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)

APPELLANTS/CROSS-APPELLEES' MOTION FOR STAY OF MANDATE PENDING PETITION FOR WRIT OF CERTIORARI

ROBERT J. MUISE, ESQ.
AMERICAN FREEDOM LAW CENTER
P.O. Box 131098
Ann Arbor, MI 48113
(734) 635-3756
rmuise@americanfreedomlawcenter.org

DAVID YERUSHALMI, ESQ.
AMERICAN FREEDOM LAW CENTER
1901 Pennsylvania Avenue NW, Suite 201
Washington, DC 20006
dyerushalmi@americanfreedomlawcenter.org
(646) 262-0500
Attorneys for Plaintiffs in Priests for Life

NOEL J. FRANCISCO
ERIC DREIBAND
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939
njfrancisco@jonesday.com

Attorneys for Plaintiffs in Roman Catholic Archbishop of Washington

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 41(d)(2) and D.C. Circuit Rule 41, Plaintiffs respectfully move for a stay of the mandate in the above-captioned case pending the filing and disposition of a petition for a writ of certiorari to the United States Supreme Court.[1] This Court entered judgment on November 14, 2014, and simultaneously ordered that the mandate be withheld "until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc." Plaintiffs filed a timely motion for rehearing en banc, and this Court denied that motion on May 20, 2015, thereby setting the mandate to be issued on May 27, 2015. Fed. R. App. P. 41(b). Plaintiffs intend to timely file a petition for writ of certiorari with the Supreme Court. *See* Sup. Ct. R. 13(1). Plaintiffs request a 90-day stay of the mandate to file their petition for a writ of certiorari, with a continuance of the stay after official notification that the petition has been filed. Fed. R. App. P. 41(d)(2)(A); D.C. Cir. R. 41(a)(2).

ARGUMENT

This Court will stay issuance of its mandate pending application for a writ of certiorari when "the certiorari petition would present a substantial question and . . . there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A); D.C. Cir. R. 41(a). Plaintiffs meet both prongs of this test. Indeed, the propriety of such relief here is

[1] "Plaintiffs" refers to all plaintiffs-appellants and cross-appellees in this case, who are now applying for a stay.

particularly strong, as the Supreme Court has consistently granted injunctions pending appeal to similarly situated plaintiffs under the All Writs Act, 28 U.S.C. § 1651, *see Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014); *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014), which imposes a much higher standard for relief than the one governing a stay of this Court's mandate, *see Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers) (noting that under the All Writs Act, "an applicant must demonstrate that the legal rights at issue are 'indisputably clear'"). In addition, the Supreme Court recently issued an administrative order effectively granting the relief requested here, recalling and staying the mandate of the Third Circuit pending further order from the Court. *See Zubik v. Burwell*, 135 S. Ct. 1544 (2015) (Alito, J., in chambers).[2]

I. PLAINTIFFS' CERTIORARI PETITION WILL PRESENT A SUBSTANTIAL QUESTION

The "substantial question" standard is not onerous. It does not, for example, require courts to conclude that the applicant is likely to succeed on the merits. Instead, a stay of the mandate is warranted where there is a "'reasonable probability'" of the Supreme Court granting certiorari and reversing. *See NextWave Personal Commc'ns*

[2] Counsel for Plaintiffs consulted with counsel for the Government, who indicated that they would consent to a temporary stay of the mandate pending further action from the Supreme Court in *Zubik*, as they have done elsewhere. *See* Response to Geneva College's Motion to Recall & Stay the Mandate, *Geneva Coll. v. Sec'y of Health & Human Servs.*, Nos. 13-3536 & 14-1374 (3d Cir. May 1, 2015) (Doc. 96). For the reasons expressed herein, however, Plaintiffs are entitled to a full stay of the mandate pending resolution of their forthcoming petition for certiorari.

v. FCC, No. 00-1402, 2001 U.S. App. LEXIS 19617, at *4 (D.C. Cir. Aug. 23, 2001) (quoting *Books v. City of Elkhart*, 239 F.3d 826 (7th Cir. 2001)). As the Supreme Court has explained in describing a similar standard:

> [The defendant] need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.

Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983) (internal quotation marks and alterations omitted).

