No. 13-1540

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, a Colorado non-profit corporation, LITTLE SISTERS OF THE POOR, BALTIMORE, INC., a Maryland nonprofit corporation, by themselves and on behalf of all others similarly situated, CHRISTIAN BROTHERS SERVICES, an Illinois non-profit corporation, and CHRISTIAN BROTHERS EMPLOYEE BENEFIT TRUST,

Plaintiffs-Appellants,

v.

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 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,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (NO. 1:13-CV-02611, HON. WILLIAM J. MARTINEZ)

BRIEF *AMICUS CURIAE* OF THE U.S. CONFERENCE OF CATHOLIC BISHOPS IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the U.S. Conference of Catholic Bishops discloses that it has no parent corporation and is a nonprofit entity that issues no stock. Accordingly, no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST[1]

Amicus curiae United States Conference of Catholic Bishops (the "Conference") is an assembly of the leadership of the Catholic Church in the United States. The Conference seeks to unify, coordinate, encourage, promote, and carry on Catholic activities in the United States; to organize and conduct religious, charitable, and social welfare work at home and abroad; to aid in education; to care for immigrants; and generally to further these goals through education, publication, and advocacy. To that end, the Conference provides and promotes a wide range of spiritual, educational, and charitable services throughout this country and around the world.

During the promulgation of the regulations at issue in this litigation (the "Mandate"), the Conference has steadily voiced its opposition to any rule that would require faithful Catholics or others to choose between violating their religious beliefs and exposing their organizations to devastating penalties.[2]

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[1] All parties consent to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel, or any person, other than the amicus curiae or their counsel contributed money intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, Comments of U.S. Conference of Catholic Bishops (Sept. 17, 2010), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf; Comments of U.S. Conference of Catholic Bishops (Aug. 31, 2011), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-

Despite the Conference's repeated efforts to work and dialogue toward a solution, the Government has steadfastly refused to create a satisfactory exemption, either for individuals seeking to run their businesses in accordance with their faith or for nonprofit religious organizations beyond houses of worship. Instead, the Government has implemented an inaptly named "accommodation," which requires objecting nonprofit entities to take numerous steps to authorize and enable third parties to provide the objectionable coverage to their employees. As the Conference informed the Government well before the accommodation was finalized, *supra* note 2, this does not resolve the religious objection to compliance with the Mandate, because even under the accommodation, objecting entities are still required to violate their religious beliefs by playing an integral role in the delivery of the mandated coverage to their employees. Despite this clear statement that the "accommodation" would require Catholic organizations to violate their religious beliefs, the Government finalized the "accommodation" and began falsely

(continued…)

on-preventive-services-2011-08.pdf; Comments of U.S. Conference of Catholic Bishops (May 15, 2012), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf; Comments of U.S. Conference of Catholic Bishops (Mar. 20, 2013), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf.

proclaiming that it had reached a compromise that would satisfy religious objections to the Mandate.

The current impasse is disturbing for several reasons. In the first place, it reflects a departure from the Government's longstanding practice of safeguarding the rights of organizations and individuals to act in accordance with their religious beliefs. The Conference has consistently supported those rights, particularly in the area of protecting the dignity of all human life. The fact that this dispute has played out in the context of the Affordable Care Act is all the more frustrating because the Catholic Church has long been a leading provider of, and advocate for, accessible, life-affirming health care, and has supported a positive role for government in helping to ensure such care.

Moreover, the Conference is deeply troubled by the manner in which courts have improperly and erroneously delved into matters of religious doctrine during the course of litigation surrounding the Mandate. Indeed, the test repeatedly championed by the Government would transform the Religious Freedom Restoration Act's substantial burden analysis into an exercise in amateur moral theology. The Constitution, however, does not permit federal courts or government officials to be arbiters of matters of faith. As the authorities ultimately responsible for the accurate proclamation of Catholic doctrine within their respective dioceses, the bishops who constitute the membership of the Conference

thus have a unique interest in ensuring the proper application of the substantial burden test. It is that test that is the primary focus of this amicus brief.

