ORAL ARGUMENT HELD ON MAY 8, 2014

Nos. 13-5368, 13-5371, 14-5021

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRIESTS FOR LIFE, ET AL.,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Defendants-Appellees.

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, ET AL.,

Plaintiffs-Appellants, *Cross-Appellees*,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, ET AL.,

Defendants-Appellees, Cross-Appellants.

On Appeal from the U.S. District Court for the District of Columbia, No. 13-1261 (Hon. Emmet G. Sullivan) & No. 13-1441 (Hon. Amy Berman Jackson)

JOINT SUPPLEMENTAL BRIEF OF APPELLANTS/CROSS-APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES*

Page(s)

CASES

* Authorities on which we chiefly rely are marked with asterisks.

STATUTES AND REGULATIONS

OTHER AUTHORITIES

GLOSSARY

Archdiocese	Appellant/Cross-Appellee Roman Catholic Archbishop of Washington
Mandate	The regulatory scheme challenged in this litigation
PFL	Priests for Life; references to Case No. 13-5368
Plaintiffs	All parties challenging the Mandate in these consolidated appeals, including Cross-Appellee Thomas Aquinas College
Prelim. Inj. Mot.	District court brief in support of motion for preliminary injunction
RCAW	Roman Catholic Archbishop of Washington; references to Case Nos. 13-5371 and 14-5021
RFRA	Religious Freedom Restoration Act
SJ Br.	District court brief in support of motion for summary judgment brief
TPA	Third party administrator

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court's decisions in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), confirm what Plaintiffs[1] have argued all along: the Government substantially burdens the exercise of religion whenever it forces religious believers to violate their sincere religious beliefs. And here, the Government's revised regulations continue to do exactly that: Plaintiffs have a sincere religious objection to (a) submitting any notice that, in their religious judgment, impermissibly facilitates delivery of the objectionable coverage, or (b) maintaining an insurance relationship with a company that will procure contraceptive coverage for the beneficiaries enrolled in their health plans. The Government, however, forces Plaintiffs to take exactly those actions on pain of crippling penalties. Just as in *Hobby Lobby*, Plaintiffs believe that if they "comply with the [regulations]," "they will be facilitating" immoral conduct in violation of their religious beliefs. *Id.* at 2759. And just as in *Hobby Lobby*, if Plaintiffs "do not comply, they will pay a very heavy price"—potentially millions of dollars in fines. *Id.* "If these consequences do not amount to a substantial burden, it is hard to see what would." *Id.*

[1] "Plaintiffs" refers to all plaintiffs in these consolidated appeals. References to No. 13-5368 are prefaced by "*PFL*"; Nos. 13-5371 and 14-5021 are prefaced by "*RCAW*."

After *Hobby Lobby* and *Wheaton*, the Government tacitly acknowledged that its regulations could not pass muster under the Religious Freedom Restoration Act (RFRA) and accordingly revised them for the *seventh* time. In doing so, however, the Government ignored the Supreme Court's admonition that the "most straightforward" path of pursuing its regulatory agenda would be to provide free contraceptive coverage itself without hijacking the private health plans of religious objectors. *Id.* at 2780. The Government easily could have done this by extending the "religious employer" exemption and allowing employees of religious objectors to purchase subsidized coverage on Affordable Care Act (ACA) exchanges or by offering them free contraceptive coverage through other existing programs. Instead, the Government announced new regulations that continue to force Plaintiffs to participate in a scheme to provide contraceptive coverage—a scheme the Government admittedly *knew* would violate their religious beliefs. 28(j) Letter from Mark Stern et al., to Mark Langer at 2 (Aug. 22, 2014).

The new regulations thus continue the Government's pattern of attempting to create the illusion of accommodation while coercing religious organizations to act contrary to their beliefs. The Government candidly admits that its revised accommodation merely offers Plaintiffs a new "alternative"—submitting a notice to the Government rather than to their insurance company or third-party administrator (TPA)—that ultimately has the "same" effect as the original

accommodation. 79 Fed. Reg. 51,092, 51,092 (Aug. 27, 2014).[2] In truth, the new regulations do nothing more than provide Plaintiffs with another avenue for violating their religion. Plaintiffs must still maintain a contractual relationship with a third party authorized to deliver the mandated coverage to their plan beneficiaries, and Plaintiffs must still submit a document that they believe wrongfully facilitates the delivery of such coverage. Thus, far from "accommodating" Plaintiffs, the revised rule continues to force them to violate their beliefs. Moreover, the new regulations continue to violate the Establishment Clause, artificially dividing the Church into two separate spheres and denying a full exemption to those parts of the Church devoted to charitable and educational ministries.

