Nos. 14-1418, 14-1453, 14-1505,
15-35, 15-105, 15-119 & 15-191

IN THE

Supreme Court of the United States

DAVID A. ZUBIK, ET AL.

v.

SYLVIA BURWELL, ET AL.

PRIESTS FOR LIFE, ET AL.

v.

DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, ET AL.

v.

SYLVIA BURWELL, ET AL.

On Writ of Certiorari to the United States Courts of Appeals for the Third & D.C. Circuits

REPLY BRIEF FOR PETITIONERS IN NOS. 14-1418, 14-1453 & 14-1505

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INTRODUCTION

The Government does not dispute that the mandate forces Petitioners to act in violation of their religious beliefs by submitting (and continually updating) objectionable documentation and contracting with insurance companies that will provide abortifacient and contraceptive coverage to their plan beneficiaries. Nor does the Government dispute that if Petitioners refuse to take those actions, they will be subject to crushing penalties. It is thus puzzling for the Government to insist that the mandate requires Petitioners to simply "opt out" and provide "notice of their refusal to provide contraceptive coverage." Gov.Br.33. If that were true, this case would have ended long ago. Throughout this litigation, Petitioners have repeatedly and unreservedly expressed their objection. Why then has the Government litigated these cases all the way to the Supreme Court, fighting tooth and nail to force Petitioners to comply? The answer is simple: it wants Petitioners to do far more than "raise their hand." It wants them to take actions that facilitate the provision of the objectionable coverage to their own plan beneficiaries in connection with their own health plans on a continuing basis. Far from allowing Petitioners to "opt out" of the regulatory scheme, the Government is desperately trying to *lock them in*.

The only question, therefore, is whether the Government has carried its burden under RFRA to prove that forcing Petitioners to take these actions is the least-restrictive means of protecting a compelling interest. It has not. Both RFRA's procedural and

substantive safeguards reflect the importance of religious liberty in our constitutional system. Procedurally, RFRA requires the Government to act in a careful and deliberate fashion, gathering evidence and weighing alternatives before burdening religious exercise. Substantively, RFRA allows the Government to take the drastic step of forcing adherents to violate their faith, but only as a last resort. Here, the Government has refused to undertake the first step of the analysis: it relies on mere assertions, not proper evidence in the record. How many people, for example, want but lack access to contraceptive coverage? Of these, how many are enrolled in health plans sponsored by religious objectors? To what extent will enforcing the mandate against Petitioners close that gap? And perhaps most importantly, how does that compare to the efficacy of less burdensome alternatives? On these critical issues, the Government has nothing to say. *See* 78 Fed. Reg. 39,870, 39,887-88 (July 2, 2013) (setting forth entirety of the Government's strict-scrutiny analysis). This Court should not countenance such a cavalier approach to RFRA's strict-scrutiny requirements.

Ultimately, RFRA allows the Government to force people to violate their religious beliefs, but only after demonstrating the respect for those beliefs that RFRA's procedural and substantive requirements demand. Because the Government failed to do that here, the decisions below should be reversed.

ARGUMENT

I. THE MANDATE SUBSTANTIALLY BURDENS RELIGIOUS EXERCISE

The mandate forces Petitioners to violate their religious beliefs by (1) signing, submitting, and continually updating objectionable documentation, and (2) maintaining health plans and ongoing insurance relationships through which objectionable coverage is provided to their plan beneficiaries. The Government does not dispute that Petitioners must take these actions. It does not contest the sincerity of their religious beliefs. And it does not deny that they will incur substantial penalties if they refuse to comply. The Government thus concedes that Petitioners face a stark choice: violate their beliefs or suffer crushing penalties. That is the definition of a substantial burden on religious exercise. Pet.Br.27-28.

A. The Mandate Is Not an "Opt Out"

The Government builds its entire substantial-burden argument on the false premise that the mandate requires Petitioners to simply "'rais[e] a hand.'" Gov.Br.41. That is manifestly incorrect.