Ultimately, to ensure that numerous Catholic and other religious nonprofit organizations are not forced to act in violation of their religious beliefs, it is of vital importance that this Court reaffirm that in assessing whether a law imposes a substantial burden on religious exercise, courts should steer well clear of deciding religious questions. Once a plaintiff represents that taking a particular action—whatever that may be—violates his or her religious beliefs, a court's only task is to confirm the sincerity of that representation, and then to determine if the Government has placed substantial pressure on the plaintiff to violate his or her beliefs.

STATEMENT OF THE CASE

Under the auspices of the Patient Protection and Affordable Care Act, the Government enacted a Mandate requiring group health plans to cover all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity. If an employer's health plan does not include the required coverage, the employer is subject to penalties of $100 per day per affected beneficiary. 26 U.S.C. § 4980D(b). Dropping employee health coverage likewise subjects employers to penalties of $2,000 per year per employee after the first thirty employees. *Id.* § 4980H(a), (c)(1). Although a

category of "religious employers" is exempt from the Mandate, that exemption is narrowly defined to protect only "the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011); 77 Fed. Reg. 8725, 8727–28, 8730 (Feb. 15, 2012). For religious entities that do not qualify as "houses of worship," such as Appellants, there is no exemption from the Mandate.

Despite sustained criticism, the Government refused to expand the "religious employer" exemption. *See* 45 C.F.R. § 147.131(a); 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013). Instead, it devised an inaptly named "accommodation" for non-exempt religious organizations. 78 Fed. Reg. 39,870 (July 2, 2013). To be eligible for the "accommodation," an entity must (1) "oppose[] providing coverage for some or all of [the] contraceptive services"; (2) be "organized and operate[] as a nonprofit entity"; (3) "hold[] itself out as a religious organization"; and (4) self-certify that it meets the first three criteria. 26 C.F.R. § 54.9815-2713A(a). If an organization meets these criteria and wishes to avail itself of the "accommodation," it must provide the required "self-certification" to its insurance company or, if the organization has a self-insured health plan, to its third party administrator. *Id.*

When an "eligible organization" submits the self-certification form, it confers upon its insurance company or third party administrator both the authority and legal obligation to provide or arrange "payments for contraceptive services"

for beneficiaries enrolled in the organization's health plan pursuant to the accommodation. *See* 26 C.F.R. § 54.9815-2713A(a)–(c). Absent the self-certification, neither an insurance company nor a third party administrator may provide such payments under the accommodation. These payments, moreover, are available only "so long as [beneficiaries] are enrolled in [the organization's] health plan." 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B). The "self-certification [also] notifies the [third party administrator] or issuer of their obligations [1] to provide contraceptive-coverage to employees otherwise covered by the plan and [2] to notify the employees of their ability to obtain these benefits." *E. Tex. Baptist Univ. v. Sebelius*, No. H-12-3009, 2013 WL 6838893, at *11 (S.D. Tex. Dec. 27, 2013).

For self-insured organizations such as the Little Sisters, the Mandate has additional implications. The self-certification form, for example, "designat[es] the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879. Indeed, the Government concedes that "'in the self-insured [context], the contraceptive coverage is part of the [self-insured organization's health] plan.'" *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441, 2013 WL 6729515, at *22 (D.D.C. Dec. 20, 2013); 29 C.F.R. § 2510.3-16 (stating that the certification is "an instrument under which the plan is operated"). Moreover, third party administrators are under no

obligation "to enter into or remain in a contract with the eligible organization." 78 Fed. Reg. at 39,880. Consequently, religious organizations must find and contract with a third party administrator willing to provide the coverage. A third party administrator that receives the self-certification and provides the mandated payments is eligible for Government funds to cover its payments plus ten percent. *See* 45 C.F.R. 156.50.

Faced with a choice of violating their religious beliefs or paying substantial penalties, Appellants filed suit alleging violations of RFRA and the First Amendment. In response, the Government argued that it lacked the authority to enforce the legal obligations imposed by the Mandate against third party administrators of self-insured church plans. In other words, if the third party administrator of a self-insured church plan receives a self-certification form from an objecting organization and refuses to provide that organization's employees with the mandated coverage, then the Government argues that as of now, there is no enforceable penalty against the third party administrator. Relying on this argument, the district court concluded that Appellants—all of whom offer or administer self-insured church plans—failed to demonstrate that compliance with the Mandate would substantially burden their exercise of religion. Appellants subsequently sought injunctive relief pending appeal, which was denied by this Court, but granted by the Supreme Court.

