No. 14-1453

In the Supreme Court of the United States

PRIESTS FOR LIFE, *et al.*,
Petitioners,
v.
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

ROBERT JOSEPH MUISE
Counsel of Record
American Freedom Law Center
P.O. Box 131098
Ann Arbor, Michigan 48113
(734) 635-3756
rmuise@americanfreedomlawcenter.org

DAVID YERUSHALMI
American Freedom Law Center
1901 Pennsylvania Avenue NW
Suite 201
Washington, D.C. 20006
(855) 835-2352

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

RULE

INTRODUCTION

The contraceptive services mandate of the Patient Protection and Affordable Care Act (Affordable Care Act or Act), Pub. L. No. 111-148, 124 Stat. 119,[1] including its so-called "accommodation," is today adversely affecting countless nonprofit religious organizations—organizations which object to being forced by this mandate to impermissibly assist the commission of a wrongful act in violation of the moral doctrines of their faith. This is plainly evident by the number of lawsuits working their way through the federal courts challenging the application of this mandate on behalf of such organizations.[2]

What makes review of this case particularly compelling is the fact that this challenge goes to the very core of Priests for Life's *raison d'être* as an organization. Pursuant to its Catholic beliefs, Priests for Life is morally prohibited from cooperating with evil, whether directly or indirectly. Thus, the burden imposed upon Petitioners' religious exercise by the challenged mandate and its "accommodation" is precisely the same whether the government is forcing Petitioners to authorize and facilitate access to and utilization of contraceptive services for Priests for Life's plan participants and beneficiaries via signing a

---

[1] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029).

[2] *See* http://www.becketfund.org/hhsinformationcentral/ (collecting cases) (last visited on Aug. 18, 2015).

"certification" or via payment to Priests for Life's insurance carrier.[3]

Contrary to Respondents' suggestion, this is not a case where Petitioners' objection is "not to any action that the government has required petitioners themselves to take, but is instead to the government's independent actions in mandating contraceptive coverage by third parties." Resp'ts Br. at 15 (internal quotations and brackets omitted); *see also id*. at (I) (incorrectly restating the question presented as "[w]hether RFRA entitles petitioners not only to opt out of providing contraceptive coverage themselves, but also to prevent the government from arranging for third parties to provide separate coverage to the affected women"). Rather, this is a case where the government is forcing Petitioners to engage in at least two acts that violate their religious obligations: (1) hiring or maintaining a contractual relationship with a company required, authorized, or incentivized to provide contraceptive coverage *to the employees and beneficiaries enrolled in Priests for Life's health plan* and (2) filing a self-certification or notification that authorizes such coverage for the objectionable contraceptive services. This point goes to the heart of Respondents' (and the D.C. Circuit's) flawed substantial burden analysis—an analysis that is

---

[3] *See* 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (rejecting a "broader exemption" for religious organization such as Priests for Life because "[i]ncluding these employers within the scope of the exemption would subject their employees to the religious views of the employer, limiting access to contraceptives, thereby inhibiting the use of contraceptive services").

inconsistent with this Court's precedent and the decisions of other courts of appeals. *See infra*.

Pursuant to their sincerely held religious convictions, Petitioners cannot and will not submit to any requirement that has the purpose or effect of providing access to or increasing the use of contraceptive services. This specifically includes the requirement under the "accommodation" that Petitioners provide a "self-certification" or notice that will then trigger the insurer's obligation to make "separate payments for contraceptive services directly for [Priests for Life's] plan participants and beneficiaries." 78 Fed. Reg. 39,870, 39,896 (July 2, 2013). This "self-certification" or notice is the moral and factual equivalent of an "authorization" by Petitioners to Priests for Life's insurer to provide coverage for the objectionable services. Petitioners are prohibited based on their sincerely held religious beliefs from cooperating in this manner with the federal government's immoral objectives.