In short, the revised regulations do not fundamentally (or otherwise) alter the nature of Plaintiffs' claims. Plaintiffs seek to exercise their religion by hiring a third party that will provide coverage to their plan beneficiaries in a manner consistent with their Catholic beliefs. The new regulations continue to prohibit

[2] CCIIO, Fact Sheet: Women's Preventive Services Coverage, http://www.cms.gov/CCIIO/Resources/ Fact-Sheets-and-FAQs/womens-preven-02012013.html (last visited Sept. 15, 2014).

them from doing so.[3] Accordingly, this litigation should proceed, and Plaintiffs are entitled to relief under *Hobby Lobby* and *Wheaton*.

ARGUMENT

I. THE NEW REGULATIONS CONTINUE TO IMPOSE A SUBSTANTIAL BURDEN ON PLAINTIFFS' RELIGIOUS EXERCISE

The new regulations continue to force Plaintiffs to violate their sincerely held religious beliefs. Consequently, under *Hobby Lobby,* they plainly impose a "substantial burden" on Plaintiffs' exercise of religion.

A. *Hobby Lobby* Is Dispositive

Hobby Lobby confirms that the Government substantially burdens the exercise of religion whenever it forces people to act contrary to their sincere religious beliefs. 134 S. Ct. at 2775-76. After a plaintiff draws a line between religiously permissible and impermissible conduct, "'it is not for [courts] to say that the line [is] an unreasonable one.'" *Id.* at 2778 (quoting *Thomas v. Review Bd.*

[3] As a "general rule," "a [regulatory] change will not moot a dispute unless it cures the problems that led to the suit." *Cent. Ky. Prod. Credit Ass'n v. United States*, 846 F.2d 1460, 1464 (D.C. Cir. 1988). For the reasons discussed below, the "gravamen of [Plaintiffs'] complaint" remains, and the new rule "disadvantages them in the same fundamental way." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 & n.3 (1993). An appellate court reviews a judgment "'in light of [the] law as it now stands, not as it stood when the judgment below was entered.'" *Sanjour v. EPA*, 56 F.3d 85, 90 (D.C. Cir. 1995) (citation omitted). Accordingly, this court must "decide the issues raised [on] appeal[] based on the current version of [the regulations]." *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 936 n.8 (9th Cir. 2002).

of Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981)). This reflects the longstanding rule that a "substantial" burden arises whenever the Government "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 718. Plaintiffs need only show that "the economic consequences will be severe" if they "do not yield" to the Government's "demand[] that they engage in conduct that seriously violates their religious beliefs." *Hobby Lobby*, 134 S. Ct. at 2775; Pls. Br. at 21-31.

Hobby Lobby also confirmed that the "'exercise of religion'" protected under RFRA "involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" 134 S. Ct. at 2770 (citation omitted). This "broad protection" extends to "'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" *Id.* at 2762 (citation omitted).

Here, Plaintiffs exercise their religion by "abst[aining] from" at least two specific "acts" that continue to be required under the Government's new regulations. *First*, nothing in the new regulations changes the fact that Plaintiffs must offer health plans that serve as conduits for the delivery of objectionable products and services to their plan beneficiaries. Plaintiffs continue to believe that hiring and maintaining a contractual relationship with a third party that is required, authorized, or incentivized to provide contraceptive coverage to the beneficiaries

enrolled in Plaintiffs' health plans would make Plaintiffs complicit in the provision of that coverage. Pls. Br. at 12-15, 26-28. In this sense, Plaintiffs are akin to Muslims or Mormons who refuse to hire a caterer that will serve alcohol to their guests at a social function. A law forcing them to hire such a caterer would substantially burden their religious exercise, regardless of whether the religious objectors would have to pay for the alcohol. Here, the same is true. It makes no difference whether Plaintiffs must pay for the contraceptive coverage; what matters is that, in their religious judgment, it would be immoral for them to hire or maintain a relationship with any company that will provide the offending products to their plan beneficiaries.[4]

Second, Plaintiffs object to submitting the required notification under the new regulations. "The notice must include," among other things, "[1] the name of the eligible organization ... , [2] the plan name and type; … and [3] the name and contact information for any of the plan's [TPAs] and health insurance issuers." 79 Fed. Reg. at 51,094-95. This notice has exactly the same effect as the self-certification: by submitting it, Plaintiffs impermissibly facilitate a scheme to (a) oblige or authorize their insurance company or TPA to engage in conduct they