SUMMARY OF ARGUMENT

The district court's decision cannot be reconciled with the Religious Freedom Restoration Act ("RFRA"), as interpreted by this Court in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc). RFRA prohibits the Government from imposing a "substantial burden" on "any" exercise of religion unless the burden is the least restrictive means of advancing a compelling government interest. 42 U.S.C. §§ 2000bb-1, 2000bb-2(4), 2000cc-5(7). In *Hobby Lobby*, this Court held that the Mandate as applied to for-profit corporations violates RFRA. 723 F.3d at 1137–44. The Government concedes that, in light of *Hobby Lobby*, the Mandate cannot survive strict scrutiny in this case. Thus, as to Appellants' RFRA claim, the only issue before this Court is whether the Mandate imposes a "substantial burden" on Appellants' exercise of religion. But *Hobby Lobby* answers that question as well. Even under the so-called accommodation, Appellants face substantial pressure to take actions that violate their religious beliefs.

As *Hobby Lobby* held—along with the overwhelming majority of courts to reach the question—the substantial-burden test under RFRA focuses primarily on the "*intensity of the coercion* applied by the government to act contrary to [religious] beliefs." 723 F.3d at 1137; *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013); *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1216–

18 (D.C. Cir. 2013) (same). "Put another way, the substantial-burden inquiry evaluates the coercive effect of the governmental pressure on the adherent's religious practice and steers well clear of deciding religious questions." *Korte*, 735 F.3d at 683. Thus, the exact "religious exercise" at issue is irrelevant to the substantial burden analysis. So long as the plaintiff has an "'honest conviction' that what the government is requiring, prohibiting, or pressuring him to do, conflicts with his religion," *id.* (quoting *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981)), this Court's "only task is to determine whether . . . the government has applied substantial pressure on the claimant" to act contrary to his faith. *Hobby Lobby*, 723 F.3d at 1137.

Here, the Government does not dispute that, like the plaintiffs in *Hobby Lobby*, Appellants have an "honest conviction" that they cannot take the actions required under the accommodation without violating their religious beliefs. Among other things, Appellants must submit the required self-certification form, thereby enabling, obligating, and incentivizing their third party administrator to provide the mandated coverage, while simultaneously notifying the third party administrator of its obligations under the accommodation. Those actions are different from the actions at issue in *Hobby Lobby*, but again, that difference is irrelevant to the substantial burden inquiry. What matters is that Appellants have a sincere religious objection to taking the actions required of them under the

accommodation; but if they refuse to take those actions, they will incur crippling fines. Because *Hobby Lobby* forecloses any argument that the Mandate can survive strict scrutiny, that should end the inquiry. As the Supreme Court has repeatedly held, coercing believers to act contrary to their sincerely held beliefs is the very definition of a "substantial burden" on religious exercise. *Thomas*, 450 U.S. at 717; *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). That explains why in eighteen of the nineteen cases to consider the regulatory scheme at issue in this litigation, courts have enjoined application of the Mandate to nonprofit plaintiffs like Appellants.[3]

