, 204a, 209a.

B. The Mandate Cannot Survive Strict Scrutiny

As Petitioners have demonstrated that the Mandate substantially burdens their exercise of religion, the "burden is placed squarely on the Government" to demonstrate that the regulation satisfies strict scrutiny. *O Centro*, 546 U.S. at 429–31; 42 U.S.C. § 2000bb-1. And as every court to consider the question in the context of the Mandate has concluded, the Government cannot meet this demanding standard.[14]

1. The Mandate Does Not Further a Compelling Government Interest

Under RFRA, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430–31. "[B]roadly formulated" or "sweeping" interests are inadequate. *Id.* at 431; *Yoder*, 406 U.S. at 221. Rather, the Government

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[14] *E.g.*, *Korte*, 735 F.3d at 685–87; *Gilardi*, 733 F.3d at 1219–24; *Hobby Lobby*, 723 F.3d at 1143–45; *E. Tex. Baptist*, 2013 WL 6838893, at *23–24; *RCNY*, 2013 WL 6579764, at *16–19; *Zubik*, 2013 WL 6118696, at *28–32; *Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648, 2013 WL 3297498, at *16–18 (M.D. Fla. June 25, 2013); *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 433–35 (W.D. Pa. 2013); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 806–07 (E.D. Mich. 2013); *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 12-6756 (N.D. Ill. Jan. 3, 2013) (Doc. No. 50); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 125–29 (D.D.C. 2012); *Newland*, 881 F. Supp. 2d at 1297–98.

must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption." *Yoder*, 406 U.S. at 236; *see also O Centro*, 546 U.S. at 431. The Government, therefore, must demonstrate a specific compelling interest in dragooning "the particular claimant[s] whose sincere exercise of religion is being substantially burdened" into serving as the instruments by which its purported goals are advanced. *Id.* at 430–31. This, it has not begun to do.

Here, the Government has proffered two generalized interests: (i) "public health" and (ii) "ensuring that women have equal access to health care." 78 Fed. Reg. at 39,872. "[B]oth interests as articulated by the government are insufficient . . . because they are 'broadly formulated interests justifying the general applicability of government mandates.'" *Hobby Lobby*, 723 F.3d at 1143 (citiation omitted). Such "sketchy and highly abstract" interests cannot be "compelling," as it is impossible for the Government to "demonstrate a nexus" between those interests and applying the Mandate to these particular claimants. *Gilardi*, 733 F.3d at 1220. In short, "[b]y stating the public interests so generally, the government guarantees that the mandate will flunk the test." *Korte*, 735 F.3d at 686.

Moreover, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal citation omitted); *see also O Centro*, 546 U.S. at 433. Here, the Government

cannot claim an interest of the "highest order" because the Mandate exempts millions of employees—through "grandfathering" provisions, the narrow exemption for "religious employers," and the enforcement exceptions for small employers. *Korte*, 735 F.3d at 686. Simply put, "the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 723 F.3d at 1143; *Gilardi*, 733 F.3d at 1222–23.

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

Finally, under RFRA, the Government must identify an "actual problem" in need of solving with respect to the particular claimants filing suit, not among the general population. *Supra* pp. 21–22. The Government has not begun to meet this burden, relying instead on the broad proposition that "lack of access to contraceptive services has proven in many cases to have serious negative health consequences for women and newborn children." 78 Fed. Reg. at

39,887. In the first place, according to the D.C. Circuit, "the science [behind that claim] is debatable and may actually undermine the government's cause." *Gilardi*, 733 F.3d at 1221. And, to say that lack of access to contraception can have negative health implications does not establish a significant lack of access among Petitioners' employees or that the Mandate would significantly increase contraception use among those employees.[15] The Government provides no evidence on these points and thus cannot show that enforcing the Mandate against objecting organizations is "actually necessary" to achieve its aims. *Brown*, 131 S. Ct. at 2738.

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

Under RFRA, the Government must also show that the regulation "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Under that test, "if there are other, reasonable ways to achieve those [interests] with a lesser burden on constitutionally protected activity, [the Government] may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). A statute or regulation is the least restrictive means if "no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights.'"