[4] Because the new regulations continue to force Plaintiffs to violate their beliefs, any suggestion that Plaintiffs are "exempt" is false. Reply Br. at 9 n.1. Plaintiffs are *not* eligible for the "religious employer" exemption, which allows some religious objectors (but not Plaintiffs) to maintain insurance arrangements consistent with their beliefs.

believe is immoral,[5] and (b) incentivize their TPAs to engage in immoral conduct by rendering them eligible for reimbursement of 115% of their costs. 79 Fed. Reg. 13,744, 13,809 (Mar. 11, 2014); 45 C.F.R. § 156.50(d)(3)(ii). To be sure, because the new regulations no longer force Plaintiffs to submit the self-certification directly to their insurance company or TPA, Pls. Br. at 9-11, they insert one additional link into the causal chain. But under Plaintiffs' religious views, that does not alter the moral calculus. Consequently, as with the self-certification, Plaintiffs believe that submitting this notification impermissibly assists the Government in carrying out the regulatory scheme. *Id.* at 12-15, 25-26.

In this respect, the notice requirement (like the self-certification) puts Plaintiffs in a situation akin to that faced by German Catholics in the 1990s. At the time, Germany allowed certain health-related abortions only if the mother obtained a certificate that she had received state-mandated counseling. If the mother decided to abort her child, she had to present the certificate from her counselor to her

[5] Under the revised accommodation, if—and only if—Plaintiffs offer insurance and submit a notification, the Government "will send a separate notification" to their insurance company or TPA "describing the[ir] obligations" under the accommodation. 26 C.F.R. § 54.9815-2713AT(b)(1)(ii)(B); *id.* § 54.9815-2713AT(c)(1)(ii)(B). Whether it receives the self-certification from Plaintiffs or a "separate notification" from the Government, Plaintiffs' insurance company or TPA "shall provide or arrange payments for contraceptive services" to "participants and beneficiaries" in Plaintiffs' health plans. *Id.* § 54.9815-2713AT(b)(2); *id.* § 54.9815-2713AT(c)(2). Thus, providing either document makes Plaintiffs morally complicit in the Government's scheme.

doctor as a prerequisite. Pope John Paul II concluded that Church representatives could not act as counselors in this regulatory scheme, even where they counseled *against* abortion, because "the certification issued by the churches was a necessary condition for abortion." *Eternal Word Television Network, Inc. v. HHS* ("*EWTN*"), 756 F.3d 1339, 1343 (11th Cir. 2014) (Pryor, J., concurring).

Significantly, the penalties for failure to comply with the Government's regulations—and thus the pressure on Plaintiffs to violate their beliefs—remain unchanged. Accordingly, Plaintiffs continue to face the same "consequences" for noncompliance as the plaintiffs in *Hobby Lobby*: If they fail to comply with the regulations, they are subject to fines of $100 a day per affected beneficiary. 134 S. Ct. at 2775. And if they drop their health plans, they incur fines of $2,000 a year per full-time employee after the first thirty employees and/or ruinous practical consequences, *id*. at 2776; Pls. Br. at 29 & n.8. After *Hobby Lobby*, there can be no doubt that "these consequences" of noncompliance "amount to a substantial burden" on Plaintiffs' religious exercise. 134 S. Ct. at 2759.

B. *Hobby Lobby* Forecloses the Government's Arguments

The Government may advance several counter-arguments, but none has any merit.

First, the Government may argue that the connection between the notification Plaintiffs must now submit and the ultimate provision of

contraceptives is too "attenuated" to support a RFRA claim. But *Hobby Lobby* specifically rejected that view. As the Supreme Court explained, such a claim "implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Id.* at 2778. Courts may not "[a]rrogat[e]" to themselves "the authority to provide a binding national answer to this religious and philosophical question." *Id.* For that reason it is Plaintiffs themselves, and not the Government or this Court, that must make the religious determination whether the actions required to comply with the revised "accommodation" are "connected to [wrongful conduct] in a way that is sufficient to make [the actions] immoral." *Id*.

Second, the Government's attempt to cloak its revised accommodation with the mantle of *Wheaton* is equally unavailing. The Government's claim that the new notice is "consistent with" the notice the Supreme Court allowed the plaintiffs to submit in *Wheaton,* 79 Fed. Reg. at 51,094, is both irrelevant and wrong. First, Plaintiffs independently object to hiring and/or maintaining a contractual relationship with a third party authorized to procure contraceptive coverage. The availability of the new notification alternative does *nothing* to address this separate objection. Second, even if the plaintiff in *Wheaton* did not object to submitting the

notification, Plaintiffs in *this* case *do* object to the notification the Government now requires—and *Hobby Lobby* makes clear that they are entitled to make that determination. 134 S. Ct. at 2778. Third, the new notification is not "consistent with" the notice in *Wheaton*. Most obviously, the *Wheaton* notice did not trigger regulatory authority and incentives for the plaintiff's TPA to provide the objectionable coverage. Rather, upon filing the *Wheaton* notice, the plaintiff became fully exempt. 134 S. Ct. at 2807. Likewise, the *Wheaton* notice did not require plaintiffs to include information such as "the name and contact information for [their TPAs] and health insurance issuers," 79 Fed. Reg. at 51,095—information that serves no purpose other than to force Plaintiffs to facilitate what they believe to be an immoral regulatory scheme.

