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.

SYLVIA BURWELL, 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)

APPELLANTS/CROSS-APPELLEES' JOINT PETITION FOR REHEARING EN BANC

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GLOSSARY

ACA	Affordable Care Act
HHS	U.S. Department of Health and Human Services
Op.	The panel opinion in these consolidated cases (included in the Addendum)
PFL	Priests for Life; references to Case No. 13-5368
Plaintiffs	All parties challenging the regulations at issue in these consolidated appeals
Pls. Br.	Plaintiffs' opening brief on appeal
Pls. Supp. Br.	Plaintiffs' supplemental brief on appeal
RCAW	Roman Catholic Archbishop of Washington; references to Case Nos. 13-5371 and 14-5021
RFRA	Religious Freedom Restoration Act
SJ	Summary judgment
TPA	Third party administrator

INTRODUCTION AND RULE 35 STATEMENT

Plaintiffs—religious nonprofits whose sincerely held beliefs prohibit them from providing, paying for, or impermissibly facilitating access to abortion-inducing products, contraceptives, and sterilization—request en banc rehearing of a panel decision that conflicts with *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); Fed. R. App. P. 35 (b)(1)(A). Though styled as an "accommodation," the regulations challenged here make it impossible for Plaintiffs to offer health coverage in a manner consistent with their beliefs. Specifically, the regulations compel Plaintiffs to (1) contract with third parties that will provide payments for the objectionable products and services to Plaintiffs' plan beneficiaries, and (2) submit documentation that, in their religious judgment, makes them complicit in the delivery of such payments. It is undisputed that compliance with the regulations would violate Plaintiffs' beliefs, and it is equally undisputed that noncompliance subjects them to massive penalties.

Nonetheless, the panel concluded that the regulations do not "substantially burden" Plaintiffs' religious exercise under the Religious Freedom Restoration Act (RFRA) and, in addition, that the regulations satisfy strict scrutiny. Both conclusions are erroneous. Just as in *Hobby Lobby*, Plaintiffs believe that if they "comply with the [regulations]," "they will be facilitating" immoral conduct in violation of their religion. *Id.* at 2759. And just as in *Hobby Lobby*, if Plaintiffs "do not comply" "they will pay a very heavy price." *Id.* That is the definition of a substantial burden.

The panel's strict scrutiny analysis, which hinges on the conclusion that conscripting Plaintiffs to violate their beliefs is necessary to achieve the Government's

ends, is equally flawed. Far from asserting a "religious veto" over efforts to ensure access to contraceptives, Op. at 34. Plaintiffs simply ask that they not be forced to participate in that project. As RFRA clearly affords them that right, Plaintiffs ask the Court to rehear this "exceptional[ly] importan[t]" case. Fed. R. App. P. 35(b)(1)(B).

ARGUMENT

RFRA prohibits the Government from imposing a "substantial burden" on religious exercise unless doing so "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1. The panel erred in holding that the regulatory scheme at issue complies with this law.

I. THE OPINION CONTRADICTS SUPREME COURT PRECEDENT

Hobby Lobby held that the Government substantially burdens the exercise of religion when it "demands" that entities either (1) "engage in conduct that seriously violates their religious beliefs" or (2) suffer "substantial" "economic consequences." 134 S. Ct. at 2775-76. For the reasons discussed below, that test is met here. The panel's contrary conclusion, like its analysis of strict scrutiny, cannot be reconciled with controlling Supreme Court precedent.

A. *Hobby Lobby* Controls the Substantial-Burden Analysis

Where, as here, a plaintiff's sincerity is not in dispute, *Hobby Lobby* makes clear that RFRA's substantial burden test involves a two-part inquiry: a court must (1) identify the religious exercise at issue, and (2) determine whether the Government has placed substantial pressure on the plaintiff to forgo that exercise. 134 S. Ct. at 2775-

76. In short, 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." *Id.* at 2775.

1. Exercise of religion

Hobby Lobby confirms 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.'" *Id.* 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" the regulations require. *First*, Plaintiffs object to hiring or maintaining a contractual relationship with any company required, authorized, or incentivized to provide contraceptive coverage to beneficiaries enrolled in Plaintiffs' health plans. Pls. Br. at 26-28; Pls. Supp. Br. at 5-6. By way of illustration, the regulations here are akin to a law requiring all schools, on pain of substantial fines, to offer free lunches to their students. If ham sandwiches were required to be on the menu, such a law could substantially burden the religious exercise of a Jewish school. And the burden would remain even if the Government offered an "accommodation" whereby the school's lunch vendor paid for and served the sandwiches. In that scenario, the school may well object to its forced participation in the lunch program—namely, to the fact that it would have to hire and maintain a relationship with a vendor that would serve non-

kosher food to its students in its facilities—even though it would not be placing the sandwiches on the students' plates. The same is true here. 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 contract with a vendor that will provide the offending coverage to their plan beneficiaries.