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

Sherbert, 374 U.S. at 407. To meet its burden, the Government must engage in a "serious, good faith consideration of workable . . . alternatives." *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (citation omitted).

Once again, every court to have considered the question has concluded that "there are viable[, less restrictive,] alternatives . . . that would achieve the substantive goals of the mandate." *Gilardi*, 733 F.3d at 1222; *see also Korte*, 735 F.3d at 686–87; *Hobby Lobby*, 723 F.3d at 1144.[16] Indeed, "[t]here are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty" than forcing nonprofit religious organizations to provide access to free contraception in violation of their sincere religious beliefs. *Korte*, 735 F.3d at 686. These include the same alternatives Petitioners proposed here: "The Government could provide the contraceptives services or insurance coverage directly to plaintiffs' employees, or work with third parties—be it insurers, health care providers, drug manufactures, or non-profits—to do so without requiring plaintiffs' active participation. It could also provide tax incentives to consumers or producers of contraceptive products." *RCNY*, 2013 WL 6579764, at *18–19; *see also Korte*, 735 F.3d at 686 (same); *Gilardi*, 733 F.3d at 1222 (same). While Petitioners in no way recommend these alternatives, and oppose many of them as a

[16] *E.g.*, *E. Tex. Baptist*, 2013 WL 6838893, at *24; *RCNY*, 2013 WL 6579764, at *18–19; *Zubik*, 2013 WL 6118696, at *30–32; *Beckwith*, 2013 WL 3297498, at *18 n.16; *Monaghan*, 931 F. Supp. 2d at 808.

matter of policy, that they remain available to the Government shows the Mandate cannot survive RFRA's narrow-tailoring requirement. In light of these alternatives, there is no justification for forcing Petitioners to violate their religious beliefs.

C. The District Court's Holding Was in Error.

The district court, however, ignored the straightforward analysis laid out above. Instead, it impermissibly arrogated unto itself the authority to determine whether compliance with the Mandate "actually" violated Petitioners' beliefs, Pet. App. 35a, ultimately concluding that under the "accommodation," Petitioners are not required to act in a manner that constitutes impermissible cooperation with immoral conduct or gives rise to scandal, Pet. App. 35a–49a. Based on this erroneous conclusion, the district court held that though Petitioners alleged the Mandate forced them to take actions that violate their religious beliefs, all Petitioners but Catholic University lacked standing to even challenge the Mandate, Pet. App. 59a–66a, and that, in any event, all Petitioners failed to demonstrate that the Mandate imposed a substantial burden on their exercise of religion, Pet. App. 35a–49a, 65a. In so holding, the district court impermissibly made itself an "arbiter[] of scriptural interpretation." *Thomas*, 450 U.S. at 715, 718.

1. The District Court Erred in Dismissing Church-Plan Petitioners for Lack of Standing

The district court erroneously held that eight out of the nine Petitioners lack standing because they participate in the self-insured health plan of the Archdiocese, which is a "church plan" exempt from

ERISA. Pet. App. 59a–66a. This holding is based on the Government's assertion that, if Petitioners' church-plan third-party administrator ("TPA") refuses to provide Petitioners' employees with the objectionable payments upon receipt of Petitioners' self-certification, then there is, as of now, no enforceable penalty against the TPA. But even if that is true, it is undisputed that the regulations that apply *to Petitioners* force *Petitioners* to engage in conduct contrary to their religious beliefs. Namely, Petitioners are required, on pain of substantial penalties, to submit a self-certification that provides their TPA with legal authority to provide their employees with payments for contraceptives. This is plainly sufficient to establish Article III standing,[17] and the district court held otherwise only by impermissibly concluding that the mandated conduct did not violate Petitioners' religious beliefs.