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[3] *See Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-709, 2014 WL 31652 (E.D. Tex. Jan. 2, 2014); *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-314 (N.D. Tex. Dec. 31, 2013) (Doc. 99); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.,* No. 2:12 cv-92, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013); *Diocese of Fort Wayne-S. Bend v. Sebelius*, No. 1:12-cv-159, 2013 WL 6843012 (N.D. Ind. Dec. 27, 2013); *Grace Schs. v. Sebelius*, No. 3:12-cv-459, 2013 WL 6842772 (N.D. Ind. Dec. 27, 2013); *E. Tex. Baptist Univ. v. Sebelius*, No. H-12-3009, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013); *S. Nazarene Univ. v. Sebelius*, No. 13-1015, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 6835094 (W.D. Pa. Dec. 23, 2013); *Reaching Souls Int'l, Inc. v Sebelius*, No. 13-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of N.Y. v. Sebelius ("RCNY")*, No. 12-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Zubik v. Sebelius*, No. 2:13-cv-01459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *Ave Maria Found. v. Sebelius*, No. 2:13-cv-15198 (E.D. Mich. Dec. 31, 2013) (Doc. 12); *Little Sisters of the Poor v. Sebelius*, No. 13-cv-2611, 2013 WL 6839900 (D. Colo. Dec. 27, 2013), *injunction pending appeal granted*, No. 13A691 (U.S. Jan. 24, 2014); *Mich. Catholic Conf. v. Sebelius*, No. 1:13-cv-1247, 2013 WL 6838707 (W.D. Mich. Dec. 27, 2013), *injunction pending appeal*

The district court reached a contrary conclusion only by second-guessing Appellants' undisputed assertion that taking the actions necessary to comply with the Mandate would violate their sincerely held religious beliefs. In short, just as in *Hobby Lobby*, Appellants sincerely believe that taking the required actions would make them "complicit in an immoral act." 723 F.3d at 1142. That is a religious judgment, based on Catholic moral principles regarding the permissible degree of cooperation with wrongdoing. The district court, however, concluded otherwise, reasoning that because the Government purportedly lacks the authority to compel third party administrators of church plans to comply with the accommodation, Appellants' religious beliefs would not be violated on the facts of this case. *Little Sisters of the Poor v. Sebelius*, No. 13-cv-2611, 2013 WL 6839900, *8–15 (D. Colo. Dec. 27, 2013)

This analysis was manifestly improper, as *Hobby Lobby* makes clear. Though purporting to engage in "[s]tatutory and regulatory interpretation," *id.* at

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granted, No. 13-2723 (6th Cir. Dec. 31, 2013); *Catholic Diocese of Nashville v. Sebelius*, No. 3:13-1303, 2013 WL 6834375 (M.D. Tenn. Dec. 26, 2013), *injunction pending appeal granted*, No. 13-6640 (6th Cir. Dec. 31, 2013); *Priests for Life v. U.S. Dep't of Health & Human Servs.,* No. 13-1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013), *injunction pending appeal granted*, No. 13-5371 (D.C. Cir. Dec. 31, 2013); *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441, 2013 WL 6729515 (D.D.C. Dec. 20, 2013), *injunction pending appeal granted*, No. 13-5371 (D.C. Cir. Dec. 31, 2013). *But see Univ. of Notre Dame v. Sebelius*, No. 13-3853, 2014 WL 687134 (7th Cir. Feb. 21, 2013).

*10, in reality, 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 Church?" *Korte*, 735 F.3d at 685. The district court's answer was ultimately "no," but "[n]o civil authority can decide that question." *Id.* Indeed, in the face of Appellants' undisputed representations that they could not, consistent with their religious beliefs, take the actions necessary to comply with the accommodation—even presuming the Government's lack of enforcement authority—the only way for the district court to conclude otherwise was to inform Appellants that they "misunderstand their own religious beliefs." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988). Such an approach is irreconcilable with the jurisprudence of both this Court and the Supreme Court, which holds that "[i]t is not within 'the judicial function'" to determine whether a plaintiff "has the proper interpretation of [his] faith." *United States v. Lee*, 455 U.S. 252, 257 (1982) (citation omitted); *Hobby Lobby*, 723 F.3d at 1141. While the Government, and the court below, may "feel[] that the accommodation" and the Government's purported lack of enforcement authority "sufficiently insulates [Appellants] from the objectionable services, . . . it is not the Court's role to say that plaintiffs are wrong about their religious beliefs." *RCNY*, 2013 WL 6579764, at *14. The "line" between religiously permissible and impermissible actions is

for the church and the individual, not the state, to draw, "and it is not for [the courts]" to question. *Thomas*, 450 U.S. at 715.