Third, it is irrelevant that the Archdiocese operates a "church plan" exempt from ERISA. Reply Br. at 14 n.4; Pls. Br. at 33-34. Even if the Government could not enforce its regulations against a church-plan TPA, those regulations would still force Plaintiffs to violate their beliefs. Under the revised regulations, Plaintiffs still must submit a notification to avoid direct imposition of the Mandate. By submitting that notification, Plaintiffs impermissibly facilitate a scheme to (a) *authorize* their TPA to provide objectionable coverage to Plaintiffs' beneficiaries, and (b) *incentivize* their TPA to engage in immoral conduct. *Supra* pp.6-7. Indeed, the regulations acknowledge that after Plaintiffs submit the notification, a church-

plan TPA "may voluntarily provide or arrange separate payments for contraceptive services and seek reimbursement" from federal funds. 79 Fed. Reg. at 51,096 n.8. As Plaintiffs have explained, they object to authorizing or incentivizing their TPA to engage in immoral conduct, even if the TPA ultimately has discretion not to do so. Pls. Br. at 33-34.

In any event, the Government's regulations belie its litigation claim that it lacks authority to enforce the regulations against church-plan TPAs. The new regulations state in absolute terms that the Government will notify all TPAs of their obligation to provide contraceptive coverage, with no exception for church plans. 29 C.F.R. § 2590.715-2713A(b)(1)(ii), (b)(2). Moreover, the new regulations are promulgated under the Internal Revenue Code, not just ERISA. 26 C.F.R. § 54.9815-2713AT(b)(1)(ii)(B), (b)(2). The Government has offered no explanation for why an ERISA exemption would impact Internal Revenue Code regulations.

Fourth, *Hobby Lobby* rejected the argument that the option of "dropping insurance coverage eliminates the substantial burden that the HHS mandate imposes." 134 S. Ct. at 2777. Indeed, even beyond the economic penalties for dropping coverage, this claim "entirely ignores the fact that the [plaintiffs] have religious reasons for providing health-insurance coverage." *Id.* at 2776. Plaintiffs' provision of coverage is itself an exercise of religion, motivated by Catholic social

teaching that health care is among those basic rights that flow from the sanctity and dignity of human life. Dropping coverage would inhibit Plaintiffs' ability to follow those teachings. Pls. Br. at 29 n.8, 44 n.13; Reply Br. at 21 n.9.

Fifth, any suggestion that Plaintiffs' TPA or insurance company has an "independent" obligation to provide the objectionable coverage to Plaintiffs' plan beneficiaries is flatly incorrect. As discussed above, any such obligation is contingent on actions Plaintiffs are coerced to take, whether that action be offering a health plan; hiring or maintaining a relationship with a TPA or insurance company; or submitting the self-certification or notification. *E.g.*, 26 C.F.R. § 54.9815-2713AT(b)-(c) (obligations of insurer or TPA arise only "[w]hen" and "[i]f" an objector offers a health plan, contracts with an insurer or TPA, and provides the notification). Indeed, the Government conceded this point below. JA442-43 (admitting that a TPA's obligations "arise[] by virtue of [its] contract with [a] religious organization[]" and receipt of the self-certification); *see also Wheaton*, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting) (same). It is these actions that Plaintiffs themselves must take that make them morally complicit and thus form the basis for their religious objection. Pls. Br. at 39-40.