Thus, for example, in *Munaf v. Geren*, 482 F.3d 582 (D.C. Cir. 2007), this Court held that an American citizen detained in Iraq by American military forces could not bring a petition for habeas corpus. The court nonetheless stayed its mandate even though it had rejected the applicant's claims and presumably believed the Supreme Court would as well. *See Munaf v. Geren*, No. 06-5324, 2007 U.S. App. LEXIS 11283 (D.C. Cir. May 9, 2007). The Supreme Court later reversed, demonstrating the wisdom of the stay. *Munaf v. Geren*, 553 U.S. 674 (2008). Likewise, in *American Gas Association v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), this Court noted that after "[t]he full court ha[d] declined to rehear the case en banc, [the panel] granted a stay of the mandate to allow the [losing party] to consider pursuit of certiorari in the Supreme Court," so that the status quo would not have to be "unscramble[d]" until "the review process comes to a complete end." *Id.* at 1519. Courts have stayed their mandate even where (unlike here) the applicant "presents a weak case for a grant of certiorari."

Books, 239 F.3d at 829; *see also, e.g.*, *United States ex rel. Chandler v. Cook Cnty.*, 282 F.3d 448, 450 (7th Cir. 2002) (staying mandate where "the possibility of the Supreme Court's granting certiorari in this or another case raising the issue is not entirely insubstantial").

Here, there is at least a reasonable probability that the Supreme Court will grant certiorari and a reasonable possibility of reversal. Indeed, if there were ever any doubt that "the issues are debatable among jurists of reason," *Barefoot*, 463 U.S. at 893, that doubt was erased by the "two thoughtful opinions, [by] Judge Kavanaugh, and Judge Brown joined by Judge Henderson, dissent[ing] from [the] denial" of rehearing en banc in this case. *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5368, 2015 U.S. App. LEXIS 8326, at *7 (D.C. Cir. May 20, 2015) (Pillard, J., concurring). Given the sharp but respectful disagreement among the jurists of this Court, there can be no doubt that the underlying questions are at least substantial, and that there is at least a reasonable probability that the Supreme Court will side with the dissenters.

A. There Is a Reasonable Probability of Supreme Court Review

1. There Is a Conflict Among the Circuit Courts on the Important Matters Raised in This Case

A split among the federal courts of appeals is among the most important factors in determining whether certiorari will be granted. *See* Sup. Ct. R. 10(a); Shapiro, et al., *Supreme Court Practice* § 4.3, at 241-43 (10th ed. 2013). Here, the Supreme Court has already recognized that the matters at issue, including whether

Plaintiffs can be forced to submit documentation they believe makes them complicit in sin, have split the courts of appeals. *Wheaton Coll.*, 134 S. Ct. at 2807 (noting that "Circuit Courts have divided on whether to enjoin" the so-called accommodation for "religious nonprofit organizations" (citing Sup. Ct. R. 10(a))); *see also id.* at 2811 (Sotomayor, J., dissenting) (acknowledging disagreement among the circuits).[3] "Such division is a traditional ground for certiorari." *Id.* at 2807 (majority op.).

Indeed, this acknowledged split reflects a deeper division among the circuit courts regarding the test used to identify a "substantial burden" for purposes of RFRA. *Compare Hobby Lobby Stores, Inc., v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir. 2013) (en banc) (holding that the substantial burden inquiry turns solely on "the intensity of the coercion applied by the government to act contrary to [sincere religious] beliefs"), *aff'd*, 134 S. Ct. 2751; *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) (same); *EWTN*, 756 F.3d 1339 (temporarily enjoining the "accommodation"), *with Geneva Coll.,* 2015 U.S. App. LEXIS 2168, at *28 (declining to analyze coercion and instead assessing "whether the appellees' compliance with the [regulations] does, in fact, . . . make them complicit in the provision of contraceptive coverage"); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014) (same).

[3] *Compare, e.g.*, *Diocese of Cheyenne v. Burwell*, No. 14-8040, 2014 U.S. App. LEXIS 12686 (10th Cir. June 30, 2014) (granting injunction pending appeal); *Eternal World Television Network, Inc. v. Sec'y U.S. Dep't of Health & Human Servs.* ("*EWTN*"), 756 F.3d 1339 (11th Cir. 2014) (same), *with Geneva College v. HHS*, No. 13-3536, 2015 U.S. App. LEXIS 2168 (3d Cir. Feb. 11, 2015)(denying injunction).

