IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT
APPEAL NO. 88ST-7CONS

UNITED STATES OF AMERICA **Appellant** **(Defendant Below)** **v.** **UNITED COMPATRIOTS and LEGAL ALLIES, Inc.,** **Appellee** **(Plaintiff Below)**	**Appeal from the United States District Court for the Middle District of WESTWOOD, Sitting at Pauley Pavilion**

OPINION OF THE COURT

Before Hazzard, Goodrich, Wilkes, Walton, Miller, Richardson, and Love, Circuit Judges

Love, Circuit Judge, (with Hazzard, Wilkes, and Walton concurring).

I. INTRODUCTION

In these consolidated appeals, religious organizations[1] challenge, under the Religious Freedom Restoration Act ("RFRA"), a requirement that they either offer their employees health insurance that covers certain contraceptive services or submit a form or notification declaring their religious opposition to that coverage. The District (trial) Court below held that the requirement violates RFRA and enjoined the government from enforcing it.

[1] The various religious organizations have banded together under the name "United Compatriots and Legal Allies" for purposes of this litigation. No party has raised any standing issues; we refer to the claims made by the organization's individual members rather than the organization as a whole.

We reverse that decision because the plaintiff cannot show that the requirement substantially burdens their religious exercise under established law.

II. FACTS

A. The Affordable Care Act

Under the Affordable Care Act ("ACA"), employers with fifty or more full-time employees generally must offer their employees a group health plan that provides "minimum essential coverage." *See* 26 U.S.C. §§ 4980H(a), (c)(2), 5000A(f)(2). Plans typically must cover all FDA-approved contraceptive methods and sterilization procedures for women without copayments or deductibles. Two types of plans are automatically exempt from the so-called contraceptive mandate: grandfathered plans, meaning those that have not made certain specified changes since March 2010, *see* 42 U.S.C. § 18011(a), and plans offered by religious employers, defined by reference to the Tax Code to include mostly churches themselves, as distinguished from associated educational or charitable institutions.

An employer that does not comply with these requirements faces draconian penalties: $2,000 per full-time employee per year for not offering a plan at all and $100 per affected individual per day for offering a plan that provides insufficient coverage, 26 U.S.C. § 4980D(a), (b)(1).

An "accommodation" is available to religious entities that do not qualify as religious employers but seek exemption from the mandate. To avail itself of that option, (1) an organization must oppose, on religious grounds, providing coverage for some or all contraceptives; (2) it must be organized as a nonprofit; (3) it must hold itself out as religious; and (4) it must certify that it satisfies the foregoing criteria. It can certify in two ways.

The first way is to complete EBSA9 Form 700 and send it to its insurer or third-party administrator. The person signing the form must certify that the organization meets the requirements and that the form is believed to be correct. The form requires the name of the organization, the name and title of the person signing it, and contact information. The second way in which an organization can certify is to submit a notice to the Department of Health and Human Services ("HHS"). The notice need not take a particular form but must include the name of the organization; a statement that it opposes, on religious grounds, providing coverage for

some or all contraceptives; the name and type of the plan; and the name and contact information of the plan's insurer or third-party administrator, if applicable.

The effect of applying for the accommodation depends on the type of plan and method of certification. If an employer with an insured plan uses Form 700, the insurer must exclude the objectionable coverage from the plan. The insurer must still, however, include contraceptives coverage for plan participants via a "separate payments" method. This means the insurer may not impose any direct or indirect costs for contraceptives on the employer or participants. In addition, it must send a notice to participants, separately from plan materials, explaining that the employer does not administer or fund contraceptives but that, instead, the insurer provides separate payments. If an employer with an insured plan submits a notice to HHS, then HHS notifies the insurer of its obligations, which are the same as if the employer had used Form 700.

The process for self-insured plans is somewhat different. If an employer with a self-insured plan uses Form 700, the third-party administrator, if there is one, must either provide separate payments (as an insurer would) or arrange for an insurer or other entity to do so. *See* 29 C.F.R. § 2590.715-2713A(b)(2).

Third-party administrators and insurers that pay for contraceptives in this circumstance are eligible for government reimbursement of 115% of their expenses. The prohibition on imposing costs and the notice requirement are the same as for insured plans. Moreover, the form "shall be an instrument under which the plan is operated, shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for [contraceptives], and shall supersede any earlier designation." *Id.* § 2510.3-16(b). In essence, the form trumps plan documents to the contrary.

If an employer with a self-insured plan submits a notice to HHS, then HHS notifies the Department of Labor, which in turn notifies the third-party administrator of its obligations. *See id.* § 2590.715-2713A(b)(1)(ii)(B). The result is the same as if the employer had used Form 700, *id.* § 2590.715-2713A(b)(1)(ii)(B), (2), except that it is the notice from the Department of Labor, instead of Form 700, that is treated as an instrument under which the plan is operated and as designation of the plan administrator, *id.* § 2510.3-16(b).

B. The Plaintiffs and The Litigation

The plaintiffs are religious organizations that oppose the use of some or all contraceptives. The sincerity of their beliefs is undisputed. The Canonical Ministries of Alford and LaBrown are automatically exempt from the mandate as religious employers, and the other plaintiffs are eligible for the accommodation.