1. At the most basic level, the Government concedes that the mandate differs from an "opt out" in an important respect: it requires Petitioners to sign and submit either a "notice" that provides the Government with information regarding their health plan and insurance company,[1] or a "self-certification"

[1] This brief uses "insurance company" to refer to both third-party administrators (TPAs) and insurance issuers. Pet.Br.11 n.2.

that informs their insurance company of its new obligation to provide and pay for the objectionable coverage in connection with Petitioners' health plans. Gov.Br.87-88. As Judge Kavanaugh explained, the act of signing and then submitting either document is significant because the documents "play[] a role in th[e] scheme" by helping ensure that Petitioners' own insurance companies will procure the objectionable coverage. *RCAW*.Pet.App.256a-67a (Kavanaugh, J., dissenting). That is why the documents "must" be submitted "in the form and manner specified by the [Government]." 26 C.F.R. § 54.9815-2713A(a)(3); 80 Fed. Reg. 41,318, 41,323 n.23 (July 14, 2015) ("An accommodation cannot be effectuated until all of the necessary information is submitted."). Petitioners are emphatically *not* allowed to simply notify the Government of their objection.

This is underscored by Petitioners' ongoing obligation to update and maintain the required information. For example, whenever Petitioners change insurance companies, they must submit a *new* self-certification or notification with "updated information" regarding their plans and providers. 26 C.F.R. § 54.9815-2713A(a)(3), (b)(1), (c)(1). In addition, they must maintain the self-certification or notification "in a manner consistent with [relevant] record retention requirements." *Id.* Because the Government already knows that Petitioners object, these obligations serve only to conscript Petitioners into facilitating the Government's scheme.

Consequently, "there is no dispute that the form is part of the process by which the Government ensures that the religious organizations' [insurance companies] provide contraceptive coverage to the

organizations' employees." *RCAW*.Pet.App.264a (Kavanaugh, J., dissenting). The regulations do not allow Petitioners to simply "raise a hand," but instead require them to file a *particular* form and provide *particular* information, precisely because it "plays a role" in the regulatory scheme. *Id.* "After all, if the form were meaningless, why would the Government require it?" *Id.*

2. More generally, the self-certification or notification differs from an "opt out" because it effectively amends Petitioners' health plans, authorizing and incentivizing their TPAs to provide the objectionable coverage. Unless Petitioners invoke the "accommodation," the Government cannot modify the instruments governing their self-insured plans or designate their TPAs as plan administrators for contraceptive benefits. Gov.Br.16 n.4. The coverage included within a self-insured plan is controlled by the plan sponsor; the Government has no authority to alter that coverage without the sponsor's permission. Pet.Br.12-14; Catholic Benefits Ass'n Amicus Br.24-29. The Government cites no contrary authority, and indeed *stipulated* that "by signing the self-certification form, [Petitioners] are designating [their] TPA as [their] plan administrator for the provision of the objectionable services" and "authoriz[ing]" the provision of that coverage. J.A.52, 60, 77-78, 108, 115-16. Likewise for church plans, the Government stipulated that "[w]ithout the self-certification form, [a] TPA *is prohibited* from providing coverage for the objectionable services to [Petitioners'] employees." J.A.52, 61, 98, 136 (emphasis added). Nor is there any dispute that Petitioners' TPAs receive the 110% "financial

incentive" only if Petitioners file the required forms. Gov.Br.35 n.13.

The situation is no different for Petitioners with insured plans. The Government concedes that their insurers have no obligation to *pay for* the objectionable coverage until Petitioners submit the forms. If Petitioners do not invoke the "accommodation," the regulations require Petitioners *themselves* to subsidize the coverage, which is exactly what *Hobby Lobby* enjoined. Pet.Br.51. And the Government concedes that Petitioners' insurers become obligated to "separately" pay for the coverage *only if* Petitioners file the forms. 26 C.F.R. § 54.9815-2713A(c).