Here, once the moral "line" is properly identified, it becomes readily apparent that Appellants are entitled to relief under RFRA. In short, Appellants believe that compliance with the Mandate violates their religious beliefs—even under the "accommodation," and even presuming the Government's lack of enforcement authority against certain third party administrators. Appellants' Br. at 21–22. The district court disagreed. Because such determinations are for individual believers and religious institutions, not courts, Appellants are likely to succeed on the merits of their RFRA claim.

ARGUMENT

Congress enacted RFRA to enlarge the scope of legal protection for religious freedom. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that neutral and generally applicable laws burdening religious practices did not trigger heightened scrutiny under the Free Exercise Clause. Responding to that decision, Congress enacted RFRA "to restore the compelling interest test" set forth in *Sherbert*, 374 U.S. 398, and *Yoder*, 406 U.S. 205. 42 U.S.C. § 2000bb(b)(1). Accordingly, RFRA prohibits the Government from "substantially burden[ing] a person's exercise of religion" unless the burden "(1) is in furtherance

of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(a)–(b).

Under RFRA, therefore, courts must first assess whether the challenged law imposes a "substantial[] burden" on the plaintiff's "exercise of religion." *Id.* In *Hobby Lobby*, this Court correctly held that where sincerity is not in dispute, RFRA's substantial burden test involves a straightforward, two-part inquiry: a court must (1) "identify the religious belief" at issue, and (2) determine "whether the government [has] place[d] substantial pressure" on the plaintiff to violate that belief. *Hobby Lobby*, 723 F.3d at 1140; *Korte*, 735 F.3d at 682–84; *Gilardi*, 733 F.3d at 1216.[4]

Under the first step, a court's inquiry is necessarily "limited." *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996). After all, it is not "within the judicial function" to determine whether a belief or practice is in accord with a particular faith. *Thomas*, 450 U.S. at 716. Courts must therefore "accept" a plaintiff's description of its religious exercise, *Hobby Lobby*, 723 F.3d at 1141, regardless of whether the court, or the Government, finds the beliefs animating that exercise to be "acceptable, logical, consistent, or comprehensible," *Thomas*, 450 U.S. at 714–

[4] A court may also inquire into the sincerity of a plaintiff's religious beliefs. *Hobby Lobby*, 723 F.3d at 1140. Here, however, neither the Government nor the court below questioned Appellants' sincerity.

15 (refusing to question the moral line drawn by plaintiff); *Lee*, 455 U.S. at 257 (same); *Hobby Lobby*, 723 F.3d at 1141 (same). To that end, "[i]t is enough that the claimant has an 'honest conviction' that what the government is requiring, prohibiting, or pressuring him to do conflicts with his religion." *Korte*, 735 F.3d at 683 (quoting *Thomas*, 450 U.S. at 716). In other words, it is left to the plaintiff to "'dr[a]w a line'" regarding the actions his religion deems permissible, and once that line is drawn, "'it is not for [a court] to say [it is] unreasonable.'" *Hobby Lobby*, 723 F.3d at 1139 (quoting *Thomas*, 450 U.S. at 715).

Under the second step, a court's analysis "turns on" "the coercion the claimant feels to violate his beliefs." *Id.*; *see also Korte*, 735 F.3d at 683 (limiting the inquiry to an "evaluat[ion of] the coercive effect of the governmental pressure on the adherent's religious practice"). Indeed, this Court has deemed any inquiry that looks beyond the "*intensity of the coercion* applied by the government" to be "fundamentally flawed." *Hobby Lobby*, 723 F.3d at 1137. Ultimately, the question is whether the Government has placed "substantial pressure on [the plaintiff] to violate [his] sincere religious beliefs." *Hobby Lobby*, 723 F.3d at 1137–38; *see also Thomas*, 450 U.S. at 717–18; *Korte*, 735 F.3d at 682–84; *Gilardi*, 733 F.3d at 1216–18.

Here, it is clear that the Mandate substantially burdens Appellants' exercise of religion. Appellants exercise their religion by, among other things, refusing to

take certain actions—such as providing the self-certification—that, in their religious judgment, impermissibly facilitate access to abortion-inducing products, contraceptives, sterilization, or related education and counseling in violation of the teachings of the Catholic Church. By threatening Appellants with onerous penalties unless they take precisely the actions their religious beliefs forbid, the Mandate substantially pressures Appellants to act contrary to those beliefs.