As noted previously, several plaintiffs have banded together for purposes of this litigation. Most are deeply, practically and closely affiliated with religious employers. Some (mainly, the hospitals tied to universities) offer health insurance through self-insured plans. Others offer plans through a traditional insurer. Some plans are exempt from the Employee Retirement Income Security Act ("ERISA") as church plans; some are not.

What all of the plaintiffs do have in common is this: they oppose abortion and believe that emergency contraceptives and intrauterine devices, which are included in the contraceptive mandate, can cause abortions. They are unwilling to provide or facilitate access to those products. Also, providing or facilitating access to them would violate their faith.

III. LEGAL ANALYSIS

This is a question arising under the First Amendment to the United States Constitution, which provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…." U.S. Const. Amend. I.

In 1993, Congress passed the Religious Freedom Restoration Act,[2] and the Plaintiffs in these actions invoke the statutory provisions of the RFRA. Under RFRA, the "[g]overnment

[2] As to the purposes of the law, one need look no further than 42 U.S. Code § 2000bb(a) and (b), the Congressional findings and declaration of purposes.

(a) **Findings** The Congress finds that—

> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
>
> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a) to (b).

Our analysis here is in two parts. First, we must address the issue of whether the challenged regulations substantially burden the Plaintiff's religious exercise under the RFRA generally. We conclude the Plaintiffs have not met their burden in this regard. Second, we address the issue of "substantial burden" in light of the parties' conflicting interpretations of the United States Supreme Court's determination in the *Hobby Lobby* case, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

A. Substantial Burden and the RFRA

A preliminary question—at the heart of this case—is the extent to which the courts defer to a religious objector's view on whether there is a substantial burden. The inquiry has three components: (1) What is the adherent's religious exercise? (2) Does the challenged law pressure him to modify that exercise? (3) Is the penalty for noncompliance substantial? It is well

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> (3) governments should not substantially burden religious exercise without compelling justification;
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> (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
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> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) **Purposes** The purposes of this chapter are—

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
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> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

established that the court accepts the objector's answer to the first question upon finding that his beliefs are sincerely held and religious.

It is also undeniable that the court evaluates the third question as one of law. Although we have not directly addressed who decides the second question, all of our sister circuits that have considered contraceptive-mandate cases have come to the same conclusion: The court makes that decision. We agree.

Two free-exercise cases are especially instructive. In *Bowen v. Roy*, 476 U.S. 693 (1986), parents challenged the government's use of a Social Security number for their daughter because they believed that the use of the number would "rob her spirit." *Id.* at 695–97. The Court ruled for the government, reasoning that the parents were challenging the government's acts, not a burden on them, *id.* at 699–701, and that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens," *id.* at 699. The Court decided for itself whether the policy in question pressured the parents to modify their religious exercise, noting that, although Roy's religious views may not accept this distinction between individual and governmental conduct[,] [i]t is clear . . . that the Free Exercise Clause, and the Constitution generally, recognize such a distinction; for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference. *Id.* at 701 n.6 (citation omitted).

The Court used the same approach in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). The plaintiffs complained of the government's plan to construct a road and permit logging on federal land, which they had used for religious purposes. *Id.* at 441–42. Relying on *Roy*, the Court rejected their claim. *Id.* at 447–49. It accepted the plaintiffs' statement of their religious beliefs, *id.* at 449–51, but concluded that the project involved only the government's management of its own property, which did not implicate the plaintiffs' constitutional rights, *id.* at 453. The Court stressed that, "[w]hatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Id.* at 451.

In addition, one RFRA case from the District of Columbia Circuit illustrates that the court decides the second question. In *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008), an

inmate objected to a requirement that he participate in the collection of a tissue sample, which the FBI would use to create a DNA profile, because he opposed on religious grounds the extraction and storage of DNA information. *Id.* at 673–74. The court ruled for the government. *Id.* at 686. It "[a]ccept[ed] as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened." *Id.* at 679. Applying that rule, it held that his religious exercise was not substantially burdened, because "[t]he extraction and storage of DNA information are entirely activities of the FBI, in which Kaemmerling plays no role and which occur after the BOP has taken his fluid or tissue sample (to which he does not object)." *Id.*

Although the plaintiffs have identified several acts that offend their religious beliefs, the acts *they* are required to perform do not include providing or facilitating access to contraceptives. Instead, the acts that violate their faith are those of third parties. Because RFRA confers no right to challenge the independent conduct of third parties, we conclude that the plaintiffs have not shown a substantial burden on their religious exercise.

First, the plaintiffs claim that their completion of Form 700 or submission of a notice to HHS will authorize or trigger payments for contraceptives. Not so. The ACA already requires contraceptive coverage: "A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for . . . with respect to women, such additional preventive care . . . as provided for in comprehensive guidelines" promulgated by HHS, 42 U.S.C. § 300gg-13(a)(4), which includes contraceptives. That provision expressly requires insurers to offer coverage. And although it does not specifically mention third-party administrators, they administer "group health plan[s]," which must include coverage. Nothing suggests the insurers' or third-party administrators' obligations would be waived if the plaintiffs refused to apply for the accommodation. Accordingly, the plaintiffs' completion of Form 700 or submission of a notice to HHS does not authorize or trigger payments for contraceptives, because the plaintiffs cannot authorize or trigger what others are already required by law to do.