Given the importance of this matter and its far-reaching impact, it is inevitable that the question presented by this petition—like the questions presented in the for-profit cases, *see Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)—will ultimately be decided by this Court. Petitioners contend that delaying this inevitability is detrimental to the public interest in light of the gravity of the moral dilemma caused by the mandate for countless religious organizations, the uncertainty surrounding its enforcement, and the costs and burdens caused by this uncertainty.

Respondents' brief in opposition should not give this Court pause as to whether the petition should be granted. Rather, the arguments Respondents (and the D.C. Circuit below) advance demonstrate why it is *necessary* that this Court grant review in this case.

Accepting Respondents' (and the D.C. Circuit's) view of the court's role in deciding a religious exercise case would fundamentally transform and thus weaken religious freedom by permitting the government (and the courts) to become the arbiters of what does and what does not burden a private party's religious beliefs. Not surprisingly, this view of the law conflicts with this Court's decisions in *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). Indeed, *Thomas*, which this Court relied upon in *Hobby Lobby*,[4] is controlling; yet, Respondents neither cite this case nor attempt to distinguish it. This fundamental conflict with controlling precedent is reason enough for this Court to grant review. Sup. Ct. R. 10(c).

---

[4] The Court rejected the government's substantial burden argument in *Hobby Lobby*, citing *Thomas* and stating, in part, "Similarly, in these cases, the [plaintiffs] and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction,' [quoting *Thomas*, 450 U.S. at 716], and there is no dispute that it does." *Hobby Lobby*, 134 S. Ct. at 2779.

ARGUMENT IN REPLY

This Court's precedent establishes that it is beyond the judicial function and competence to declare that the challenged "accommodation" does not conflict with, and thus substantially burden,[5] Petitioners' religious beliefs. *Thomas*, 450 U.S. at 716 ("Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").

Respondents claim, in essence, that the accommodation does not conflict with Catholic Church teaching because Priests for Life no longer has any "obligation 'to contract, arrange, pay, or refer for contraceptive coverage' to which it has religious objections.'" Resp'ts Br. at 7. But that argument is nothing more than the government deciding for Petitioners what does and what does not conflict with their religious obligations—an argument which is

---

[5] Petitioners' refusal to cooperate with the government's "accommodation" scheme subjects Priests for Life to crippling fines. *See* 26 U.S.C. § 4980D(b)(1). The only other "option" presented by way of this Hobson's choice is for Priests for Life to drop its healthcare coverage altogether, which would also be a violation of Petitioners' religious beliefs and would cause further harm to the individual Petitioners and Priests for Life as an organization. *See* App. 153 (dissent). Imposing such harsh consequences certainly qualifies as a substantial burden on religious exercise under RFRA. *See, e.g., Hobby Lobby*, 134 S. Ct. at 2775-76, 2779 (holding that a "substantial burden" exists when the government "demands" that persons or entities either "engage in conduct that seriously violates their religious beliefs" or else suffer "substantial" "economic consequences").

patently improper. *See Hobby Lobby*, 134 S. Ct. at 2779; App. 155 (Brown, J. dissenting from denial of rehearing) ("In declaring that—contrary to Catholic Plaintiffs' contentions—it would be consistent with the teaching of the Catholic Church for Plaintiffs to comply with the regulations the panel exceeded both the 'judicial function and [the] judicial competence.'") (quoting *Thomas*, 450 U.S. at 716); *Korte v. Sebelius*, 735 F.3d 654, 685 (7th Cir. 2013) ("The question for us is not whether compliance with the contraception mandate can be reconciled with the teachings of the Catholic Church. That's a question of religious conscience for [the plaintiffs] to decide. They have concluded that their legal and religious obligations are incompatible . . . That qualifies as a substantial burden on religious exercise, properly understood.").

Determining which actions are sinful because they amount to material cooperation with evil or the facilitation of immorality or even scandal raises theological questions which "federal courts have no business addressing." *Hobby Lobby,* 134 S. Ct. at 2778; *see also id.* (stating that "the circumstances under which it is wrong for a person to perform an act that is innocent in itself but has the effect of enabling or facilitating the commission of an immoral act by another" is "a difficult and important question of religion and moral philosophy").