I. THE MANDATE VIOLATES RFRA

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

RFRA defines "exercise of religion" to include "*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). "This definition is undeniably very broad, so the term 'exercise of religion' should be understood in a generous sense." *Korte*, 735 F.3d at 674; *Gilardi*, 733 F.3d at 1216 (noting that religious exercise is "broadly defined" under RFRA). As the Supreme Court has recognized, religious exercise includes "not only belief and profession but the performance of (or abstention from) physical acts." *Smith*, 494 U.S. at 877.

When identifying a religious exercise, a court is not "permit[ted] to resolve religious questions or decide whether the claimant's understanding of his faith is mistaken." *Korte*, 735 F.3d at 685. The reason for this approach is obvious: "[c]ourts are not arbiters of scriptural interpretation." *Id.* at 716. "It is not within

the judicial ken to question . . . the validity of particular litigants' interpretations of [the] creeds [of their faith]." *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989). Accordingly, the Supreme Court has "[r]epeatedly and in many different contexts" "warned that courts 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. Indeed, since *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), it has been clear that secular authorities may not decide the meaning of religious doctrine or beliefs. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 115–16 (1952). As the Supreme Court recently and unanimously reiterated, each religion is entitled to "shape its own faith," free of judicial interference. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

Here, Appellants' undisputed representations establish that they exercise their religion by refusing to take actions in furtherance of a regulatory scheme to provide their plan beneficiaries with access to abortion-inducing products, contraceptives, sterilization, and related education and counseling. Appellants' Br. at 17–19, 21–22. Most obviously, the Little Sisters believe that submitting the required self-certification form violates their religious beliefs, because doing so renders them "complicit in a grave moral wrong" and "undermine[s] [their] ability to give witness to the moral teachings" of the Catholic Church. *Korte*, 735 F.3d at 683; Appellants' Br. at 21. That form is far more than a simple statement of

religious objection to the provision of contraceptive coverage: it enables, obligates, and incentivizes any third party administrator receiving the form to provide Appellants' employees with the mandated coverage, while simultaneously "notify[ing] the [third party administrator of its] obligations to [(1)] provide contraceptive-coverage to [Appellants'] employees [and (2) to inform them] of their ability to obtain those benefits." *E. Tex. Baptist*, 2013 WL 6838893, at *11.

Significantly, the Little Sisters' religious objection does not turn on whether the third party administrator receiving the form actually follows through and provides the objectionable coverage. Appellants' Br. at 21–22. Appellants object generally to taking any action that "'authorize[s] anyone to arrange or make payments for contraceptives, sterilization, and abortifacients,'"—even if the third party administrator ultimately has the discretion not to provide such payments—and specifically to "'[d]eliver[ing] the self-certification form to another organization that could then rely on it as an authorization to deliver those contraceptives, sterilization, and abortifacients to the Little Sisters' employees, now or in the future.'" *Little Sisters of the Poor*, 2013 WL 6839900, at *9 (quoting Appellants' declarations); Appellants' Br. at 21–22. In short, Appellants' "cannot participate in the government's scheme without violating their sincere and undisputed religious beliefs." Appellants' Br. at 22; *cf. Hobby Lobby*, 723 F.3d at 1141 (noting that RFRA protects parties who "object to being forced to [participate

in] a system that enables someone else to behave in a manner [they] consider immoral").

Declining to provide the self-certification, or to take the other actions required by the Mandate, constitutes an exercise of religion, *Smith*, 494 U.S. at 877, because—just as in *Hobby Lobby*—Appellants sincerely believe that taking these actions would make them "complicit in an immoral act," 723 F.3d at 1142. In other words, Appellants "ha[ve] an 'honest conviction' that what the government is requiring, prohibiting, or pressuring them to do conflicts with their religio[us beliefs]," *Korte*, 735 F.3d at 683 (quoting *Thomas*, 450 U.S. at 716). Just as the court "accepted the religious belief in [*Hobby Lobby*]," so too "must [this Court] accept [Appellants'] beliefs." 723 F.3d at 1141.[5]