The plaintiffs offer two variations of that theory, but those are equally unconvincing. The plaintiffs assert that their listing the names and contact information of their insurers and third-party administrators will make it easier for the government to inform those entities of their obligations. It will, but that does not mean the plaintiffs' religious exercise is burdened. Without

the accommodation, the plaintiffs would have to offer a plan that covered contraceptives, so the effect of the government's communications with the insurers and third-party administrators is to shift the burden to those entities. Providing the names and contact information facilitates only the plaintiffs' exemption, not contraceptive coverage.

Separately, the self-insured plaintiffs contend that their completion of Form 700 or submission of a notice to HHS will make their third-party administrators eligible for the government's reimbursement. Again, it will, but that does not mean the plaintiffs' religious exercise is burdened.

For the insured plans, the insurers will not lose money by paying for contraceptives, because the savings on pregnancy care at least are expected to equal the costs of contraceptives. There is a potential problem for the self-insured plans, though: The third-party administrators do not bear the risk of claims, so they will not realize any savings on pregnancy care. The regulations prohibit passing on the costs of contraceptives, 29 C.F.R. § 2590.715-2713A(b)(2), but in an efficient market, the third-party administrators would be unable to avoid doing so without additional revenue. The reimbursement is the government's attempt to solve the problem by giving the third-party administrators additional money to cover the costs of contraceptives. Assuming the amount is sufficient, the reimbursement is what will allow the self-insured plaintiffs to avoid paying for contraceptives.

Second, the plaintiffs urge that the accommodation uses their plans as vehicles for payments for contraceptives. But that is just what the regulations prohibit. Once the plaintiffs apply for the accommodation, the insurers may not include contraceptive coverage in the plans. The insurers and third-party administrators may not impose any direct or indirect costs for contraceptives on the plaintiffs; they may not send materials about contraceptives together with plan materials; in fact, they must send plan participants a notice explaining that the plaintiffs do not administer or fund contraceptives. The payments for contraceptives are completely independent of the plans.

Third, the plaintiffs theorize that the requirement that they offer their employees a group health plan pressures them to authorize or facilitate the use of contraceptives. They must contract with the insurers and third-party administrators to offer a plan, and those entities pay for contraceptives. In the plaintiffs' view, the insurers and third-party administrators would not do so absent the contracts, so the contracts facilitate the use of contraceptives.

The plaintiffs misunderstand the role of the contracts. Under the accommodation, the contracts are solely for services to which the plaintiffs do not object; the contracts do not provide for the insurers and third-party administrators to cover contraceptives, do not make it easier for those entities to pay for contraceptives, and do not imply endorsement of contraceptives. Instead, the plaintiffs are excluding contraceptive coverage from their plans and expressing their disapproval of it, but the government is requiring the insurers and third-party administrators to offer it—separately from the plans—despite the plaintiffs' opposition. The plaintiffs' religious beliefs forbid them from providing or facilitating access to contraceptives, but the requirement that they enter into the contracts does not force them to do so. The acts that violate their faith are the acts of the government, insurers, and third-party administrators, but RFRA does not entitle them to block third parties from engaging in conduct with which they disagree.

A hypothetical illustrates the breadth of the plaintiffs' position. Suppose a person needs a passport for an upcoming trip. She fills out the application, but as she is about to mail it, she learns that the State Department will assign her a number when it approves her request. She opposes, on religious grounds, the use of a number to identify her, *see generally Roy*, 476 U.S. at 695–97, as well as any act that would facilitate the use of a number, so she sues under RFRA. That case is indistinguishable from the one at bar. The objector does not oppose completing the application but only the State Department's assigning her a number in response even though she need not help the department do so. The idea that she could force the department to justify, under strict scrutiny, its application requirement or use of a number is unreasonable. Yet the plaintiffs here are making the same type of claim. Accepting such claims could subject a wide range of federal programs to strict scrutiny. Perhaps an applicant for Social Security disability benefits disapproves of working on Sundays and is unwilling to assist others in doing so. He could challenge a requirement that he use a form to apply because the Social Security Administration might process it on a Sunday. Or maybe a pacifist refuses to complete a form to indicate his beliefs because that information would enable the Selective Service to locate eligible draftees more quickly.

The possibilities are endless, but we doubt Congress, in enacting RFRA, intended for them to be.

Fourth, the self-insured plaintiffs postulate that they will be required to pay for contraceptives despite the regulations to the contrary. They say the government lacks the

authority under ERISA to prohibit third-party administrators from passing on the costs, insurers are unlikely to work with the third-party administrators because of the small amounts involved (an insurer must seek reimbursement on behalf of a third-party administrator), and the 115% reimbursement will not cover the costs.