Finally, Hobby Lobby likewise rejected the claim that granting Plaintiffs a RFRA exemption would impermissibly burden third parties. 134 S. Ct. at 2781 n.37; Reply Br. at 17-19. As the Court explained, "[n]othing in the text of RFRA or

its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals." 134 S. Ct. at 2781 n.37. "By framing any government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless." *Id.*

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Ultimately, the "problem" with the Government's regulatory scheme "is that federal law compels [Plaintiffs] to act" in violation of their beliefs. *EWTN*, 756 F.3d at 1348 (Pryor, J., concurring). The Government could have chosen to provide contraceptive coverage without involving Plaintiffs. *Infra* pp.17-24. Instead, it chose to make Plaintiffs' actions a prerequisite to the provision of that coverage. Here, Plaintiffs have "declared, without dispute," that such "participation" "makes [them] complicit in a grave moral wrong" under "the teachings of the Catholic Church." 756 F.3d at 1348. "So long as [Plaintiffs'] belief is sincerely held and undisputed—as it is here—[a court has] no choice but to decide that compelling the participation of [Plaintiffs] is a substantial burden on [their] religious exercise." *Id.*

II. THE REVISED REGULATIONS CANNOT SURVIVE STRICT SCRUTINY

As even the revised regulations substantially burden Plaintiffs' exercise of religion, the "burden is placed squarely on the Government" to show that they

satisfy strict scrutiny. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 429 (2006). The Government cannot meet that demanding standard, as confirmed by the Supreme Court in *Hobby Lobby*, this Court in *Gilardi v. U.S. Department of Health & Human Services*, 733 F.3d 1208 (D.C. Cir. 2013), *vacated on other grounds*, 134 S. Ct. 2902 (2014), and every other court to rule on this question.[6]

A. The Revised Regulations Do Not Further a Compelling Government Interest

Under RFRA, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *Hobby Lobby*, 134 S. Ct. at 2779 (citation omitted). "[B]roadly formulated" or "sweeping" interests are inadequate. *O Centro*, 546 U.S. at 431; *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). Rather, the Government must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption." *Yoder*, 406 U.S. at 236. In other words, a court must "look to the marginal interest in enforcing the contraceptive mandate in th[is]

[6] *E.g.*, *Korte v. Sebelius*, 735 F.3d 654, 685-87 (7th Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1143-45 (10th Cir. 2013) (en banc), *aff'd*, 134 S. Ct. 2751; *La. Coll. v. Sebelius,* No. 12-0463, 2014 WL 3970038, at *17 n.18 (W.D. La. Aug. 13, 2014) (collecting cases); Pls. Br. at 2 n.3.

case[].” *Hobby Lobby*, 134 S. Ct. at 2779. Here, the Government has failed to establish a compelling interest for at least four reasons.

First, the Government has asserted “two [purportedly] compelling governmental interests” “in public health and gender equality.” *RCAW* Defs. SJ Br. (Doc. 26) at 21, 24; *PFL* Defs.’ SJ Br. (Doc. 13) at 24.[7] But *Hobby Lobby* rejected these “very broadly framed” interests, noting that RFRA “contemplates a ‘more focused’ inquiry.” 134 S. Ct. at 2779. Indeed, “[b]y stating the public interests so generally, the government guarantee[d] that the mandate will flunk the test.” *Korte*, 735 F.3d at 686.

Second, “a law cannot be regarded as protecting an interest of the highest order” “when it leaves appreciable damage to that supposedly vital interest unprohibited.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (citation omitted); *O Centro*, 546 U.S. at 433. Here, the Government cannot claim an interest of the “highest order” because, as of the end of 2013, its regulations exempted health plans covering 90 million employees through, among other things, “grandfathering” provisions. *Korte*, 735 F.3d at 686; *Geneva Coll. v. Sebelius*, 941 F. Supp. 2d 672, 684 & n.12 (W.D. Pa. 2013). Simply put, “the interest here cannot be compelling because the [Mandate]

[7] These were the only interests asserted by the Government when it moved for summary judgment. *RCAW* Defs. SJ Br. (Doc. 26) at 20-29; *PFL* Defs. SJ Br. (Doc. 13) at 24-29.

presently does not apply to tens of millions of people." *Hobby Lobby*, 723 F.3d at 1143; *Korte*, 735 F.3d at 686.

Third, at best, the Mandate would only "[f]ill" a "modest gap" in contraceptive coverage. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). The Government acknowledges that contraceptives are widely available at free and reduced cost and are also covered by "over 85 percent of employer-sponsored health insurance plans." 75 Fed. Reg. 41,726, 41,732 n.20 (July 19, 2010). In such circumstances, the Government has not "identif[ied] an actual problem in need of solving." *Brown*, 131 S. Ct. at 2738 (citation omitted). After all, the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9.

Finally, RFRA requires the Government to identify a compelling need for enforcement against the "particular claimants" filing suit, not among the general population. *Hobby Lobby*, 134 S. Ct. at 2779. The Government has not even attempted to make this showing, relying instead on the general proposition that "lack of access to contraceptive services" may "have serious negative health consequences." 78 Fed. Reg. 39,870, 39,887 (July 2, 2013). But this does not establish a significant lack of access among Plaintiffs' plan beneficiaries or that the

Mandate would significantly increase contraception use among those individuals.[8] The Government provides no evidence on these points and thus cannot show that enforcing the Mandate against Plaintiffs is "actually necessary" to achieve its aims. *Brown*, 131 S. Ct. at 2738.