At the outset, it is worth noting that the regulations contain no exemption for church-plan TPAs. Rather, they require *all* TPAs to provide contraceptive payments upon receipt of an eligible organization's self-certification. *See* 29 C.F.R. § 2590.715–2713A(b)(2) (stating that "[i]f a third party administrator receives a copy of the [self]

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[17] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992) (explaining that when "the plaintiff is himself an object of" regulation, "there is ordinarily little question" that the regulation "has caused him injury"); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) (stating that a plaintiff "may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning . . . the Free Exercise Clause").

certification . . . the third party administrator shall provide or arrange payments for contraceptive services"). Moreover, the exact same requirements are spelled out in 26 C.F.R. § 54.9815–2713A(b)(2), a regulation issued not pursuant to ERISA, but under the Internal Revenue Code. The district court's entire, erroneous theory of standing, therefore, rests on the speculative notion that TPAs operating in a highly regulated industry will flout their legal obligations. But the "possibility that third parties may violate the law is too speculative to defeat standing." *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 48 (D.C. Cir. 1994).

More importantly, even if the Government is correct, the Mandate *still* requires Petitioners to engage in conduct contrary to their religious beliefs. Regardless of what Petitioners' TPA must do, it is undisputed that the regulations require *Petitioners* to, *inter alia*, (a) provide their employees with contraceptive coverage directly, or (b) issue a self-certification authorizing their TPA to do so. It is equally undisputed that both of those actions are contrary to Petitioners' sincerely held religious beliefs and that the Government will impose crushing fines on them if they do not comply.

Indeed, in response to the Government's argument, each church-plan Petitioner issued an undisputed sworn affidavit specifically stating that its "sincerely held religious beliefs" "not only prohibit it from providing payments and/or coverage for abortion-inducing products, contraception, sterilization, and related counseling, but also from providing a certification that authorizes a third-party administrator to do so—even if the third-party administrator ultimately has the discretion not to

provide such payments and/or coverage." [18] As Petitioners explained below, the certification requirement is akin to requiring Petitioners to certify that they oppose the death penalty and then making the issuance of that certification the legal authority for the executioner to flip the switch. Regardless of what the executioner does, issuing that certification would be contrary to Petitioners' religious beliefs because of what it requires *Petitioners* to do—namely, authorize a third-party to engage in immoral conduct.

The notion that Petitioners lack standing to challenge regulations that apply directly to them and require them to take actions they find religiously objectionable, is both erroneous and unprecedented. *See Lujan*, 504 U.S. at 561–62. This is precisely why every other court to consider this question has concluded that church-plan organizations identical to Petitioners have Article III standing. *RCNY*, 2013 WL 6579764, at *6–7; *Reaching Souls*, 2013 WL 6804259, at *4–5; *Mich. Catholic Conf.*, 2013 WL 6838707, at *4; *Little Sisters*, 2013 WL 6839900, at *5–7; *E. Tex. Baptist*, 2013 WL 6838893, at *12–13; *Beaumont*, 2014 WL 31652, at *5. As Judge Cogan explained:

> [Plaintiffs] alleged injury is that the Mandate renders them complicit in a scheme aimed at providing coverage to which they have a religious objection. This alleged spiritual complicity is independent of whether the scheme

[18] Pet. App. 147a–48a, 156a–57a, 165a–67a, 175a–77a, 184a–86a, 193a–94a, 202a–03a.

> actually succeeds at providing contraceptive coverage. It is undisputed that all of the non-exempt plaintiffs will still have to either comply with the Mandate and provide the objectionable coverage or self-certify that they qualify for the accommodation. Plaintiffs allege that their religion forbids them from completing this self-certification, because to them, authorizing others to provide services that plaintiffs themselves cannot is tantamount to an endorsement or facilitation of such services. Therefore, regardless of the effect on plaintiffs' TPA, the regulations still require plaintiffs to take actions they believe are contrary to their religion.

RCNY, 2013 WL 6579764, at *7. Because Petitioners are "directly affected by the [regulations] against which their complaints are directed," their standing is indisputable. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n.9 (1963).