Yet this scenario has not yet transpired. This means that the issue is not ripe, and we express no view on its merits. The legal principles here are clear. A court should dismiss a case for lack of "ripeness" when the case is abstract or hypothetical. The key considerations are the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required. However, even where an issue presents purely legal questions, the plaintiff must show some hardship in order to establish ripeness.

The plaintiffs' prediction that third-party administrators will attempt to charge them for contraceptives may not come to pass, so the matter is not fit for judicial decision. The administrative costs associated with payments for contraceptives may turn out to be low. If so, the insurers and third-party administrators will be eager to take advantage of the 115% reimbursement, and the third-party administrators will profit from the arrangement and have no occasion to pass on the costs. The plaintiffs say that is unlikely because only a small number of their employees will use contraceptives. But their reasoning overlooks the economies of scale that the insurers and third-party administrators could establish by paying for contraceptives for the employees of many religious organizations.

Fifth, the Canonical Ministries of Alford and LaBrown, which are automatically exempt from the mandate as religious employers, submit that the regulations will require them either to sponsor a plan that complies with the contraceptive mandate or to remove from their plans affiliated entities that are not religious employers but are eligible for the accommodation. That is a misreading of the regulations, which allow those types of organizations to share a plan provided that the entity that does not qualify as a religious employer applies for the accommodation.

Because the accommodation does not burden the plaintiffs' religious exercise, neither does a requirement that the Canonical Ministries do nothing and the affiliated entities apply for the accommodation.

In short, the acts the plaintiffs are required to perform do not involve providing or facilitating access to contraceptives, and the plaintiffs have no right under RFRA to challenge the independent conduct of third parties. Because the plaintiffs have not shown that the regulations substantially burden their religious exercise we need not reach the strict-scrutiny prong or the other requirements for an injunction.

B. *Hobby Lobby*

Not surprisingly, the plaintiffs and the government take drastically different views of the impact of the Supreme Court's decision in *Hobby Lobby*. So, too, does the dissent.

We only briefly revisit the facts and basic outcome here. Hobby Lobby, owned by the Green family, and Conestoga Wood Specialties, owned by the Hahn family, attacked the requirement of employer insurance plan, contraceptive care under the ACA as violating their and their corporate religious freedom. The Supreme Court determined that for-profit corporations could be considered *persons* under the RFRA. It noted that the HHS treats *nonprofit* corporations as *persons* within the meaning of RFRA. The Court stated, "no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations."

Importantly, the corporations were neither automatically exempt from the mandate as religious employers nor eligible for the accommodation; they had to offer insurance that covered contraceptives or face large penalties. *Burwell v. Hobby Lobby*, at 2775–76. So, the Court held that the mandate violated RFRA as applied to the corporations. *Id.* at 2785. But the Court did not have to address, in our estimation, the substantial burden analysis in a manner applicable here.

The reason why is framed by the parties' arguments in the *Hobby Lobby* case. The Supreme Court rejected the government's theory "that the connection between what the objecting parties must do (provide health-insurance coverage for [contraceptives]) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated," *id.* at 2777, explaining that drawing the line between acceptable and unacceptable levels of involvement was the owners' prerogative, *id.* at 2778–79. In doing so, the Court reaffirmed that courts defer to the objector's description of his religious exercise upon finding that his beliefs are sincerely held and religious. And the Court analyzed the substantiality of the penalties for

noncompliance itself, rather than automatically accepting the corporations' position. *Id.* at 2775–77.

But the Supreme Court did not address the issue at the heart of the substantial burden analysis: "Does the challenged law pressure him to modify that exercise?" The Hobby Lobby Court had no reason to, because there was no doubt that imposing large penalties for not offering insurance that covered contraceptives pressured the corporations to facilitate the use of contraceptives.

So, with Hobby Lobby not answering the core part of the question at issue here, and in the absence of further guidance from the Supreme Court, we are bound to follow *Roy* and *Northwest Indian Cemetery* by deciding, as a question of law, whether the challenged law pressures the objector to modify his religious exercise. The other circuits' decisions confirm the continued vitality of that approach.

The Court did not resolve the issue in *Hobby Lobby* but, instead, rejected the government's notion that there was no substantial burden, because the intervening acts of third parties, such as employees' decisions to use contraceptives, made the connection between the plaintiffs' providing contraceptive coverage and the destruction of an embryo too attenuated. 134 S. Ct. at 2777–79. The distinction between that case and the instant one is that the regulations compelled the *Hobby Lobby* plaintiffs to participate in providing contraceptives, albeit in an indirect way. What the regulations require of the plaintiffs here has nothing to do with providing contraceptives.

The difference is not just that there are more links in the causal chain here than in *Hobby Lobby*—a difference that would not change the outcome, given that we accept an adherent's judgment as to how much separation is enough. It is also that the type of compelled act is quite different—the act at issue in this case is not one that authorizes or facilitates the use of contraceptives.

The *Hobby Lobby* Court did not consider this type of situation and actually suggested in *dictum* that the accommodation does not burden religious exercise: The majority noted that "HHS has effectively exempted certain religious nonprofit organizations" through the accommodation, *id.* at 2763, and the concurrence observed that "the accommodation equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs," *id.* at 2786 (Kennedy, J., concurring).