And the division among the lower courts is likely to grow given that some courts may agree with the three judges of this Court who dissented from the denial of rehearing based on their view that the panel's decision is mistaken and inconsistent with Supreme Court precedent.

In addition, certiorari is likely because this Court's decision created a split with the Seventh and Tenth Circuits on the issue of strict scrutiny. In *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013), the Seventh Circuit held that the Government could employ several less-restrictive means of providing free contraceptive coverage without using the health plans of religious objectors as a conduit. "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.* Here, by contrast, this Court ruled out these alternative means because they would "make the coverage no longer seamless from the beneficiaries' perspective, instead requiring them to take additional steps to obtain contraceptive coverage elsewhere." *Priests for Life*, 772 F.3d at 245.

This Court's decision also conflicts with the Tenth Circuit's decision in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), which held that the Government's goal of providing contraceptive coverage to employees cannot qualify as a "compelling" interest "because the contraceptive-coverage requirement presently does not apply to tens of millions of people" under its various exemptions.

Id. at 1143. The Tenth Circuit held that the regulations "'cannot be regarded as protecting an interest of the highest order when [they] leave[] appreciable damage to that supposedly vital interest unprohibited.'" *Id.* (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006)). By contrast, this Court held that "[t]he government's interest in a comprehensive, broadly available system is not undercut by the other exemptions in the ACA, such as the exemptions for religious employers, small employers, and grandfathered plans." *Priests for Life*, 772 F.3d at 266.

Because the circuits are split, there is a reasonable probability Plaintiffs' petition for certiorari will be granted.

2. Plaintiffs' Petition Will Raise an Important Question of Federal Law That Has Not Been, but Should Be, Squarely Decided by the Supreme Court

The Supreme Court also grants certiorari when a court of appeals has "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). "The importance of the issues involved in the case as to which review is sought is of major significance in determining whether the writ of certiorari will issue." Shapiro, *supra*, § 4.11, at 263. Additionally, "certiorari has been granted where the court of appeals based its decision upon a point expressly reserved or left undecided in prior Supreme Court opinions." *Id.* § 4.5, at 254 (citing cases).

Here, the Supreme Court expressly reserved the issue presented in this case in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2782 & n.40 (2014) (discussing the accommodation and clarifying, "[w]e do not decide today whether an approach of this

type complies with RFRA for purposes of all religious claims"). Similarly, the Supreme Court expressly did not decide this issue on the merits when granting extraordinary relief to other religious non-profits. *Wheaton Coll.*, 134 S. Ct. at 2807 ("In light of the foregoing, this order should not be construed as an expression of the Court's views on the merits."); *Little Sisters of the Poor*, 134 S. Ct. at 1022 ("[T]his order should not be construed as an expression of the Court's views on the merits.").

The core question of religious liberty at issue in this case is, moreover, "exceptionally important." *Priests for Life*, 2015 U.S. App. LEXIS 8326, at *20 (Brown, J., dissenting). Indeed, the Supreme Court has already recognized the importance of this issue by granting extraordinary relief to every entity that has requested it under the far more demanding All Writs Act. *See supra* Part I.A; *Wheaton Coll.*, 134 S. Ct. 2806; *Little Sisters of the Poor*, 134 S. Ct. 1022; *cf. Zubik*, 135 S. Ct. 1544. Additionally, the sheer number of challenges to the accommodation across the country, and the results in those cases thus far, further confirms the importance of this question. Aside from the instant case, there are at least 40 cases pending in the lower courts challenging the accommodation. *See* Becket Fund, HHS Mandate Information Central, http://www.becketfund.org/hhsinformationcentral/ (last visited May 21, 2015). In no less than 29 of those cases, courts have granted injunctions.[4]

[4] *See, e.g.*, *Wheaton Coll.*, 134 S. Ct. 2806; *Little Sisters*, 134 S. Ct. 1022; *Ass'n of Christian Schs. Int'l v. Burwell*, No. 14-1492 (10th Cir. Dec. 19, 2014) (Doc. 14); *Catholic Charities Archdiocese of Phila. v. HHS*, No. 14-3126 (3d Cir. Sept. 2, 2014); *EWTN*, 756 F.3d 1339; *Cheyenne*, No. 14-8040 (Doc. 27); *Insight for Living Ministries v. Burwell*, No. 14-

Accordingly, the manner in which the Supreme Court and lower federal courts have treated the very same issue at stake here confirms that this case raises an important question of law on which there is a reasonable probability that the Supreme Court will grant certiorari.