To be clear, the Government's failure to "satisfy the Supreme Court's compelling interest standard[]" does not preclude this Court from "recogniz[ing] the importance of [the asserted] interests." *Hobby Lobby*, 723 F.3d at 1143. The fact that an interest is not compelling does not make it unimportant or insignificant—it merely means that it does not justify overriding the congressional concern for religious liberty embodied in RFRA. *Gilardi*, 733 F.3d at 1221 ("[I]nterests underpinning the mandate can be variously described as legitimate, substantial, perhaps even important, but [they do] not rank as *compelling*, and that makes all the difference.").

B. The Revised Regulations Are Not the Least Restrictive Means of Furthering the Government's Asserted Interests

The Government must also show that its regulations are "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2). Under that "exceptionally demanding" test, *Hobby Lobby*, 134 S. Ct. at 2780, "if there are other, reasonable ways to achieve those [interests] with a lesser

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

burden on constitutionally protected activity, [the Government] may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (citation omitted). A regulation is the least restrictive means only if "no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights." *Sherbert v. Verner*, 374 U.S. 398, 407 (1963). This test is particularly demanding here, because "RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions." *Hobby Lobby*, 134 S. Ct. at 2761 n.3 (citation omitted).

It bears emphasizing that *the Government* bears the burden of proof here. As the Solicitor General recently explained in the analogous RLUIPA context, the Government cannot satisfy its burden through "unsubstantiated statement[s]." Br. for the U.S. as Amicus Curiae at 17, *Holt v. Hobbs*, No. 13-6827 (U.S. May 29, 2014), 2014 WL 2329778. Rather, it must "offer evidence—usually in the form of affidavits from [government] officials—explaining how the imposition of an identified substantial burden furthers a compelling government interest and why it is the least restrictive means of doing so, with reference to the circumstances presented by the individual case." *Id.* Indeed, such "explanation[s must] relate to the specific accommodation the plaintiff seeks"; where a plaintiff "identifies

[acceptable] less restrictive alternatives," the Government must "demonstrate that they have 'considered and rejected the efficacy of' those alternatives." *Id.* at 18; *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (requiring a "serious, good faith consideration of workable [alternatives]" (citation omitted)). In short, to prevail, the Government must rely on *evidence* that the accommodation is the only feasible way to distribute cost-free contraceptives to women employed by religious objectors.

The Government has not remotely met this burden—indeed, in the courts below, it barely tried. As every court to consider the question has held, "[t]here are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty" than forcing religious organizations to participate in the delivery of free contraception in violation of their beliefs. *Korte*, 735 F.3d at 686; *supra* note 6. Most obviously, as the Supreme Court explained in *Hobby Lobby*, "[t]he most straightforward way of doing this would be for the Government to assume the cost of providing the … contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." 134 S. Ct. at 2780; *RCAW* Prelim. Inj. Mot. (Doc. 6) at 28-29; *RCAW* SJ Br. (Doc. 28) at 27-31; *PFL* SJ Reply (Doc. 19) at 25; *PFL* Prelim. Inj. Mot. (Doc. 7) at 26.

There are any number of ways the Government could provide free contraceptive coverage without using Plaintiffs' plans as a conduit: it "could provide the contraceptives services or insurance coverage directly to plaintiffs' employees, or work with third parties—be it insurers, health care providers, drug manufactures, or nonprofits—to do so without requiring plaintiffs' active participation. It could also provide tax incentives to consumers or producers of contraceptive products." *Roman Catholic Archdiocese of N.Y. v. Sebelius*, 987 F. Supp. 2d 232, 255-56 (E.D.N.Y. 2013); *Korte*, 735 F.3d at 686 (same). This could be accomplished by "build[ing] on the vast federal machinery that already exists for providing health care subsidies on a massive scale"—whether through adjusting the eligibility requirements of the Title X family planning program, the Medicaid program, or any number of other federal programs that already provide cost-free contraceptives to women. *RCAW* SJ Br. (Doc. 28) at 27-31 & nn.19-20. Indeed, the Government has recently established a network of insurance exchanges under the ACA, and nothing prevents the Government from permitting employees of religious objectors to purchase fully subsidized coverage (either for contraceptives alone, or full plans) on those exchanges. *See id.* While Plaintiffs oppose many of these alternatives on policy grounds, all of them are "less restrictive" than the "accommodation" because they would deliver free

contraception without forcing Plaintiffs to violate their beliefs. *RCAW* SJ Br. (Doc. 28) at 32-33.