Thus, *Hobby Lobby* is of no help to the plaintiffs' position, and the requirement to offer a group health plan does not burden their religious exercise.

REVERSED.

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DISSENTING OPINION

Goodrich, Circuit Judge, dissenting (with whom Miller and Richardson concur).

I dissent.

I. THE REGULATIONS AND THE FACTS

As an initial matter, the majority has given short shrift to the impact and importance of the regulatory scheme we are addressing. It deserves further explanation.

After an initial outcry, HHS recognized that its contraceptive mandate implicated sincere religious objections and thus created a regulatory exemption for certain "religious employers." 78 Fed.Reg. 39870, 39874 (July 2, 2013); 45 C.F.R. 147.131(a). This exemption is available to tens of thousands of churches and associations of churches, as well as to "integrated auxiliaries" of churches—a category defined by how closely an organization is affiliated with or controlled by a church. 26 C.F.R. 1.6033-2(h). A "religious employer" need not do anything to avail itself of this exemption; it need not certify its religious beliefs, execute or deliver any forms, provide notice to HHS or any other government authority, or do anything that would result in its employees receiving contraceptive coverage in connection with its healthcare plan.

Although HHS was well aware that religious objections to the contraceptive mandate were by no means limited to houses of worship, their associations, or their "integrated auxiliaries," it nonetheless refused to exempt other nonprofit religious organizations from the statutory requirement to provide preventative coverage, which by regulation extends to providing all FDA-approved contraceptives free of cost.

Accordingly, countless religious colleges and seminaries, faith-based charities, orders of nuns, and other religious organizations remain subject to the contraceptive mandate. Instead of exempting these nonprofit employers, HHS offered them an additional means, unavailable to objecting for-profit employers, through which they can "comply" with the mandate to provide contraceptive coverage. 78 Fed. Reg. at39879 ("an eligible organization is considered to comply with section 2713 of the PHS Act"). To be clear, this so-called "accommodation" is a means by which the nonprofit can fulfill its statutory obligation to provide coverage, not an exemption from that obligation.

More specifically, this regulatory option requires a nonexempt religious employer to "self-certify" that it is a religious employer and has religious objections to providing some or all FDA-approved contraceptive methods. 26 C.F.R. 54.9815-2713AT(b)(ii)(A), (c)(1).

By doing so, the employer triggers a regulation that requires either its insurer or, in the case of a self-insured employer (which many religious employers are), its third party administrator ("TPA") to make "separate payments for contraceptive services directly for plan participants and beneficiaries." 78 Fed.Reg. at 39876; see 26 C.F.R. 54.9815–2713AT(b)(2), (c)(2). In other words, unlike the exemption provided to grandfathered plans and religious employers, the "accommodation" does not excuse the employer from ensuring that participants in its plan receive contraceptive coverage in connection with that plan. It instead provides a regulatory mechanism that enables the employer to satisfy both the statutory obligation to provide preventative care and the regulatory obligation to provide contraception coverage, and thereby "assur[e] that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage." 77 Fed. Reg. 16501, 16503 (Mar. 21, 2012).

Originally, objecting nonprofits had only one option for "self-certifying": executing and delivering to its insurer or TPA Employment Benefits Security Administration ("EBSA") Form 700. The execution of this document is critical not only to discharging the employer's statutory/regulatory obligation, but also to the actual provision of the objected-to coverage. As

the form states on its face, upon execution and delivery, it becomes "an instrument under which the plan is operated." *Ibid.* In particular, it designates the TPA as "plan administrator and claims administrator," not generally, but "solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed.Reg. at 39879; 29 C.F.R. 2510.3–16(b), (c).

That designation is essential because without it, a TPA would have no contractual authority to pay any claims (let alone claims for contraceptive coverage excluded from the employer's plan), as a self-insured employer pays claims itself. And under ERISA, self-funded plans can be modified only by a written document. 29 U.S.C. § 1102(a)(1). Accordingly, execution of Form 700 is necessary not only to trigger the regulatory obligation of the TPA to provide contraceptive coverage to the religious organization's employees, but also to "ensure[ ] that there is a party with legal authority"—both as a contractual matter and for purposes of ERISA liability—to make payments to plan beneficiaries for contraceptive services. 78 Fed.Reg. at 39879. Only if an employer executes an instrument that amends its plan in that manner does a TPA become both obligated and authorized to provide the objected-to coverage, and eligible for 115% reimbursement for the costs of doing so. See 45 C.F.R.156.50(d)(1)-(3).

Unsurprisingly, religious organizations found little solace in a so-called "accommodation" that continues to require them to satisfy their statutory/regulatory obligation to provide the objected-to contraceptive coverage, but allows them to do so by effectively amending their own plans to authorize their own issuers or administrators to provide that coverage, and simply excuses them only from paying for the coverage directly. After all, these organizations do not merely object to paying for or being the direct provider of contraceptive coverage; they object to taking actions that make them complicit in, or facilitate, access to abortifacients. Filing a form that the government itself deems sufficient to treat the religious employers as providing the coverage required by the statute and regulations certainly supplies a reasonable basis for religious employers to believe that they are at least facilitating the coverage to which they object. Accordingly, several nonprofit religious organizations have brought lawsuits (including this one) challenging the contraception mandate as applied to nonprofit religious organizations as, among other things, a violation of the Religious Freedom Restoration Act (RFRA).