B. There Is a Reasonable Probability of Reversal

There is also at least a reasonable probability that the Supreme Court will conclude that this Court's decision is contrary to Supreme Court precedent, including the Court's recent decisions in *Hobby Lobby* and *Holt v. Hobbs*, 125 S. Ct. 853 (2015). Indeed, that is exactly what three judges of this Court concluded in dissent from the

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cv-00675, 2014 U.S. Dist. LEXIS 165228 (E.D. Tex. Nov. 25, 2014); *Ave Maria Univ. v. Burwell*, No. 2:13-cv-630, 2014 WL 5471048 (M.D. Fla. Oct. 28, 2014); *Ave Maria Sch. of Law v. Burwell*, No. 2:13-cv-795, 2014 WL 5471054 (M.D. Fla. Oct 28, 2014); *La. College v. Sebelius*, No. 12-0463, 2014 U.S. Dist. LEXIS 113083 (W.D. La. Aug. 13, 2014); *Archdiocese of St. Louis v. Burwell*, No. 4:13-CV-2300, 2014 WL 2945859 (E.D. Mo. June 30, 2014); *Brandt v. Burwell*, No. 14-CV-0681, 2014 WL 2808910 (W.D. Pa. June 20, 2014); *Colo. Christian Univ. v. Sebelius*, No. 13-CV-02105, 2014 WL 2804038 (D. Colo. June 20, 2014); *Catholic Benefits Ass'n v. Sebelius*, No. CIV-14-240-R, 2014 WL 2522357 (W.D. Okla. June 4, 2014); *Dordt Coll. v. Sebelius*, No. C 13-4100, 2014 WL 2115252 (N.D. Iowa May 21, 2014); *FOCUS v. Sebelius*, No. 1:13-cv-03263 (D. Colo. Apr. 23, 2014) (Docs. 39, 40); *Dobson v. Sebelius*, No. 13-cv-03326, 2014 WL 1571967 (D. Colo. Apr. 17, 2014); *Roman Catholic Archdiocese of Atl. v. Sebelius*, No. 1:12-CV-03489, 2014 WL 1256373 (N.D. Ga. Mar. 26, 2014); *Ave Maria Found. v. Sebelius*, 991 F. Supp. 2d 957 (E.D. Mich. 2014); *Catholic Diocese of Beaumont v. Sebelius*, 10 F. Supp. 3d 725 (E.D. Tex. 2014); *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-314 (N.D. Tex. Dec. 31, 2013) (Doc. 99); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12 cv-92, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013); *Diocese of Fort Wayne-S. Bend v. Sebelius*, 988 F. Supp. 2d 958 (N.D. Ind. 2013); *Grace Schs. v. Sebelius*, 988 F. Supp. 2d 935 (N.D. Ind. 2013); *E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743 (S.D. Tex. 2013); *S. Nazarene Univ. v. Sebelius*, No. Civ-13-1015-F, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); *Reaching Souls Int'l, Inc. v. Sebelius*, No. 13-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Legatus v. Sebelius*, 988 F. Supp. 2d 794 (E.D. Mich. 2013); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, 987 F. Supp. 2d 232 (E.D.N.Y. 2013).

denial of rehearing en banc, in accord with at least two other judges in different circuits. *See Priests for Life*, 2015 U.S. App. LEXIS 8326, at *21 (Brown, J., dissenting) ("The panel's substantial burden analysis is inconsistent with the precedent of the Supreme Court and this Court"); *id.* at *42 (Kavanaugh, J., dissenting) ("[T]he panel opinion misapplies the Religious Freedom Restoration Act and contradicts the Supreme Court's recent decisions."); *see also Univ. of Notre Dame v. Burwell*, No. 13-3853, 2015 U.S. App. LEXIS 8234, at *55 (7th Cir. May 19, 2015) (Flaum, J., dissenting) (stating that the accommodation substantially burdens religious exercise because it "compels Notre Dame to contract with parties . . . in a manner in which Notre Dame believes makes it complicit in moral wrong," and "Notre Dame's only alternative is to endure crippling fines"); *EWTN*, 756 F.3d at 1345 (Pryor, J., concurring) (accommodation substantially burdens religious exercise by forcing plaintiffs to "'participat[e] in an activity prohibited by [their] religion'"). There is at least a reasonable probability that the Supreme Court will agree with these five judges.