Second, Plaintiffs object to filing the self-certification or notification, as they believe submitting either document makes them morally complicit in the provision of contraceptive coverage. Pls. Br. at 25-26; Pls. Supp. Br. at 6-8. Once Plaintiffs submit the documents, (1) their third party administrators (TPAs) and insurers are obligated and authorized to provide coverage under the accommodation; and (2) their TPAs are incentivized to provide the coverage by reimbursement at 115% of their costs. 79 Fed. Reg. 13,744, 13,809 (Mar. 11, 2014); 45 C.F.R. § 156.50(d)(3)(ii).[1] Neither the obligation nor the incentive arise *unless* Plaintiffs submit the required documents.

After *Hobby Lobby*, there can be no dispute that these actions fall well within the scope of religious exercise protected by RFRA. They are clearly "physical acts" from which Plaintiffs believe they must "abst[ain]" "for religious reasons." 134 S. Ct. at

[1] In this respect, Plaintiffs are in the same situation faced by German Catholics in the 1990s. At the time, Germany allowed certain 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 doctor as a prerequisite. Pope John Paul II concluded that Church representatives could not act as counselors in that scheme, even if they counseled *against* abortion, as "the certification issued by the churches was a necessary condition for abortion." *EWTN v. HHS*, 756 F.3d 1339, 1343 (11th Cir. 2014) (Pryor, J., concurring).

2770 (citation omitted). As in *Hobby Lobby*, Plaintiffs "believe" the actions "demanded by the HHS regulations [are] connected to" illicit conduct "in a way that is sufficient to make it immoral for [Plaintiffs] to" take those actions, *id.* at 2778, and it is not for a court "'to say that the line [they] drew [i]s . . . unreasonable,'" *id.* (citation omitted).

2. Substantial burden

Once Plaintiffs' religious exercise is established, the question becomes whether "the economic consequences will be severe" if Plaintiffs "do not yield" to the Government's "demand[]." *Id.* at 2775. Here, Plaintiffs face the same "consequences" as the *Hobby Lobby* plaintiffs: If they fail to comply, they are subject to fines of $100 a day per affected beneficiary. *Id.* And if Plaintiffs drop coverage altogether, they would face ruinous consequences, including potential annual fines of $2,000 per employee after the first thirty employees, *id.* at 2776, and their ability to follow Church teachings regarding the provision of healthcare would be inhibited, *id.* As the regulations "force[] [Plaintiffs] to pay an enormous sum of money" "if they insist on providing insurance coverage in accordance with their religious beliefs, the[y] clearly impose[] a substantial burden on those beliefs." *Id.* at 2779.

3. The Panel Failed to Apply *Hobby Lobby*

The panel's substantial burden analysis is irreconcilable with *Hobby Lobby* for at least four reasons.[2] *First*, the panel begins by stating that it must "evaluate the

[2] Though *Hobby Lobby* applies RFRA to the regulatory scheme at issue here, the panel does not even cite that decision in its substantial burden analysis. Instead, it

substantiality of any burden on religious exercise." Op. at 26. Plaintiffs have never suggested otherwise. But the panel misunderstands the nature of this "evaluat[ion]," which is limited to assessing the "sever[ity]" of the "consequences" of noncompliance. 134 S. Ct. at 2775. In other words, while it is certainly true that "[w]hether a law substantially burdens religious exercise . . . is a question of law for courts to decide," Op. at 26, that inquiry is limited to the substantiality *of the pressure* the Government imposes on the plaintiff to violate his beliefs, 134 S. Ct. at 2775-76.