II. THE SUBSTANTIAL BURDEN UNDER RFRA

I think it is important to revisit exactly where I part company with the majority. The second section of the Religious Freedom Restoration Act states:

> 42 U.S. Code § 2000bb–1 - Free exercise of religion protected (a) In general. Government shall not *substantially burden* a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) **Exception** Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> > (1) is in furtherance of a compelling governmental interest; and
> > (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (c) **Judicial relief** A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.
>
> (emphasis added).

We are not dealing here with the exception of subsection (b). Instead, we are dealing with a threshold issue of whether the HHS mandate is a "substantial burden" to the First Amendment rights asserted by the Plaintiffs.

This basic matter is important, because, as noted, there is no dispute that plaintiffs sincerely believe that complying with the contraceptive mandate via the regulatory option requires them to facilitate access to contraceptive coverage in violation of their religious beliefs. And there is no dispute that failure to comply with the contraceptive mandate through one of the avenues HHS has offered will result in massive financial penalties. As the District Court correctly recognized, that should have been the end of the substantial burden analysis, as forcing plaintiffs to choose between taking an action that they sincerely believe would violate their religion or "pay[ing] an enormous sum of money" "clearly imposes a substantial burden on" their exercise of religion. *Hobby Lobby*, 134 S.Ct. at 2779. That is so whether or not courts agree with plaintiffs that the action in question would violate their religious beliefs, as courts simply do not have the authority to "second guess" a sincerely held religious belief.

Yet that is precisely what the majority is doing in concluding that the government has not imposed a substantial burden on plaintiffs' exercise of religion. The majority does not dispute that plaintiffs sincerely believe that each of the avenues through which HHS allows them to comply with the contraceptive mandate would force them to facilitate contraceptive coverage in violation of their religious beliefs, or that the consequences of non-compliance—namely, massive penalties—are "draconian." Instead, the majority insists that the substantial burden analysis turns not on whether plaintiffs are being pressured to comply with a law that they find objectionable on religious grounds, but rather on whether plaintiffs are correct in their belief that by being pressured to comply with that law, they are really being "pressured...to facilitate the use of contraceptives." The court rejected plaintiffs' RFRA claims by reasoning that plaintiffs are simply wrong to believe that "the acts they are required to perform" under the regulatory option are tantamount to "providing or facilitating access to contraceptives."

That reasoning is impossible to reconcile with the Supreme Court's substantial burden jurisprudence. The United States Supreme Court admonished decades ago that "it is not within the judicial function and judicial competence to inquire whether" someone who sincerely objects to a law on religious grounds has "correctly perceived the commands of [his] faith." *Thomas v. Review Board*, 450 U.S. 707, 716 (1981). After all, "[c]ourts are not arbiters of scriptural interpretation," and they are "singularly ill equipped" to make sensitive decisions about what does or does not interfere with religious beliefs—e.g., whether the degree of complicity required is religiously problematic. *Ibid.* Instead, the only questions for the courts to resolve in the substantial burden analysis are whether a religious belief is sincerely held and, if so, whether the "pressure" the government has "put[ ] on an adherent to modify his behavior and to violate his beliefs" is "substantial." *Id.* at 718; *see also United States v. Lee*, 455 U.S. 252, 257 (1982).

III. ***HOBBY LOBBY***

To the extent there was any doubt on that score, *Hobby Lobby* eliminated it. Just as in this case, "HHS's main argument" concerning the substantial burden inquiry in *Hobby Lobby* "[wa]s basically that the connection between what the objecting parties must do… and the end that they find to be morally objectionable [wa]s simply too attenuated." 134S.Ct. at 2777. Rather than resolve that argument as part of its substantial burden analysis, the Court

made clear that it was entirely misplaced, as it "addresses a very different question that the federal courts have no business addressing," and that the Court itself has "repeatedly refused" to answer. *Id.* at 2778 (collecting cases). The "difficult and important question" of whether "the line" someone draws in determining what actions are "consistent with his religious beliefs"—including how much facilitation or complicity is too much—is instead a line for the religious adherent alone to draw. *Ibid.* The only questions the Court found relevant to its substantial burden analysis were whether "the line drawn" by the challengers "reflect[ed] an honest conviction" and, if so, whether the government had substantially pressured them to cross that line. *Ibid.* And as the Court went on to conclude, putting employers to the choice of crossing that line or "pay[ing] an enormous sum of money" unquestionably does substantially pressure them to cross that line. *Id.* at 2779.

As several judges have recognized, that same reasoning compels the conclusion that the nonprofit regulation imposes a substantial burden on religious exercise. As Judge Pryor has explained, "[s]o long as the [religious organization's] belief is sincerely held and undisputed—as it is here—we have no choice but to decide that compelling the participation of the [religious organization] is a substantial burden on its religious exercise." *Eternal Word Television Network, Inc. v. Sec'y, Dep't of Health & Human Servs.,* 756 F.3d 1339, 1348 (11th Cir. 2014) (Pryor, J., specially concurring).