First, this Court's decision rests in part on the conclusion that the Mandate does not impose a "substantial burden" on Plaintiffs' religious exercise. *Priests for Life*, 772 F.3d at 246-56. *Hobby Lobby*, however, held that there is a substantial burden when the Government "demands" that entities either (1) "engage in conduct that seriously violates their religious beliefs" or else (2) suffer "substantial" "economic consequences." 134 S. Ct. at 2775-76, 2779. In *Hobby Lobby*, the Supreme Court accepted the plaintiffs' belief that if they "compl[ied] with the [regulations]," "they

w[ould] be facilitating" the "destruction of an embryo." *Id.* at 2759, 2777 & n.33. The Court then found a substantial burden because the penalty for non-compliance was substantial. *Id.* ("If these consequences do not amount to a substantial burden, it is hard to see what would."). The Court did not probe whether the plaintiffs' theory of facilitation was correct.

There is a reasonable probability that the Supreme Court will agree with Plaintiffs' argument that this Court engaged in a different, incorrect substantial-burden analysis. This Court's substantial-burden ruling hinges on its conclusion that complying with the regulations would not "facilitate contraceptive coverage." *Priests for Life*, 772 F.3d at 253. But whether the conduct required of Plaintiffs under the regulations constitutes impermissible facilitation and thus makes them complicit in sin is a *religious* question. As the Supreme Court explained, this issue "implicates a difficult and important question of religion and moral philosophy." *Hobby Lobby*, 134 S. Ct. at 2778. Resolution of that question should be left to religious adherents, not the courts. As Judge Kavanaugh explained, courts "may not question the wisdom or reasonableness (as opposed to the sincerity) of plaintiffs' religious beliefs—including about complicity in wrongdoing." *Priests for Life*, 2015 U.S. App. LEXIS 8326, at *53.

Here, by asking whether the required actions truly "facilitate" contraceptive coverage (a religious question) rather than whether the Government has placed substantial pressure on Plaintiffs to take those actions (a legal question), this Court misapplied the substantial-burden standard. As this Court acknowledged, Plaintiffs

believe as a religious matter that it would be immoral for them to submit the required documentation or to maintain a contractual relationship with any third party that will provide contraceptive coverage to their health-plan beneficiaries. *See Priests for Life*, 772 F.3d at 251. Yet it is undisputed that if Plaintiffs fail to take those required actions, they will be subject to substantial penalties and other potentially ruinous economic and organizational consequences. Thus, under the reasoning of *Hobby Lobby*, the Mandate imposes a "substantial burden" on their religious exercise. At the very least, there is a "reasonable probability" that the Supreme Court—like numerous other courts across the country, *see supra* note 4—will agree.[5]

The reasonable probability of reversal is confirmed by the fact that the Supreme Court has twice granted, vacated, and remanded ("GVR-ed") pre-*Hobby Lobby* appellate decisions upholding the accommodation. *See Univ. of Notre Dame v. Burwell*, No. 14-392, 2015 WL 998533 (U.S. Mar. 9, 2015); *Mich. Catholic Conf. v. Burwell*

[5] Plaintiffs respectfully disagree that this case is about "how the challenged regulations operate." *Priests for Life*, 2015 U.S. App. LEXIS 8326, at *12 (Pillard, J., concurring). However the regulations are interpreted, it is undisputed that Plaintiffs are compelled to offer health coverage through an insurance company or TPA that will provide the mandated coverage to their employees. It violates Plaintiffs' religious beliefs to maintain such a relationship, but they are forced to do so on pain of ruinous penalties. Pls. En Banc Br. at 3-4. Moreover, as Plaintiffs have elsewhere argued at length, *e.g.*, *id.* at 9-10, it is simply not the case that the "obligation to provide contraceptive coverage to all insured women" exists independently of Plaintiffs' submission of the mandated "notice." 2015 U.S. App. LEXIS 8326, at *14. But rather than reiterate those arguments here, Plaintiffs submit that the issue is at least one on which reasonable jurists can disagree. *E.g.*, *Wheaton Coll.*, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting) (stating that a TPA "bears the legal obligation to provide contraceptive coverage *only upon receipt of a valid self-certification*" (emphasis added)).