B. The Mandate Imposes a Substantial Burden on Appellants' Religious Exercise

Once Appellants' refusal to comply with the accommodation is identified as a sincere religious exercise, the "substantial burden" analysis is straightforward. At that point, a court's "only task is to determine whether . . . the government has applied substantial pressure on the claimant" to act contrary to his faith. *Hobby*

[5] Of course, a religious exercise need not be "compelled by" a claimant's faith to be protected under RFRA. 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). Thus, RFRA would apply to actions motivated by religious belief even if not compelled by it. In any event, RFRA plainly protects religious exercise where, as here, the claimant believes he is compelled by his religion to refrain from taking the actions at issue.

Lobby, 723 F.3d at 1137. Here, the Mandate plainly imposes a substantial burden on Appellants' religious exercise. Failure to take the actions required under the Mandate subjects Appellants to potentially fatal fines of $100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b). If the Little Sisters seek to drop health coverage altogether, they would be subject to a fine of $2,000 per year, per full-time employee after the first thirty employees, *see id.* § 4980H(a), (c)(1).

In short, the Government has put Appellants to a stark choice: violate their religious beliefs or pay crippling fines. These penalties clearly impose the type of pressure that qualifies as a substantial burden. In *Yoder*, for example, the Supreme 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 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.

Indeed, this is the exact choice, and the exact penalties, that this Court found imposed a substantial burden in *Hobby Lobby*. Just as in *Hobby Lobby*, the Government has imposed a "Hobson's choice" on Appellants, "demand[ing]," on pain of onerous penalties, "that [Appellants] enable access to contraceptives that [they] deem morally problematic." *Hobby Lobby*, 723 F.3d at 1141. They can either "abide by the sacred tenets of their faith" and "pay a penalty" that would

"cripple" their organizations, or else they must act in a way they believe makes them "complicit in a grave moral wrong." *Gilardi*, 733 F.3d at 1218. In such circumstances, "it is difficult to characterize the pressure as anything but substantial." *Hobby Lobby*, 723 F.3d at 1140; *see also Korte*, 735 F.3d at 683–84 (stating that "there can be little doubt that the contraception mandate imposes a substantial burden on [Appellants'] religious exercise"); *Gilardi*, 733 F.3d at 1218 ("If that is not 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,' we fail to see how the standard could be met." (quoting *Thomas*, 450 U.S. at 718)).

C. The District Court's Attempt to Distinguish This Case from *Hobby Lobby* Is Unavailing

The district court attempted to distinguish *Hobby Lobby*—and its proper application of the substantial burden test—by claiming that Appellants "are not similarly situated to the *Hobby Lobby* plaintiffs because [they] can avoid the fines levied upon non-compliance with the Mandate by signing the self-certification form." *Little Sisters of the Poor*, 2013 WL 6839900, at *8. But the fact that the for-profit plaintiffs in *Hobby Lobby* were not eligible for the so-called accommodation, while Appellants are, is of no moment. As *Hobby Lobby* makes clear, because RFRA protects "any exercise of religion," 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (emphasis added), the precise nature of the religious exercise at issue is irrelevant to the substantial burden analysis, *Hobby Lobby*, 723 F.3d at

1137, 1140–41. A court's "only task" is to determine whether the asserted exercise—whatever that may be—is sincere and religious before proceeding to assess whether the government has "applied substantial pressure on the claimant" to violate his beliefs. *Id.* at 1137. Thus, it is immaterial that the plaintiffs in *Hobby Lobby* exercised their religion by refusing to directly provide certain forms of contraceptive coverage, *id.* at 1140, while Appellants exercise their religion by declining to take the actions necessary to comply with the "accommodation," such as submitting the self-certification form authorizing others to provide the objectionable items. What matters is that in this case, as in *Hobby Lobby*, "[t]he contraception mandate forces [Appellants] 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.