Judges Kavanaugh and Brown likewise recently emphasized the "bedrock principle" of *Thomas* and *Hobby Lobby* "that we may not question the wisdom or reasonableness (as opposed to the sincerity) of plaintiffs' religious beliefs—including about complicity in wrongdoing." *Priests for Life v. U.S. Dep't of Health & Human Servs*., No. 13-5368, slip op. 10 (D.C. Cir. May 20, 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc); see also *id.* at 6-7 (Brown, J., dissenting from denial of rehearing en banc). And as Judge Flaum aptly put it, whether the regulatory option available to nonprofits forces them to facilitate access to contraceptive coverage "is not a question of legal causation but of religious faith. 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." *Univ. of Notre Dame v. Sebelius,* 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting), *vacated and remanded*, 135 S.Ct. 1528 (2015).

Unfortunately, when it comes to challenges to the contraceptive mandate by nonprofit religious employers, adherence to the clear teachings of *Hobby Lobby* and Thomas has become a feature more common to dissenting opinions than majorities. Indeed, each of the courts of appeals that have resolved such challenges has employed a substantial burden analysis more reminiscent of the approach advanced by the dissenters in *Hobby Lobby*. *See Hobby Lobby*, 134 S.Ct. at 2799 (Ginsburg, J., dissenting) (finding no substantial burden because there were "independent decisionmakers… standing between the challenged government action and the religious exercise claimed to be infringed").

For instance, in *Geneva College v. Secretary of United States Department of Health & Human Services*, 778 F.3d 422 (3d Cir. 2015), the Third Circuit first erroneously concluded that RFRA requires courts to "objectively assess whether the appellees' compliance with the self-certification procedure does, in fact… make them complicit" in facilitating religion, then drew its own conclusion that the procedure does not. *Id.* at 435. Likewise, the Seventh Circuit has adamantly insisted both that it "is for the courts to determine whether the law actually forces [employers] to act in a way that would violate [their] beliefs," *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 611-12 (7th Cir. 2015) (Posner, J.) ("Notre Dame II"), and that religious employers are wrong to believe that it does, *see Wheaton College v. Burwell*, --- F.3d --, No. 14-2396, 2015 WL 3988356, at *7 (7th Cir. 2015) (Posner, J.) ("No one is asking Wheaton to violate its religious beliefs."). And the D.C. Circuit dismissed the employers' RFRA objections by reasoning that the nonprofit regulation requires them to do nothing more than complete "a bit of paperwork" that "wash[es] their hands of any involvement in providing insurance coverage for contraceptive services." *Priests for Life v. HHS*, 772 F.3d 229, 237, 247 (D.C. Cir. 2014).

Those cases simply cannot be reconciled with the Supreme Court's repeated admonishment that "it is not within 'the judicial function and judicial competence'" to decide whether a religious adherent has "correctly perceived the commands of [his] faith." *Lee*, 455 U.S. at 257 (*quoting Thomas*, 450 U.S. at 716). Indeed, just this past Term the United States Supreme Court applied the 2000 amendments of the Religious Land Use and Institutionalized Persons Act (RLUIPA) to the RFRA. RLUIPA redefined exercise of religion as any exercise of religion, "whether or not compelled by, or central to, a system of religious belief," which is to be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted

by the terms of this chapter and the Constitution." The RLUIPA contains a substantial identical burden test, and the Supreme Court found it sufficient that an inmate demonstrated that he would "face serious disciplinary action" if forced to shave a beard that he sincerely believed his religion required him to maintain. *Holt v. Hobbs*, 135 S.Ct. 853, 862 (2015). In doing so, the Court spent no time evaluating whether maintaining a half-inch beard was really necessary or sufficient to comply with a "dictate of [petitioner's] religious faith." *Ibid.* Nor did it focus on the fact that shaving takes only a few minutes. Instead, it was enough that petitioner's belief was sincere, and that the government had placed substantial pressure on him to violate it.

So, too, here. Thousands of religious employers throughout the nation sincerely believe that complying with the nonprofit regulations involves a degree of facilitation or complicity that would violate their religious beliefs, and there is no question that the consequences of declining to pursue the "accommodation" route for fulfilling the contraceptive mandate are "draconian." Indeed, the ultimate regulatory mandate at issue here—the contraceptive mandate—is the exact same one that was at issue in *Hobby Lobby*, and the fines for noncompliance are identical as well. The only difference is that HHS has given plaintiffs an option for fulfilling the mandate that was not offered to for-profit corporations like *Hobby Lobby*.

But as long as the proffered means of fulfilling the contraceptive mandate violate sincerely held religious beliefs, then the existence of a substantial burden follows ineluctably from *Hobby Lobby*. Just as in *Hobby Lobby*, the government has "demand[ed] that [employers] engage in conduct that seriously violates their religious belief[s]" on pain of "substantial economic consequences." *Hobby Lobby*, 134 S.Ct. at 2776. And just as in *Hobby Lobby*, that economic pressure "clearly imposes a substantial burden on those beliefs." *Id.* at 2779. In fact, the substantial economic consequences are exactly the same, because the ultimate mandate is exactly the same. Perhaps courts could conclude that the existence of additional regulatory means of compliance with the contraceptive mandate alters the least restrictive means analysis. But if the additional regulatory means violate sincerely held religious beliefs, then *Hobby Lobby* controls the substantial burden inquiry.