The panel never addresses this fundamental question. Instead of discussing the severe consequences imposed on Plaintiffs if they refuse to comply with the regulations, the panel erroneously focuses on the nature of the actions Plaintiffs are compelled to take. It thus dismisses Plaintiffs' religious exercise as involving merely a "bit of paperwork," and the submission of a "single sheet of paper"—actions that, in the panel's view, constitute a "*de minimis* administrative" burden. Op. at 7, 31, 35. RFRA, however, contains no requirement that a religiously objectionable act involve substantial physical exertion; to the contrary, RFRA protects "'any exercise of religion.'" 134 S. Ct. at 2792 (citation omitted). The reason for this approach is obvious: an action that may seem trifling to a court may have eternal consequences

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distinguishes the case by asserting it involved different compelled actions. Op. at 22-23. But that is akin to claiming *Sherbert v. Verner*, 374 U.S. 398 (1963), should not control *Thomas v. Review Board*, 450 U.S. 707 (1981), as the former involved compelled work on the Sabbath, while the latter involved compelled work on munitions. As RFRA protects *any* exercise of religion, 134 S. Ct. at 2792, such distinctions are without a difference; the nature of the religious exercise is irrelevant to the analysis.

for a believer. Accordingly, the Government may not, for example, force an Orthodox Jew to flip a light switch on the Sabbath merely because it deems such action inconsequential. Rather it is up to the plaintiff to "dr[a]w a line" regarding the actions his religion deems permissible, *Thomas*, 450 U.S. at 715; at that point, a court's only task is to determine whether the pressure placed on the plaintiff to cross that line is "substantial," *id.* at 718; 134 S. Ct. at 2779.

Second, the panel's conclusion that the accommodation amounts to an "opt out" cannot be squared with *Hobby Lobby*'s command that plaintiffs, not courts, determine whether an act "is connected" to illicit conduct "in a way that is sufficient to make it immoral." *Id.* at 2778. The panel fails to appreciate that whether a particular action allows Plaintiffs to "wash[] their hands of any involvement in [contraceptive] coverage," Op. at 26, or makes them complicit in wrongdoing, is itself a religious judgment rooted in Catholic teachings regarding material cooperation and "scandal." *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting) (objection based not on principles "of legal causation but of religious faith"). As *Hobby Lobby* confirms, courts may not "[a]rrogat[e]" unto themselves "the authority" to "answer" the "religious and philosophical question" of "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." 134 S. Ct. at 2778. And here, Plaintiffs have concluded that the accommodation simply offers them a different way to violate their religious beliefs. That is no more of

an "opt out" than allowing a religious pacifist to choose between military service and working in a munitions factory when his beliefs forbid him from both.

Third, citing *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008), *Bowen v. Roy*, 476 U.S. 693 (1986), and *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the panel asserts that "[w]hat Plaintiffs object to here are 'the government's independent actions in mandating contraceptive coverage, not to any action that the government has required [Plaintiffs] themselves to take.'" Op. at 34 (citation omitted). This is, quite simply, false. Plaintiffs "vigorously object on religious grounds to the act[s] that the government requires *them* to perform, not merely to later acts by third parties." *E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743, 765 (S.D. Tex. 2013) (emphasis added). Specifically, Plaintiffs have repeatedly reiterated their objection to maintaining the objectionable insurance relationship and to submitting the objectionable documentation required by the regulations. *Supra* pp. 3-5. *Kaemmerling*, *Bowen*, and *Lyng*, in contrast, stand for nothing more than the proposition that an individual cannot challenge an "activit[y] of [a third party], in which [he] play[ed] *no role*." 553 F.3d at 679 (emphasis added) (government extraction of DNA from sample in its possession); *Lyng*, 485 U.S. at 449 (government building road on public land); *Bowen*, 476 U.S. 693 (government use of Social Security number in its possession).[3]

[3] Significantly, when the *Bowen* Court considered the plaintiffs' objection to an action *they* were required to take—transmitting their daughter's social security number to the government—"'five justices . . . expressed the view that the plaintiffs [would

Fourth, the panel's decision rests in part on the premise that Plaintiffs' TPAs and insurers have an "independent obligation" to provide contraceptive coverage to Plaintiffs' employees. Op. at 38, 41. This is both wrong and irrelevant. It is wrong because any such obligation is contingent on actions the regulations coerce *Plaintiffs* to take, whether that action be offering a health plan; hiring or maintaining a relationship with a TPA or insurer; or submitting the self-certification or notification. *E.g.*, 26 C.F.R. § 54.9815-2713AT(b)-(c) (obligations arise only "[w]hen" and "[i]f" an objector acts). In fact, a TPA "bears the legal obligation to provide contraceptive coverage only upon receipt of a valid self-certification," *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2814 n.6 (2014) (Sotomayor, J., dissenting), as the Government admitted in this very case, Pls. Br. at 47. Likewise, an insurer can provide coverage under the accommodation to Plaintiffs' employees only by virtue of its contractual relationship with Plaintiffs and only after Plaintiffs file the required documents. 26 C.F.R. § 54.9815-2713A(c)(2); *Hobby Lobby,* 134 S. Ct. at 2763 ("When [an] issuer receives [the form], the issuer *must then* . . . provide separate payments."). If third parties truly had an "independent obligation" to provide coverage to Plaintiffs' employees, then the Government could not plausibly argue that granting relief to entities like Plaintiffs "would deprive hundreds of employees" of contraceptive coverage. Br. in Opp'n at 36, *Wheaton Coll. v. Burwell*, No. 13A1284 (U.S. July 2014). And if the regulations really

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have been] entitled to an exemption from [that] administrative requirement.'" *Notre Dame*, 743 F.3d at 566 (Flaum, J., dissenting); Pls. Br. at 39 n.12.

operated independently of Plaintiffs, the Government could hardly claim a "compelling interest" in forcing them to act.