Respondents contend that Petitioners' understanding of the Religious Freedom Restoration Act (RFRA)[6]—an understanding which Respondents describe as "sweeping"—is "inconsistent with our

---

[6] 42 U.S.C. §§ 2000bb, *et seq*.

Nation's traditions and finds no support in this Court's precedents." Resp'ts Br. at 19. Respondents are mistaken. Indeed, in order to accept Respondents' understanding of RFRA, this Court would have to reverse *Thomas* (and *Hobby Lobby*) because its holding and rationale cannot be reconciled with Respondents' arguments or the D.C. Circuit's decision.

In *Thomas*, this Court held that the State placed a substantial burden on Thomas' right to free exercise of religion when it denied him unemployment compensation benefits because he voluntarily terminated his employment with a factory that produced armaments, claiming that the production of items that could be used for war was contrary to his religious beliefs. *See id*. at 717-18 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.").

Thomas specifically stated that he did not object to the physical work required of him. *Thomas*, 450 U.S. at 711 (observing that Thomas "testified that he could, in good conscience, engage indirectly in the production of materials that might be used ultimately to fabricate arms"). In fact, Thomas made it clear that it was not the physical act of the work that violated his religious beliefs, but the purposes and effects *of what someone else would do* with the result of his "work" at some later point in time (*i.e.*, use the tanks he worked on for war). *See id*. at 714 (quoting Thomas at his hearing).

Similarly in this case, Petitioners do not oppose declaring their objection to contraceptive coverage, such as signing the declarations submitted in this case or even writing an op-ed in a local newspaper. That is, the physical act of signing some statement that is

aligned in its purposes and effects with Petitioners' religious beliefs is perfectly consonant with Petitioners' religious faith. But Thomas did object to doing the exact same unobjectionable work (*i.e.*, turning a wrench) when that work resulted in an item (*i.e.*, a tank) that would be used subsequently by a third-party (*i.e.,* the military) to do that which was objectionable: to wage war. That is, not only is waging war objectionable to Thomas, but any act, the purpose and effect of which is to facilitate the waging of war by a third party at some later time, was proscribed by Thomas' religious beliefs, and thus a substantial burden was found. And the same is true in this case. Thus, *Thomas* provides an *a fortiori* argument for a RFRA violation here. As this Court stated, "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs." *Id.* at 715; *see also Hobby Lobby*, 134 S. Ct. at 2779 (same).

Indeed, unlike Thomas, whose religious beliefs drew a line between possible indirect enabling of war by working in a foundry and still indirect (but less so according to Thomas) enabling of war in an armament factory, Petitioners have no ambiguity about their religious faith. By engaging in the acts required by the accommodation, Petitioners would be directly and with certainty impermissibly assisting the commission of a wrongful act in violation of the moral doctrines of the Catholic Church. These are forced acts that Petitioners' religious faith forbids because of their purpose and effect no less, and even more so, than the act in *Thomas*.

Respondents argue that "[u]nder petitioners' view, however, all such accommodations could be recast as substantial burdens on the exercise of religion and subjected to strict scrutiny. For example, 'a religious conscientious objector to a military draft' could claim that being required to claim conscientious-objector status constitutes a substantial burden on his exercise of religion because it would "trigger' the draft of a fellow selective service registrant in his place and thereby implicate the objector in facilitating war.'" Resp'ts Br. at 19 (citing Pet. App. 26a-27a (citation omitted)). But this analogy is inapposite to the facts of this case. The proper analogy would be a situation where a selective service registrant objected to the military draft because the government's conscientious-objector "exemption" would then require him to work in a munitions factory—an "accommodation" that would similarly violate his religious beliefs. *Cf. Thomas*, 450 U.S. 707. In short, Respondents' hypothetical is far afield from the present case because the "accommodation" is not an "exemption."