And to make matters worse, courts not only have impermissibly arrogated to themselves the authority to answer "a difficult and important question of religion and moral philosophy," *id.* at 2778, but have failed to grasp the true nature of the religious objections that employers are raising. These cases are not about whether the government can force religious employers to

execute a "bit of paperwork." *PFL*, *supra*, 772 F.3d at 237. Nor are they about whether religious employers have a right to prevent their employees from receiving access to coverage for the objected-to contraceptives. Rather, they are about whether the government may force religious employers, contrary to their religious convictions, to comply with a mandate to provide contraception coverage to their employees in a way that is "seamless" and ultimately involves the provision of contraceptive coverage via the religious employers' own plans.

The government would seem to be poorly positioned to question that its regulatory option involves a meaningful degree of complicity or facilitation. After all, HHS does not view its "accommodation" as an exemption from the requirement that plaintiffs provide a qualifying healthcare plan that includes the mandated contraceptives and abortifacients. Instead, the required paperwork is viewed as a means of complying with the contraceptive mandate, which ultimately flows from a statutory requirement. Having concluded that its accommodation is good enough (as a matter of administrative law) to put plaintiffs in compliance with their regulatory and statutory obligations to provide no-cost contraceptive coverage, it takes real chutzpah for the government to then insist that this same accommodation involves no meaningful facilitation or complicity in the provision of those contraceptives and abortifacients. It is all well and good for the government to think it has threaded the needle and found a way for religious nonprofits to comply with the contraceptive mandate without violating their religious beliefs, but ultimately it is for the religious adherent to determine how much facilitation or complicity is too much.

Just like its need to ensure that its "accommodation" complies with the ACA, the government's need to ensure that its "accommodation" complies with ERISA (as well as the APA) likewise ensures that the degree of complicity and facilitation is substantial. That much is clear from the fact that the form or notice HHS requires employers to execute serves as "an instrument under which [its healthcare] plan is operated." That instrument is essential to "ensure[ ] that there is a party with legal authority" to make payments for contraceptive services, 78 Fed.Reg. at 39880, as a TPA would have no contractual authority to pay claims without it. It is the "affirmative act" of executing that instrument—not the independent actions of any third parties—that plaintiffs sincerely believe would violate their religious beliefs. The situation thus is not meaningfully different from one in which the government mandates that all hospitals perform abortions, but purports to "accommodate" religious hospitals by requiring them to sign a form authorizing doctors supplied and paid by the government to perform

abortions on their premises. It is not hard to see why a hospital would find little solace in the government's assurances that it is not "facilitating" abortion because its own doctors are not the ones that the hospital has authorized to use its facility to perform abortions.

As the foregoing confirms, the majority is simply wrong to insist that availing themselves of HHS's regulatory option for compliance with the contraceptive mandate would not require plaintiffs to"facilitat[e] access to contraceptives." Indeed if the form were meaningless, why would the government require it?

The answer is obvious: because it is not meaningless at all, but rather is essential to the operation of HHS's scheme for ensuring that nonexempt employers comply with the contraceptive mandate.

But ultimately, who has the better of the complicity and facilitation arguments is beside the point. What matters under RFRA and the Supreme Court's cases is that plaintiffs sincerely believe that complying with the contraceptive mandate via the nonprofit regulation would violate their religious beliefs, and that the government nonetheless is exerting substantial economic pressure—the exact same pressure as in *Hobby Lobby*—on plaintiffs to do so. The substantial burden analysis requires nothing more.

I therefore dissent. I would affirm the decision of the court below.

IN THE UNITED STATES SUPREME COURT

No. NC-11-AA

UNITED COMPATRIOTS and LEGAL ALLIES, Inc., **PETITIONER** **(Appellee and Plaintiff below)** **v.** **UNITED STATES OF AMERICA** **RESPONDENT** **(Appellant and Defendant below)**	**Appeal from the United States Court of Appeals for the Fourteenth Circuit, Sitting at Bruinville**

ORDER GRANTING CERTIORARI

The petition of the Plaintiff – Appellant United Compatriots and Legal Allies, Inc. for an order of certiorari to the United States Court of Appeals for the Fourteenth Circuit is hereby GRANTED. Oral argument shall be conducted on October 24, 2015, in Crawfordsville, Indiana. The argument shall be confined to the following issues:

1. Whether the Affordable Care Act's requirement that certain entities offer their employees health insurance that covers certain contraceptive services or submit a form or notification declaring their religious opposition to that coverage is a "substantial burden" under the Religious Freedom Restoration Act ("RFRA")? And

2. Whether this Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014) dictates a finding of "substantial burden" for these purposes?

Petitioner shall be entitled to open and close the argument.

FOR THE COURT

John R. Wooden

John R. Wooden, Clerk of the Court