But even assuming the panel accurately interpreted the regulations, the accommodation would still substantially burden Plaintiffs' religious exercise because they separately object to contracting with third parties authorized to provide their employees with the mandated coverage, *regardless* of whether the authorization arises from an "independent obligation" or is "triggered" by Plaintiffs' submission. *Supra* pp. 3-4. Just as a Muslim might refuse to hire a caterer that would serve alcohol to his guests at an event, Plaintiffs refuse to contract with a third party that will provide contraceptives to their plan beneficiaries—which the regulations force them to do.

B. The Regulations Cannot Survive Strict Scrutiny

Because the regulations substantially burden Plaintiffs' exercise of religion, the "burden is placed squarely on the Government" to satisfy strict scrutiny. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 429 (2006). The Government has not met 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, Pls. Br. at 2 n.3; Pls. Supp. Br. at 13-23.[4]

[4] This case was briefed under the Government's concession that *Gilardi* foreclosed its strict scrutiny arguments. Op. at 45. Prior to *Gilardi*, the Government asserted only "two compelling governmental interests" "in public health and gender equality" in the district court. RCAW Defs. SJ Br. (Doc. 26) at 21, 24; PFL Defs. SJ

1. The Regulations Do Not Further a Compelling 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." 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." *Id.* at 236. In other words, a court must "look to the marginal interest in enforcing the contraceptive mandate in th[is] case[]." *Hobby Lobby*, 134 S. Ct. at 2779. This the Government has failed to do.

First, as noted above, *Hobby Lobby* rejected the only compelling interests asserted in the court below. *Supra* p. 10 n.4. It likewise rejected the interest, set forth *sua sponte* by the panel, in a "sustainable system of taxes and subsidies under the ACA to advance public health." Op. at 48 (citing *United States v. Lee*, 455 U.S. 252 (1982)); *see* 134 S. Ct. at 2783-84. That, in and of itself, should be the end of the analysis.

Br. (Doc. 13). Those "very broadly framed" interests were rejected by *Hobby Lobby*, as RFRA "contemplates a 'more focused' inquiry." 134 S. Ct. at 2779. Nevertheless, the panel requested simultaneous briefs post-*Hobby Lobby*. The eight double-spaced pages devoted to strict scrutiny in the Government's brief became twenty-one single spaced pages in the panel opinion, which found a "confluence of compelling interests" necessitating "seamless" provision of health coverage. Op. at 7, 45-66. Thus, though not necessary to its decision, the panel reached out to rule on strict scrutiny based on arguments raised for the first time on appeal in a brief to which Plaintiffs could not respond. The panel's approach cannot be reconciled with established law placing the burden of proof squarely on the Government's shoulders.

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 Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (citation omitted). As of the end of 2013, the Government exempted health plans covering 90 million employees through a variety of exemptions. *Korte v. Sebelius,* 735 F.3d 654, 683 (7th Cir. 2013); *Geneva Coll. v. Sebelius*, 941 F. Supp. 2d 672, 684 & n.12 (W.D. Pa. 2013). The Government cannot claim an interest of the "highest order" in providing free contraceptive coverage because its regulatory scheme leaves millions of women without such coverage. *See Hobby Lobby*, 134 S. Ct. at 2780.

Indeed, that the Government has granted a full exemption for "religious employers" shows that it lacks a compelling interest in denying a "comparable exception" to Plaintiffs. *Id.* at 2782 n.41; 45 C.F.R. § 147.131(a). "Everything the Government says about" exempt religious employers "applies in equal measure to" entities like Plaintiffs, and thus "it is difficult to see how" the Government can "preclude any consideration of a[n] exception" for Plaintiffs. *O Centro*, 546 U.S. at 433. This is particularly true as the "religious employer" exemption extends to *all* churches, regardless of whether they object to providing contraceptive coverage. And while the Government has asserted, without evidence, that "religious employers" deserve an exemption because their employees are more likely to share their employers' opposition to contraceptives than Plaintiffs' employees, 78 Fed. Reg. 39,870, 39,874 (July 2, 2013), such unsubstantiated "assum[ptions]" do not satisfy RFRA, Op. at 65.