3. Finally, the mandate differs from an "opt out" because it forces Petitioners to contract with insurance companies that will provide the coverage to Petitioners' own plan beneficiaries in connection with Petitioners' own health plans. Although the Government claims the mandate does nothing more than impose "separate regulatory obligations" on third parties, Gov.Br.51 n.20, that is incorrect. In fact, the mandate imposes direct and draconian penalties on *Petitioners* if *they* fail to hire companies that will then—and only then—provide the objectionable coverage to Petitioners' plan beneficiaries. Thus, by establishing a health plan, enrolling beneficiaries, and performing all the administrative duties needed to maintain that plan,[2]

[2] For example, the Government stipulated that Petitioners must periodically submit plan beneficiaries' names to their insurance companies. J.A.52, 60-61, 89, 100, 128, 137.

Petitioners necessarily facilitate whatever coverage the company provides to their plan beneficiaries. They maintain the crucial link between the providers and the recipients of the objectionable coverage. Pet.Br.11-14, 35-36.

The Government does not dispute that if Petitioners refuse to engage in this conduct, they will incur "substantial" penalties. Pet.Br.37-40. Instead, it argues that because Petitioners "want" to offer health plans, they are not really being forced to violate their beliefs, particularly as the regulations do not "require petitioners to enter into any new contracts, or to modify their existing arrangements." Gov.Br.50-51. But of course, Petitioners want to offer health plans in a manner *consistent with their religious beliefs*. It is only with the advent of the mandate that Petitioners must offer plans in a manner that violates Catholic teachings. These changed circumstances "creat[e] … conflict[s] … that had not previously existed." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 143 (1987); Pet.Br.46.[3]

The Government's position would cut off religious believers from "the economic life of the Nation," *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2783 (2014), by denying them the right to contract with others to provide conscience-compliant services. According to the Government, so long as the believer

[3] Petitioners are not trying to "dictate" insurance companies' conduct. Gov.Br.51. Petitioners simply ask that *they* be free to enter into *voluntary* arrangements with companies *willing* to provide conscience-compliant coverage.

does not *pay* for the objectionable products, RFRA provides no constraint on forcing Muslims to hire caterers that will serve alcohol to their wedding guests; forcing Christian colleges to contract with cable companies that will provide "adult" channels to their residents; or forcing Jewish schools to hire vendors that will serve non-kosher meals to their students. That cannot be the law.

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These realities dispel any notion that the mandate somehow operates "independent[ly]" of Petitioners. Gov.Br.41. Rather, it is entirely *dependent* on Petitioners' actions. Unless Petitioners offer a health plan and contract with an insurance provider, no coverage flows. Even then, unless Petitioners sign and submit the required documents, no coverage flows. The Government is thus not asking Petitioners to "raise their hand" to opt out. It is forcing them to hand over the keys to the health plans they must offer and maintain.

Indeed, these cases illustrate Petitioners' essential role in the regulatory scheme. Because of existing injunctions, Petitioners have not filed the self-certification or notification. Consequently, none of their insurance companies offer the objectionable coverage in connection with Petitioners' plans. The regulations thus plainly depend on Petitioners' actions.

B. Petitioners' Refusal to Comply Is a Protected Exercise of Religion

The Government does not dispute that the mandate forces Petitioners to act in violation of their beliefs. Instead, it contends that RFRA is

categorically inapplicable where regulations require someone to take "an act that is innocent in itself" but that nevertheless violates her faith because it "has the effect of enabling or facilitating the commission of an immoral act by another." *Hobby Lobby*, 134 S. Ct. at 2778. In the Government's words, RFRA never applies where "an adherent objects to taking an otherwise-unobjectionable act because it believes that act will make it complicit in the government's" regulatory scheme. Gov.Br.26. As *Hobby Lobby* held, there is no basis for such a cramped view of religious exercise.