2. The Mandate Substantially Burdens Petitioners' Religious Exercise

The district court also concluded that even if the church-plan Petitioners had standing, the Mandate does not substantially burden their exercise of religion. Pet. App. 65a. That conclusion, like the district court's conclusion that the Mandate does not burden Catholic University's exercise of religion, was

erroneous.[19] Petitioners believe that participation in the accommodation would impermissibly "facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling" in a manner contrary to the Catholic doctrines of material cooperation and scandal. *Supra* Part III.A.1. Under the established law described above, the district court was required to accept that description of Petitioners' beliefs. As in *Thomas*, Petitioners "drew a line" between religiously permissible and impermissible conduct, and "it [wa]s not for [the court] to say [the line was] unreasonable," 450 U.S. at 715, 718; if Petitioners interpret the "creeds" of Catholicism to prohibit compliance with the Mandate, as they do, "[i]t is not within the judicial ken to question" "the validity of [their] interpretation[]." *Hernandez*, 490 U.S. at 699.

But instead of accepting the line Petitioners drew, the district court sought to "determine whether compliance with the [Mandate] *actually constitutes* compelled 'facilitation.'" Pet. App. 35a (emphasis added). In other words, the district court "purport[ed] to resolve the religious question underlying th[is] case[]: Does [complying with the Mandate] impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the Catholic

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[19] Although the district court's substantive analysis applied to Catholic University, based on its summary holding that the other plaintiffs likewise failed to establish a substantial burden, Pet. App. 65a, Petitioners treat the district court's reasoning as to Catholic University as applicable to all Petitioners.

Church?" *Korte*, 735 F.3d at 685.[20] The district court's answer was ultimately "no," but of course, "[n]o civil authority can decide that question." *Id.*; *supra* Part III.A.

The district court claimed reliance on this Court's decision in *Bowen v. Roy*, 476 U.S. 693 (1986) and the D.C. Circuit's decision in *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008). But those cases stand for nothing more than the proposition that an individual cannot challenge an "'activit[y] of [a third party], in which [he] play[ed] *no role*.'" *Id.* at 679 (emphasis added). In *Bowen*, for example, this Court held only that an individual's religious beliefs could not be used "to dictate the conduct of the Government's internal procedures." 476 U.S. at 700. Specifically, the Appellee's religious exercise was not substantially burdened because his objection was to the conduct of a third party; namely, to the

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[20] Indeed, the district court's opinion is littered with unconstitutional evaluations of Petitioners' religious beliefs that run directly contrary to Petitioners express representations. *Compare* Pet. App. 40a (stating that the Mandate "does not place Catholic University in a position where it will give rise to 'scandal by acting in a way inconsistent with church teachings'"), *with* Pet. App. 209a ("Were the University to comply with the Mandate . . . CUA would commit the further offense of giving scandal."). *Compare* Pet. App. 42a (declaring that the "self-certification . . . cannot be accurately characterized as an act that 'facilitates' the employees' access to the services"), *with* Pet. App. 208a (listing the self-certification as among the acts that impermissibly "facilitate[s] access to" the mandated coverage "in a manner contrary to CUA's sincere religious beliefs").

government's use of a social security number to administer his daughter's public welfare benefits. *Id.*[21] Likewise, in *Kaemmerling*, the plaintiff did not object to any action he was forced to take, but only "to the government extracting DNA information from . . . specimen[s]" *it already had*. 553 F.3d at 679. The D.C. Circuit thus concluded that Kaemmerling failed to state a RFRA claim because he could not "identify any 'exercise' which is the subject of the burden to which he objects." *Id.*

Here, in contrast, the provision of contraceptive coverage is not an "activit[y] of [a third party], in which [Petitioners] play no role." *Id.* Whereas Kaemmerling "did not object to what the government forced him to do," Petitioners "vigorously object on religious grounds to the act[s] the government requires *them* to perform, not merely to later acts by third parties." *E. Tex. Baptist*, 2013 WL 6838893, at *18; *supra* Part III.A.1. The district court had no authority to discount the significance of these actions. While the court describes the self-certification as

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[21] If anything, *Bowen* supports Petitioners' position. The Appellee in that case objected not only to the government's use of his daughter's social security number, but also to the *separate* requirement that *he provide* the government with that number in order for her to receive benefits. 476 U.S. at 701–12 (opinion of Burger, C.J.). Though it did not decide the question due to a dispute over mootness, a majority of the Court would have held that this requirement imposed a substantial burden on Appellee's religious exercise. *See id.* at 715–16 (Blackmun, J., concurring in part); *id.* at 724–33 (O'Connor, J., concurring in part, dissenting in part); *id.* at 733 (White, J., dissenting).