("*MCC*"), No. 14-701, 2015 WL 1879768 (U.S. Apr. 27, 2015). Such action necessarily indicates a "reasonable probability that th[ose] decision[s] . . . rest[] upon a premise" that should be "reject[ed]" in light of subsequent authority. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Because this Court's decision relied heavily on both *Notre Dame* and *MCC*, *see Priests for Life*, 772 F.3d at 239, 246-47, 251-53, 255, 257, there is a reasonable probability that the Supreme Court will find that it too is contrary to *Hobby Lobby*.

Second, this Court's decision also rested in part on its conclusion that the accommodation is the least restrictive means of advancing a compelling governmental interest. *See Priests for Life*, 772 F.3d at 256-67. There is a reasonable probability that the Supreme Court will disagree with that conclusion as well, for two reasons. As an initial matter, the Supreme Court may well conclude that the Government cannot establish a compelling interest in forcing non-profit religious employers to facilitate contraceptive coverage for their employees when countless other employers are exempt from that requirement. In the court below, the Government asserted only "two compelling governmental interests" "in public health and gender equality." RCAW Defs. SJ Br. (Doc. 26) at 21, 24; PFL Defs.' SJ Br. (Doc. 13). Those "very broadly framed" interests, however, were specifically rejected by the Supreme Court in *Hobby Lobby*, which noted that RFRA "contemplates a 'more focused' inquiry." 134 S. Ct. at 2779. *Hobby Lobby* likewise rejected the Government's supposed interest, set forth *sua sponte* by this Court, in a "sustainable system of taxes and subsidies under the

ACA to advance public health." *Priests for Life*, 772 F.3d at 258 (citing *United States v. Lee*, 455 U.S. 252 (1982)); *see* 134 S. Ct. at 2783-84.

In addition, even if the Government did have a compelling interest in providing such coverage, there is a reasonable probability that the Supreme Court would conclude that the Government could provide such coverage in many alternative ways without forcing religious objectors and their health plans to serve as the delivery vehicles. *Hobby Lobby* emphasized that the least-restrictive means test is "exceptionally demanding." 134 S. Ct. at 2780. And it is well established that "if 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).

Here, this Court held that the Government has a compelling interest in ensuring the "seamless[]" provision of contraceptive coverage as part of employee health coverage, because "[i]mposing even minor added steps would dissuade women from obtaining contraceptives." *Priests for Life*, 772 F.3d at 265. RFRA, however, requires the Government to satisfy "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), and it is certainly debatable—particularly in light of the dearth of evidence—whether avoiding the inconvenience of "minor added steps" to obtain free contraceptive coverage meets that standard, *see Priests for Life*, 2015 U.S. App. LEXIS 8326, at *36 (Brown, J., dissenting) (stating that

"[t]he 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"). Indeed, particularly in light of the Court's admonition that the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced," *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2741 n.9 (2011), there is at least a reasonable probability that the Court will find the asserted interest in "seamless" access less than compelling.

The Supreme Court may well agree with the Seventh Circuit that "[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 in the delivery of that coverage. *Korte*, 735 F.3d at 686 (giving examples of alternative ways of delivering such coverage independently of religious employers' health plans). The Court's likelihood of agreeing with *Korte* is particularly strong given its observation in *Hobby Lobby* that "[t]he most straightforward way of [providing contraceptive coverage] would be for the Government to assume the cost" of independently providing "contraceptives . . . 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 (emphasis added).

Plaintiffs too have offered numerous alternatives that would require only minor tweaks to existing programs, such as Title X, the Medicaid program, or the Affordable

Care Act's insurance exchanges. *See, e.g.*, Pls. Supp. Br. at 20; *supra* p. 1. The Government, however, has not introduced any evidence showing why these "alternative[s]" are not "viable." 134 S. Ct. at 2780. Even if it had, the Supreme Court might well disagree with the notion that providing the coverage independent of objecting nonprofits would be unworkable: after all, the Government has already committed to paying third-party administrators ("TPAs") 115% of their costs under the accommodation, 79 Fed. Reg. 13,744, 13,809 (Mar. 11, 2014), and been willing to create and revise regulations, *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).