Finally, at best, the regulations would "[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 already covered by "over 85 percent of employer-sponsored health insurance plans." 75 Fed. Reg. 41,726, 41,732 n.21 (July 19, 2010). Thus, the Government cannot claim to have "identif[ied] an 'actual problem' in need of solving." *Brown*, 131 S. Ct. at 2738.[5]

2. The Regulations Are Not the Least Restrictive Means

The least-restrictive means test is "exceptionally demanding." *Hobby Lobby*, 134 S. Ct. at 2780. "[I]f there are other, reasonable ways to achieve [the Government's interests] with a lesser burden on constitutionally protected activity, [it] may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). A regulation is the least restrictive means only if "no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights." *Sherbert*, 374 U.S. at 407.

As the Solicitor General recently explained, the Government bears the burden of proof on the least-restrictive means test, which requires "evidence" instead of mere "unsubstantiated statement[s]." Br. for the U.S. as Amicus Curiae at 17, *Holt v. Hobbs*, No. 13-6827 (U.S. May 2014), 2014 WL 2329778. Though the Government offered

[5] The panel suggests that five Justices in *Hobby Lobby* endorsed the position that the regulations serve a compelling interest. Op. at 47-48. This misreads Justice Kennedy's concurrence, which merely observes that the Government "makes the case" that the regulations serve the purported interests. 134 S. Ct. at 2785-86.

no evidence below that the accommodation is the only feasible way to distribute cost-free contraceptives, the panel held that it must use Plaintiffs' health plans to ensure the "seamless[]" provision of coverage to their beneficiaries. Op. at 62. In the panel's view, using *any* other means would be unworkable because "[i]mposing even minor added steps would dissuade women from obtaining contraceptives." *Id.*

That conclusion, upon which the panel's analysis hinges, is supported by nothing more than citation to ipse dixit statements in the Federal Register. *Id.* at 62-63 (citing 78 Fed. Reg. at 39,888). In other words, the panel determined that it could force Plaintiffs to violate their sincerely held religious beliefs based on unsubstantiated assertions that some unknown number of women might suffer "minor" inconvenience in their efforts to obtain free contraceptives. This conclusion cannot be the result of "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). After all, the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown*, 131 S. Ct. at 2741 n.9.

This is particularly true because "[t]here are many ways to [provide free contraceptive coverage], almost all of them less burdensome on religious liberty" than forcing religious objectors to participate. *Korte*, 735 F.3d at 686 (giving examples). As the Court explained in *Hobby Lobby*, "[t]he most straightforward way of doing this would be for the Government to assume the cost" of independently providing "contraceptives . . . to any women who are unable to obtain them." 134 S. Ct. at 2780.

Though Plaintiffs have offered numerous alternatives, which would involve minor tweaks to existing programs, such as Title X, the Medicaid program, or the Affordable Care Act's insurance exchanges, *e.g.*, Pls. Supp. Br. at 20; *supra* p. 1, the Government has not attempted to show why these "alternative[s]" are not "viable." 134 S. Ct. at 2780. Even if it had, the Government could not plausibly assert that providing coverage independent of objecting nonprofits would be unworkable: it has already committed to paying TPAs 115% of their costs under the accommodation, 79 Fed. Reg. at 13,809; and shown a willingness to create and revise regulatory regimes, *e.g.*, 45 C.F.R. § 156.50. And 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 in order to achieve this important goal." 134 S. Ct. at 2781; *see also id.* (stating that "nothing in RFRA" suggests that a less restrictive means cannot involve the creation of a new program).[6]

CONCLUSION

For the foregoing reasons, this Court should grant rehearing en banc.

[6] The panel's 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.39; *id.* at 2763 n.9. It simply found the accommodation acceptable for plaintiffs who did not object to it. *Id.* at 2782 & n.39; *id.* at 2786 (Kennedy, J., concurring). While the accommodation may "effectively exempt[]" such plaintiffs, *id.* at 2763, it does no such thing for plaintiffs who do object to compliance. Indeed, if there was ever any suggestion that *Hobby Lobby* blessed the accommodation, the Court dispelled that notion by granting injunctive relief to a nonprofit entity in *Wheaton*. 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting) (claiming the order "entitle[d] hundreds or thousands of other [nonprofits]" to relief).

Respectfully submitted, this the 26th day of December, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that, on December 26, 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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