nothing more than an "organization rais[ing] its hand and say[ing] 'I object,'" Pet. App. 44a, Petitioners attach far more serious consequences to the act. The Court might believe "'it's just a form,'" *RCNY*, 2013 WL 6579764, at *13, but for Petitioners, submitting that form makes them "complicit in a grave moral wrong." *Gilardi*, 733 F.3d at 1217–18. "It is not for [a] Court to say otherwise." *RCNY*, 2013 WL 6579764, at *14.

Continuing to parse Petitioners' religious beliefs, the district court claimed that Petitioners object only to the *consequences* of their actions, not to the actions themselves. Pet. App. 42a (stating that Petitioners object to the "consequences of the self-certification, not to the action of certifying itself"); Pet. App. 43a ("[T]he reason plaintiffs' object to the self-certification is that they object to what happens after someone else receives it."). This is both incorrect and irrelevant. In the first place, Petitioners' undisputed affidavits state their religious objections to taking the actions the Mandate requires of *them*. *See supra* Part III.A.1. And in any event, there is no authority for the bizarre notion that RFRA does not protect the religious exercise of plaintiffs who object to taking certain actions because of their consequences. After all, the consequences of an action, or the context in which the action takes place, can determine whether the action itself is morally acceptable. For example, giving a neighbor a ride to the bank may not, in and of itself, be morally objectionable, but it would be if one knows that the neighbor intends to rob the bank.

Indeed, the district court's conclusion was inconsistent with this Court's precedent. For example, in *Lee,* the Amish plaintiff had no inherent

objection to the payment of taxes; rather, he objected to the payment of taxes when the "consequence" of that action was to "enable other Amish to shirk their duties toward the elderly and needy." *Hobby Lobby*, 723 F.3d at 1139. Likewise, the pacifist plaintiff in *Thomas* had no inherent objection to the act of hammering steel into cylinders; he objected to hammering steel into cylinders when those cylinders would be placed atop military tanks and used to prosecute the war effort. *See Thomas*, 450 U.S. at 715; *RCNY*, 2013 WL 6579764, at *14 (explaining that the Government "transform[ed] a voluntary act that plaintiffs believe to be consistent with their religious beliefs into a compelled act that they believe forbidden"); *Zubik*, 2013 WL 6118696, at *25 (analogizing to "a neighbor who asks to borrow a knife to cut something on the barbecue grill, and the request is easily granted. The next day, the same neighbor requests a knife to kill someone, and the request is refused. It is the reason the neighbor requests the knife which makes it impossible for the lender to provide it on the second day.").[22]

[22] Despite the district court's claim, the Mandate substantially burdens the religious exercise of Petitioners Don Bosco and Catholic Information Center. Pet. App. 65a. Though not statutorily required to provide health care, 26 U.S.C. § 4980H, if these Petitioners provide noncompliant health coverage, they will be fined $100 a day per affected beneficiary, *id.* § 4980D(b). Moreover, dropping coverage to avoid the Mandate would inhibit their ability to exercise their religion and would be economically ruinous. Pet. App. 167a, 204a; *Hobby Lobby*, 723 F.3d at 1140–41; *Legatus*, 2013 WL 6768607; *Geneva Coll. v. Sebelius*, No. 2:12-CV-00207, 2013 WL 3071481, at *9–10 (W.D. Pa. June 18, 2013). Finally, although the

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari before judgment should be granted.

Respectfully submitted,

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(continued…)

Archdiocese meets the Mandate's definition of a "religious employer," it is still injured by the Mandate because many of the Archdiocese's non-exempt affiliates offer their employees health coverage through the Archdiocese's plan. The Archdiocese must therefore either maintain an insurance plan with a third-party administrator authorized to provide contraceptive benefits to its affiliates' employees, or else decline to extend its heath plan to those affiliates. Pet. App. 215a–16a.