Finally, the Supreme Court's decision in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), confirms the reasonable probability of reversal here. In enjoining the government from forcing a prisoner to shave his beard, *Holt* makes clear that there was nothing idiosyncratic about *Hobby Lobby*'s substantial-burden analysis. It makes no difference whether the religious exercise at issue is refraining from shaving one's beard (*Holt*), refraining from paying for contraceptive coverage (*Hobby Lobby*), or refraining from maintaining an objectionable contractual relationship and submitting an objectionable form (here). The dispositive inquiry is whether the religious exercise is "sincere," and

whether the believer "will face serious disciplinary action" unless he forgoes the exercise. *Id.* at 862. When the Government "puts [the plaintiff] to this choice, it substantially burdens his religious exercise." *Id.*

Holt also demonstrates why the Government fails the "exceptionally demanding" least-restrictive-means test. The government must "not merely explain" its exemption denial (here, the denial of an exemption awarded to thousands of other religious objectors), but must "*prove* that denying the exemption is the least restrictive means of furthering a compelling governmental interest." *Id.* at 864(emphasis added). The Court also found that where a policy is riddled with many exemptions, the government "cannot show" that it passes the least-restrictive-means test. *Id.* at 863-64 (exemptions made the government position "hard to take seriously").

For these reasons, this case raises a substantial question that warrants a stay.

II. THERE IS GOOD CAUSE FOR A STAY TO PRESERVE THE STATUS QUO.

Plaintiffs also meet the "good cause" prong of Rule 41(d)(2). Good cause is established based on the "equities in the case." Knibb, *Federal Court of Appeals Manual* § 34:13, at 924 (6th ed. 2013). Here, good cause justifies the stay to preserve the status quo, because (1) absent a stay Plaintiffs will suffer irreparable harm and (2) a stay is in the public interest. *See, e.g.*, *id.* (stating that a stay can be justified by showing "the irreparable harm that could result without one"); *Books*, 239 F.3d at 829 (finding that the public interest justifies a stay). Indeed, the equities favor a stay here for the same

reasons that this Court originally granted an injunction pending appeal, concluding that Plaintiffs "satisfied the requirements" for injunctive relief set forth in *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 19-20 (2008). *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5317, 2013 U.S. App. LEXIS 26035 (D.C. Cir. Dec. 31, 2013) (per curiam). The equities have not changed.

First, if the stay is denied, Plaintiffs will suffer irreparable harm, because they will be required to choose between paying ruinous fines and taking specific actions—complying with the Mandate or participating in the accommodation—that violate their religious beliefs.[6] To be sure, this Court concluded that these actions do not impose a "substantial burden" on Plaintiffs under RFRA. Plaintiffs respectfully disagree with that conclusion. But for present purposes, it is beside the point. Here, it is undisputed that Plaintiffs believe that compliance with the regulatory framework makes them complicit in the provision of contraception. Thus, absent a stay of this

[6] The injunction pending appeal entered by this Court in this case explicitly remains in place "pending further order of the court." *Priests for Life*, 2013 U.S. App. LEXIS 26035, at *3. Although the Court has now issued its opinion on the merits, that opinion has no legal effect until the mandate issues. *See* Fed. R. App. P. 41 Adv. Com. Notes ("A court of appeals' judgment or order is not final until issuance of the mandate; at that time, the parties' obligations become fixed."). Thus, this Court's opinion does not lift the existing injunctions until the mandate issues. *See Conax Fla. Corp. v. United States*, 824 F.2d 1124, 1132 (D.C. Cir. 1987) ("This court's previous order requiring the government not to release the drawings at issue during the pendency of this appeal shall be dissolved with the issuance of the mandate in this case."); *Minkoff v. Payne*, 210 F.2d 689, 693 (D.C. Cir. 1953) ("[W]hen our mandate issues," it "will cause to be dissolved . . . all existing stays or injunctions[.]"); *see also Sherley v. Sebelius*, No. 10-5287 (D.C. Cir. Apr. 29, 2011) (ordering "the stay entered by this court . . . be dissolved upon issuance of the court's mandate in this case").

Court's mandate, Plaintiffs will be forced, under pain of massive penalties, to take specific actions that, under their religious beliefs, they believe to be immoral. Avoiding that harm establishes "good cause" for a stay.