The Government has not even attempted to show why these "alternative[s]" are not "viable." *Hobby Lobby,* 134 S. Ct. at 2780. Among other things, it "has not provided any estimate of the average cost per employee of providing access to ... contraceptives." *Id.* Nor has it "provided any statistics regarding the number of employees who might be affected because they work for [organizations] like [Plaintiffs]." *Id.* Nor has the Government asserted "that it is unable to provide such statistics." *Id.* at 2780-81. Indeed, it has submitted no evidence whatsoever on this subject. And without this evidence, the Government cannot plausibly contend that its interests would be negatively impacted by extending the religious employer exemption to all Plaintiffs. After all, "for all [this Court] know[s], a broader religious exemption would have so little impact on so small a group of employees that the argument cannot be made." *Gilardi*, 733 F.3d at 1222; *supra* p.16.[9]

Even had the Government attempted to shoulder its burden, it would not be able to meet this test. Absent evidence to substantiate its claims, the Government cannot claim that the cost of providing coverage—which likely "would be minor

[9]In fact, the Government has admitted it has "no evidence" to support the distinction it used to exempt entities it deems religious employers but not entities such as Plaintiffs (i.e., that employees of the former are more "religious" than employees of the latter). *RCAW* SJ Br. (Doc. 28) at 20.

when compared with the overall cost of ACA"—would be prohibitive. *Hobby Lobby,* 134 S. Ct. at 2781. And regardless, RFRA "may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs." *Id.* If "providing all women with cost-free access to [contraceptives] is a Government interest of the highest order, it is hard to understand [an] argument that [the Government] cannot be required … to pay *anything* … to achieve this important goal." *Id.* Indeed, the Government can hardly quibble about cost when it is *already* paying TPAs 115% of their costs under the accommodation. 79 Fed. Reg. at 13,809. Simply put, the view "that RFRA can never require the Government" to "expend additional funds" to avoid burdening religious objectors, "reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted [RFRA]." 134 S. Ct. at 2781.

Moreover, these alternatives are eminently workable because, as noted above, the Government's objectives could be achieved through minor regulatory tweaks to existing programs. *Supra* p.20.[10] Even if a new regulatory program were necessary, the Government can hardly object, as it has shown its willingness to create (and repeatedly modify) such programs—by, among other things, establishing the infrastructure by which TPAs are compensated under the

[10] This remains true even if legislative action would be necessary. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1458 (2014) (describing less restrictive alternatives requiring congressional action).

accommodation. 45 C.F.R. § 156.50; *Hobby Lobby*, 134 S. Ct. at 2781 (stating that "nothing in RFRA" suggests that a less restrictive means cannot involve the creation of a new program). The Government may attempt to claim that it is more convenient to commandeer Plaintiffs' plans, but administrative convenience cannot justify forcing religious organizations to violate their beliefs, particularly where the Government submitted no evidence of any compelling need to do so.[11] *RCAW* SJ Br. (Doc. 28) at 30-31.

Finally, any suggestion that *Hobby Lobby* endorsed the "accommodation" as a viable least-restrictive means in all cases is mistaken. In fact, the Court expressly did "not decide" that question. 134 S. Ct. at 2782 & n.40; *id*. at 2763 n.9. Instead, it simply found the accommodation *less* restrictive than requiring plaintiffs to pay for contraceptives in the context of a challenge brought by plaintiffs who *did not object* to the accommodation. *Id.* at 2782 & n.40; *id.* at 2786 (Kennedy, J., concurring) ("[T]he plaintiffs have not criticized [the accommodation]."). While the accommodation may "effectively exempt[]" such plaintiffs, *id.* at 2763 (majority op.), it does no such thing for entities like Plaintiffs, who *do* object to

[11] Insofar as the Government contends an exemption would fail strict scrutiny because it would burden third parties, it forfeited that argument by raising it for the first time on appeal and only then under the substantial-burden analysis. Reply Br. at 17-19. In any event, as these alternatives demonstrate, exempting Plaintiffs "need not result in any detrimental effect on any third party," because "the Government can readily arrange for other methods of providing contraceptives, without cost sharing." *Hobby Lobby*, 134 S. Ct. at 2781 n.37.

compliance. Indeed, if there was ever any suggestion that *Hobby Lobby* blessed the accommodation, the Court dispelled that notion in *Wheaton*. Far from foreclosing challenges to the accommodation, the dissenters in *Wheaton* confirmed that that order "entitle[s] hundreds or thousands of other [nonprofits]" to relief. 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting).