1. The substantial-burden inquiry requires a court to (1) identify the religious exercise at issue; and (2) determine whether the Government has placed substantial pressure—i.e., a substantial burden—on the plaintiff to abandon that exercise. Pet.Br.27-28. As Petitioners have explained, where a regulation requires someone to take action that violates her beliefs, the only *legal* inquiries involve the sincerity of those beliefs and the substantiality of the penalties for refusing to act. Pet.Br.29-44.

Here, the Government does not question *whether* Petitioners must act in violation of their beliefs—it concedes they must—but rather asks this Court to examine *why* those actions violate their beliefs. And if the *reason* a compelled action violates an adherent's beliefs is that it would make him complicit in wrongdoing by others, the Government would have this Court hold that RFRA does not apply. This, of course, contravenes the most basic principle of this Court's free-exercise jurisprudence: "Courts should not undertake to dissect religious

beliefs." *Thomas* v. *Review Bd.*, 450 U.S. 707, 714 (1981).

The Government's position also contradicts RFRA's plain text. RFRA protects "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000cc-5(7)(A), 2000bb-2(4) (emphasis added). To be sure, as the term implies, religious "*exercise*" must involve some *action* by the plaintiff (a condition concededly satisfied here). Pet.Br.45-46. But the statute contains no exception for acts motivated by religious theories of moral complicity. To impose purportedly "objective limits," Gov.Br.45, within that definition would write the word "any" out of the statute, curtailing the scope of "religious exercise" without any textual basis.

Imposing artificial limits on the compelled conduct that "counts" under RFRA also "would cast the Judiciary in a role that [it] w[as] never intended to play." *Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439, 458 (1988). By what "objective" standard could courts discern which religiously-motivated acts qualify as "cognizable" instances of religious exercise? Gov.Br.45. Does refusal to flip a light switch on the Sabbath count? Refusal to shave a beard? Refusal to certify completion of pregnancy counseling? *See* 50 Catholic Theologians Amicus Br.13-15. Or, as here, refusal to submit documents or maintain contracts that facilitate wrongdoing? Pet.Br.38-40. No "principle of law or logic" offers any insight. *Emp't Div. v. Smith*, 494 U.S. 872, 887 (1990). Instead, courts would be mired in the inherently religious inquiries this Court has long decried. Pet.Br.41-44.

2. This attempt to outlaw complicity-based religious objections also contradicts decades of precedent. The Government asserts that "petitioners have identified no case vindicating a claim like the one they press here," involving "otherwise unobjectionable act[s]" that would make the plaintiff "complicit in the government's subsequent arrangements with third parties." Gov.Br.26, 41-52. Not so. Pet.Br.32-34.

In *Thomas,* for example, the plaintiff did not inherently object to fashioning steel into cylinders. Rather, he objected because that action was used to make "weapons of war," 450 U.S. at 711, 715—weapons *the Government* would use for objectionable purposes. Likewise, the plaintiff in *Lee* did not inherently oppose paying taxes. He objected because paying the taxes would make him "complicit in the government's subsequent arrangements with third parties"—i.e., the Government would use the taxes to dispense benefits, thereby allowing other Amish to shirk their duties to the elderly. *See United States v. Lee,* 455 U.S. 252, 257 (1982).

Indeed, this Court has never suggested that the basis for a religious objection must somehow inhere in "the nature of the acts required of the religious objector," Gov.Br.45, without any consideration of context or consequences. Such a rule would defy common sense and centuries of moral teaching. Many actions are not "inherently" objectionable, but may become objectionable depending on the circumstances. *Cf.* Former DOJ Officials Amicus Br.4-15 (noting criminal-law examples). Working in a mill is not inherently objectionable, but it might be if done on the Sabbath. *Sherbert v. Verner*, 374 U.S.