Second, a stay is in the public interest. *Books*, 239 F.3d at 829. In *Books*, for example, the court found that a Ten Commandments monument on public property violated the Establishment Clause. *Id.* at 827. On remand, the government would have to formulate and implement a remedy. *Id.* The court found the "public interest is best served [by] affording the City a full opportunity to seek review in the Supreme Court of the United States before its officials devote attention to formulating and implementing a remedy." *Id.* at 829; *see also American Gas Ass'n*, 912 F.2d at 1519 (D.C. Cir. 1990) (noting that a stay is warranted to ensure the parties do not have to "unscramble" their affairs until "the review process comes to a complete end"). Here too, the public interest is best served by allowing Plaintiffs a full opportunity to seek Supreme Court review before scrambling the status quo.

Third, a stay would also serve the public interest because the substantial penalties to which Plaintiffs would otherwise be exposed under the regulations may impact the charitable services they can provide in their communities. For example, in the past year alone Catholic Charities stretched its modest budget to serve over 116,000 men, women, and children of all economic, religious, and social backgrounds. If the current injunction is lifted and the Government decides to enforce its regulations, Catholic Charities and the other Plaintiffs would need to decide whether

to act in violation of their religious beliefs or find a way to pay the enormous fines they would incur. Putting them to this choice thus may prove disruptive not just to Plaintiffs, but to the communities they serve.

For all of these reasons, there is good cause to stay the Court's mandate.

CONCLUSION

In sum, Plaintiffs meet the "substantial question" and "good cause" standards of Fed. R. App. P. 41(d)(2). This is clear from the extraordinary action that the Supreme Court itself has taken in the analogous cases of *Wheaton College* and *Little Sisters*, where the Court entered interlocutory injunctions under the All Writs Act, 28 U.S.C. § 1651, which requires the applicant to demonstrate that the applicant's right to relief is "indisputably clear." *Lux*, 561 U.S. at 1307. The same is true of the Supreme Court's recent administrative order recalling and staying the Third Circuit's mandate in *Zubik*. It follows that Plaintiffs here are entitled to relief under the significantly lower standard of Rule 41(d)(2).

Accordingly, Plaintiffs respectfully request that this Court grant their motion for a stay of the mandate pending their filing of a petition for a writ of certiorari.[7]

[7] In the alternative, for the reasons articulated in their merits briefs, petition for rehearing en banc, and herein, Plaintiffs request an injunction pending disposition of their petition for certiorari. *See* Fed. R. App. P. 8; Sup. Ct. R. 23.3.

Respectfully submitted, this the 22nd day of May, 2015.

/s/ Robert J. Muise
ROBERT J. MUISE, ESQ.
AMERICAN FREEDOM LAW CENTER
P.O. Box 131098
Ann Arbor, Michigan 48113
(734) 635-3756
rmuise@americanfreedomlawcenter.org

/s/ David Yerushalmi
DAVID YERUSHALMI, ESQ.
AMERICAN FREEDOM LAW CENTER
1901 Pennsylvania Avenue NW, Suite 201
Washington, D.C. 20006
dyerushalmi@americanfreedomlawcenter.org
(646) 262-0500

Attorneys for Plaintiffs in Priests for Life

/s/ Noel J. Francisco
NOEL J. FRANCISCO
ERIC DREIBAND
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939
njfrancisco@jonesday.com

Attorneys for Plaintiffs in Roman Catholic Archbishop of Washington

CERTIFICATE OF SERVICE

I hereby certify that, on May 22, 2015, 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.

/s/ Robert J. Muise

ROBERT J. MUISE
AMERICAN FREEDOM LAW CENTER
P.O. Box 131098
Ann Arbor, MI 48113
(734) 635-3756
rmuise@americanfreedomlawcenter.org

DAVID YERUSHALMI
AMERICAN FREEDOM LAW CENTER
1901 Pennsylvania Avenue NW, Suite 201
Washington, DC 20006
dyerushalmi@americanfreedomlawcenter.org
(646) 262-0500

Attorneys for Plaintiffs in Priests for Life

/s/ Noel J. Francisco

NOEL J. FRANCISCO
ERIC DREIBAND
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939
njfrancisco@jonesday.com

Attorneys for Plaintiffs in Roman Catholic Archbishop of Washington