For similar reasons, the district court erred in its extended attempt to explain why the Government's purported inability to force the third party administrators of church plans to comply with the accommodation should relieve the burden on Appellants' religious exercise. *Little Sisters of the Poor*, 2013 WL 6839900, at *11–15. Whether this lack of enforcement authority means that the Little Sisters can submit the self-certification form without making themselves "complicit in a grave moral wrong" is "a question of religious conscience for [Appellants] to decide." *Korte*, 735 F.3d at 685; *see also Hobby Lobby*, 723 F.3d at 1142 ("[T]he

question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity."). As detailed above, Appellants have answered that question. They sincerely believe—and the Government does not dispute—that they cannot provide the self-certification, even assuming the Government lacks the authority to compel their third party administrator to provide the mandated coverage.[6] *Supra* Part I.A. The district court had no authority to conclude otherwise.

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[6] On February 21, 2014, a divided panel of the Seventh Circuit rejected a nonprofit plaintiff's request for a preliminary injunction under RFRA. *See Notre Dame*, 2014 WL 687134. That decision, however, is riddled with errors. *First*, the court misapplied RFRA in the same way as the district court here. Rather than identifying the religious belief at issue, and then determining whether the Government has placed substantial pressure on Notre Dame to violate that belief, the court instead held that compliance with the "accommodation" did not burden Notre Dame's religious exercise because "[i]t amounts to signing one's name and mailing the signed form to two addresses." *Id.* at *11. That, however, is a religious determination that the Seventh Circuit was not authorized to make. No "principle of law or logic," *Smith*, 494 U.S. at 887, equips a court to assess the moral significance of a particular act, and RFRA and Supreme Court precedent expressly prohibit them from doing so. *See supra* Part I.A; *Notre Dame*, 2014 WL 687134, at *18 (Flaum, J., dissenting) ("Notre Dame tells us that Catholic doctrine prohibits the action that the government requires it to take. So long as that belief is sincerely held, I believe we should defer to Notre Dame's understanding."). *Second*, the *Notre Dame* court fundamentally misunderstood the regulatory scheme at issue, erroneously holding that even if an objector refused to sign the self-certification, its third party administrator "must provide the services no matter what." *Id.* at *8. That, however, is clearly wrong: a third party administrator's obligation to provide contraceptive coverage, and its ability to be reimbursed for doing so, arise only if a religious organizations issues the self-certification, as is plain from the face of the

CONCLUSION

At bottom, the district court's conclusion that the Mandate does not substantially burden the religious exercise of Appellants reflects a misunderstanding of the religious objection at issue. Appellants have made the religious judgment that taking the actions required by the Mandate—even under the accommodation, and even presuming the Government lacks enforcement authority to compel church-plan third party administrators to comply with the accommodation—violates their religious beliefs. In other words, they have determined that compliance with Mandate would make them "complicit in an immoral act." *Hobby Lobby*, 723 at 1142. As Judge Gorsuch explained in *Hobby Lobby*,

> All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the

(continued…)

regulations and as the Government has repeatedly conceded. *E.g.*, Appellants' Br. at 20 & n.6; *see also* Tr. of Hr'g at 12-13, *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441 (D.D.C. Nov. 22, 2013) ("THE COURT: But [a third party administrator's] duty to [provide the mandated coverage] only arises by virtue of the fact that he has a contract with the religious organizations? [THE GOVERNMENT]: Yes. They become a plan administrator and are required to make these payments by virtue of the fact that they receive the self-certification form from the employer.").

> degree to which those who assist others in committing wrongful conduct themselves bear moral culpability.

Id. at 1152 (Gorsuch, J., concurring). Appellants "are among those who seek guidance from their faith on these questions," *id.*, and their faith has led them to the firm and sincere conclusion that the actions required of them by the Mandate cross the "line" between permissible and impermissible facilitation of wrongful conduct, *Thomas*, 450 U.S. at 715. For the reasons described above, that line is indisputably theirs to draw, and it is not for this Court or the Government to question. *Id.* By placing substantial pressure on Appellants to cross this line, primarily in the form of crushing fines, the Government has substantially burdened their exercise of religion.

March 3, 2014

Respectfully submitted,

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March 3, 2014

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I hereby certify that, on March 3, 2014, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system, which served all case participants at their designated electronic mail addresses.

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