III. THE REVISED REGULATIONS EXCEED THE GOVERNMENT'S STATUTORY AUTHORITY AND VIOLATE THE APA

Finally, the revised regulations do not affect this litigation for a separate reason: they violate the notice-and-comment requirements of the Administrative Procedure Act (APA) and exceed the Government's authority under ERISA.

A. The Government Did Not Have "Good Cause" to Impose the Interim Final Rules Without Notice and Comment

Under the APA, the Government must have "good cause" to promulgate interim final rules without notice and comment. 5 U.S.C. § 553(b)(B). The ACA neither "expressly" eliminates the good-cause requirement nor establishes "procedures so clearly different from those required by the APA that [Congress] must have intended to displace the norm." *Coalition for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 18 (D.D.C. 2010). It is thus very different from statutes held to dispense with the "good cause" requirement. *E.g.*, *Asiana Airlines v. FAA*, 134 F.3d 393, 396, 398 (D.C. Cir. 1998) (directing agency to seek comment "'pursuant to,' not in anticipation of, [interim final] rule").

Absent any dispensation, "interim final rules [must] be promulgated either with notice and comment or with 'good cause' to forego notice and comment." *Coalition*, 709 F. Supp. 2d at 19; *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 444 (W.D. Pa. 2013). This Court has "repeatedly made clear that the good cause exception is to be narrowly construed and only reluctantly countenanced." *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012). The Government bears the burden, and its assertions of good cause are not entitled to any "particular deference." *Id*. Here, after years of delay, multiple rounds of rulemaking, and with the Mandate still inapplicable to millions of employees, the Government cannot seriously assert any urgent need to forgo notice and comment.

B. The Revised Regulations for Self-Insured Plans Violate ERISA

The previous version of the "accommodation" required a self-insured eligible organization to submit a self-certification to its TPA that amended its plan documents to designate the TPA as plan administrator for contraceptive benefits. Pls. Br. at 9-10. Now, the Government asserts that once an eligible organization submits the required notification, the Government can use it to "designate the relevant [TPA] as plan administrator under section 3(16) of ERISA for" contraceptive benefits. 79 Fed. Reg. at 51,095. This authority is found nowhere in ERISA, which, absent narrow exceptions inapplicable here, limits the definition of a plan administrator to "the person specifically so designated by *the terms of the*

instrument under which the plan is operated." 29 U.S.C. § 1002(16)(A) (emphasis added).

The Government offers no explanation for how it can override or amend "the terms of the instrument under which [Plaintiffs'] plan[s are] operated" to appoint a plan administrator. ERISA sets forth specific requirements regarding the amendment of employee benefit plans. Such plans must be "established and maintained pursuant to a written instrument," which must include "a procedure for amending [the] plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. § 1102(a)(1), (b)(3). Courts have repeatedly held that those procedures are the exclusive means to amend a plan instrument. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 79 (1995); *Overby v. Nat'l Ass'n of Letter Carriers*, 595 F.3d 1290, 1295-97 (D.C. Cir. 2010) ("[T]here must be amendment procedures in a plan, and those amendment procedures must be followed for the valid adoption of an amendment."). The Government's attempt to hijack Plaintiffs' plans by ipse dixit must therefore be rejected.[12]

[12] The remainder of Plaintiffs' claims are fundamentally unaffected by the revised regulations, with one exception: the Government eliminated the gag rule prohibiting Plaintiffs from directly or indirectly influencing their TPAs' decision to procure contraceptive coverage. 79 Fed. Reg. at 51095. This beneficial change of position at least partially resulted from this litigation, which means the *RCAW* Plaintiffs have prevailed on this claim. 10 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2667 (2014). Nonetheless, the Government maintains that "attempt[s] to prevent a [TPA] from" complying with the accommodation remain "generally unlawful" and "prohibited under other state and federal laws."

CONCLUSION

The district courts' judgments in the Government's favor should be reversed; those in Plaintiffs' favor should be affirmed.

Respectfully submitted, this the 16th day of September, 2014.

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79 Fed. Reg. at 51,095. Plaintiffs maintain their challenge to the extent the Government contends it continues to be unlawful to "say[] to the TPA, if you don't stop making the payments [for contraceptives], we're going to fire you." Hr'g Tr. at 40-41, *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441 (D.D.C. Nov. 22, 2013) (Doc. 54).

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the length limitations set out in this court's order of September 2, 2014. The brief, including headings, footnotes, and quotations, contains 6,249 words, as calculated by the Microsoft Word word count function.

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CERTIFICATE OF SERVICE

I hereby certify that, on September 16, 2014, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

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