The singular *exemption* from the proscriptions of the contraceptive services mandate for organizations that object to it on religious grounds applies only to those organizations that fall under Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). These organizations are essentially churches and religious orders—a very narrow class of nonprofit organizations. Respondents assert, however, that "[t]he accommodation . . . 'effectively exempt[s]' objecting employers from the contraceptive-coverage requirement." Resp'ts Br. at 7. But the difference between the actual *exemption* and the *accommodation* demonstrates that the latter does

not accomplish the task of the former. If the government were truly concerned about the religious objections of organizations such as Priests for Life, it knows how to exempt them from the mandate, but has refused to do so.

Additionally, forcing religious objectors into the Hobson's choice presented by the "accommodation" will not promote any legitimate government interest. As it stands now, the only objective the government will accomplish should it ultimately prevail in this litigation is that it will force organizations such as Priests for Life to cancel their health insurance, suffer the consequences, and thus undermine the broader goal of increasing healthcare coverage for individuals.

While Respondents are dismissive of Priests for Life's moral obligations, these obligations trump the government's desire to increase the "use of contraceptive services" by compelling access to these services. *See* 77 Fed. Reg. at 8728. In short, whatever interests, compelling or otherwise, the government claims to have in forcing Priests for Life to participate in its objective of promoting contraceptive services, those interests will not be accomplished by enforcing the "accommodation." Rather, the government's broader interests in providing legitimate healthcare coverage will be adversely affected by forcing religious organizations such as Priests for Life out of the business of providing healthcare benefits to its employees.

Respondents assert that Petitioners' religious objection "would appear to apply to any system in which their employees gain an entitlement to contraceptive coverage from third parties after

petitioners opt out." Resp'ts Br. at 23. That assertion is simply not true. As noted by Petitioners, *see* Pet. at 16, in *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013), the Seventh Circuit identified several less-restrictive means of providing free contraceptive coverage *without* using the health plans of religious objectors as the means to accomplishing this objective: "The government can provide a 'public option' for contraception insurance; it can give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers; it can give tax incentives to consumers of contraception and sterilization services. No doubt there are other options." *Id*. Indeed, the government could make contraceptive services "more affordable by giving refundable tax credits to individuals" under the existing system of state and federal exchanges. *See generally King v. Burwell*, 135 S. Ct. 2480, 2487 (2015); *see also Hobby Lobby*, 134 S. Ct. at 2781 ("If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal."); *see also* Joint Supplemental Br. of Appellants/Cross-Appellees at 20 (offering numerous other alternatives that would require only minor tweaks to existing programs, including the Act's insurance exchanges).

Respondents reject such workable alternatives, claiming that they "would require women to take steps to learn about, and to sign up for, a new government funded and administered health benefit. . . . They would also require women to identify different

providers or reimbursement sources or to pay out of pocket and wait for reimbursement." Resp'ts Br. at 24-25 (citations omitted). Respondents apparently (and incorrectly) believe that women are so helpless and incapable that they can't take such small steps to obtain government-funded contraceptives on their own. Nonetheless, any harm caused by undergoing such minor, administrative steps to receive cost-free contraceptive coverage is speculative, *see* App. 160 (dissent) ("The government has pointed to no evidence in the record demonstrating its purported interest in providing contraceptive coverage without cost-sharing is harmed when women must undergo additional administrative steps to receive the coverage."), and cannot overcome the heavy burden required under strict scrutiny to justify the substantial burden on Petitioners' religious exercise.[7]

In the final analysis, Petitioners' legal and religious obligations are incompatible: the mandate, with its "accommodation," forces Petitioners to do what their religion tells them they must not do in violation of RFRA.

---

[7] *See* 42 U.S.C. § 2000bb-1(b) (requiring strict scrutiny).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT JOSEPH MUISE
Counsel of Record
American Freedom Law Center
P.O. Box 131098
Ann Arbor, Michigan 48113
(734) 635-3756
rmuise@americanfreedomlawcenter.org

DAVID YERUSHALMI
American Freedom Law Center
1901 Pennsylvania Avenue NW
Suite 201
Washington, D.C. 20006
(855) 835-2352

Counsel for Petitioners