398, 399 (1963). Making a donation to a health clinic is not inherently objectionable, but it might be if the clinic performs abortions. Producing a multi-use chemical is not inherently objectionable, but it might be if the chemical is used in lethal injections. *Cf. Glossip v. Gross*, 135 S. Ct. 2726, 2796 (2015) (Sotomayor, J., dissenting). The Government would apparently rule out all these examples, banishing contextual moral reasoning from the realm of religious exercise and radically constricting RFRA's protections.[4]

3. As is typical in religious-objection cases, the Government sets forth a parade of horribles that would supposedly follow were this Court to recognize a substantial burden. Gov.Br.44-50. But the Government's predictions of impending doom "echo[] the classic rejoinder[s] of bureaucrats throughout history," *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006), and rest

[4] The Government unearths the briefs in *Bowen v. Roy*, 476 U.S. 693 (1986), claiming the plaintiffs objected not only to the Government's using their daughter's social-security number, but also to applying for benefits if the Government used that number to administer the benefits. Gov.Br.45-46. As *Lyng*, confirms, however, the entire premise of *Bowen* and its progeny is that the plaintiffs were not "coerced" into doing anything. 485 U.S. at 499; *Bowen*, 476 U.S. at 699 (plaintiff did not object to any "restriction on what he may believe or what he may do"). Unaddressed arguments in the briefs cannot alter these holdings. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) ("Questions which 'merely lurk in the record,' are not resolved."). The Government's reading of *Bowen* also contradicts *Thomas*, *Lee*, and *Hobby Lobby*.

on the flawed contention that Petitioners object to an "opt out." In reality, the only consequence of recognizing a substantial burden here would be to reaffirm the longstanding principle that the Government must satisfy strict scrutiny before forcing citizens to violate their faith. This is hardly "astonishing" or "startling," and is entirely "[]consistent with our Nation's tradition of religious accommodation." Gov.Br.45, 49, 52.

The Government frets over the far-fetched hypothetical of someone who objects to "the [very] act" of objecting to the military draft, Gov.Br.48, but that is dramatically different from this case. Here, the Government is not forcing Petitioners to simply "raise their hand." Instead, it is forcing Petitioners to submit documents and maintain contractual relationships that materially facilitate the Government's regulatory goals. The mandate is thus far more analogous to a law requiring conscientious objectors to perform alternative duties that would likewise violate their beliefs. *See* Military Historians Amicus Br.6-21. Presumably even the Government would concede that forcing objectors to choose between military service and, say, making "turrets for military tanks," *Thomas,* 450 U.S. at 710, could impose a substantial burden on religious exercise, *Lee*, 455 U.S. at 261 n.12 (courts cannot "speculate" whether alternatives would "ease or mitigate the perceived sin of participation"). So too here.

Ultimately, the Government is wrong to assert that there are no "principled limits" on the "rule petitioners urge this Court to adopt." Gov.Br.52. Petitioners merely invoke the rule this Court has long followed: Is the plaintiff coerced to act contrary

to his religious beliefs? Are those beliefs sincere? If so, are the consequences for noncompliance "substantial"? If the answer to these questions is yes, there is a substantial burden on religious exercise.[5] Of course, that does not mean an exemption is required. But it does mean the Government must show that imposing that burden is narrowly tailored to further a compelling interest. The Government may not like that rule, but this is not the proper forum to address the merits of Congress's policy choice in enacting RFRA.

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Cases touching on issues of great controversy, "like hard cases[,] make bad law." *N. Sec. Co. v. United States,* 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting). In such circumstances, competing considerations "exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." *Id.* There is no doubt

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[5] No precedent is to the contrary. In *Tony & Susan Alamo Foundation v. Secretary of Labor*, the Court simply held that the law did not force employees to violate their beliefs because they objected only to cash wages, and the law allowed in-kind payment. 471 U.S. 290, 303-05 (1985). Likewise, in *Jimmy Swaggart Ministries v. Board of Equalization*, the sales tax "impose[d] no constitutionally significant burden on appellant's religious practices," because the plaintiff "never alleged" that paying the tax "violates its sincere religious beliefs." 493 U.S. 378, 392 (1990). And in *Braunfeld v. Brown*, 366 U.S. 599 (1961), the law was "saved" only because it was necessary to protect a "strong state interest." *Sherbert*, 374 U.S. at 408.

that this case touches on issues of great controversy. But it is equally beyond doubt that in holding that the Government does not substantially burden religious exercise when it "directly compel[s]" citizens to violate their faith, the courts below twisted the well-settled substantial-burden standard beyond all recognition. *Sherbert*, 374 U.S. at 403; *RCAW*.Pet.App.257a n.3 (Kavanaugh, J., dissenting). This Court should not follow their lead.

II. THE MANDATE IS NOT THE LEAST-RESTRICTIVE MEANS OF FURTHERING A COMPELLING INTEREST

RFRA has substantive and procedural components. Both embody the high value this Nation places on the free exercise of religion. Substantively, RFRA allows the Government to force citizens to violate their beliefs only in furtherance of a compelling need, and only if that need cannot be met in a less burdensome way. Procedurally, RFRA reflects these values by requiring a rigorous, evidence-based analysis before the Government may coerce compliance. To be sure, if the Government meets that burden, it may compel a violation of conscience. But the citizenry at large—including those forced to violate their beliefs—has the benefit of knowing that the Government imposed that harm only after exhausting all other avenues. That, in and of itself, serves an important value, regardless of the substantive outcome.

Here, the Government has failed on both counts. Substantively, the mandate is both "seriously underinclusive [and] seriously overinclusive," *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741-42 (2011). It is underinclusive because it is riddled with

exemptions that belie the claim that enforcing the mandate against Petitioners is necessary to protect a compelling interest. And it is overinclusive because it intrudes on Petitioners' religious exercise without using or even meaningfully considering less-restrictive alternatives. But just as importantly, the mandate fails RFRA's procedural requirements: far from conducting the rigorous, evidence-based analysis RFRA demands, the Government provided no evidence on critical elements of its case, summarily dismissing Petitioners' concerns. In so doing, the Government failed to accord religious freedom the status to which it is entitled in our system of governance.

A. The Mandate Is Seriously Underinclusive

1. A law is underinclusive if it fails to prohibit other "allegedly harmful conduct," thus undermining any claim that denying a *religious* exemption is "genuinely" necessary to protect "an interest 'of the highest order.'" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 578-79 (1993) (O'Connor, J., concurring). Here, the Government cannot explain why it can exempt Catholic Charities of Erie but somehow cannot exempt Catholic Charities of Pittsburgh. Pet.Br.58-61. Nor can it explain why it exempts many "religious employers" that *do not object* to contraceptive coverage, but has a "compelling" need to deny an exemption for religious nonprofits that *do* object. Pet.Br.61. These irrationalities reflect the opposite of the careful tailoring strict scrutiny requires. Knights of Columbus Amicus Br.4-22.

Until the Government filed its brief, it had *always* maintained that the "religious employer" exemption did not "undermine [its] compelling" interests because "[h]ouses of worship and their integrated auxiliaries" "are more likely" "to employ people" who share their objection to "contraceptive services." 78 Fed. Reg. at 39,887; *see also* 80 Fed. Reg. at 41325; 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012). The Government asserted that justification throughout this litigation, in *Hobby Lobby*, [6] and when it "finaliz[ed]" the exemption. 78 Fed. Reg. at 39,874, 39,887. The Government now attempts to disavow that reasoning, Gov.Br.69-71, but it is too late. "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). And here, the Government cannot produce a shred of evidence that "religious employers" are more likely to hire co-religionists than non-exempt religious nonprofits. Pet.Br.67-68; *infra* p.33.

The Government's current claim that the exemption reflects a "long tradition" of respecting a "special sphere of autonomy" solely for "houses of worship" is equally flawed. Gov.Br.28, 67. This crabbed understanding of religious autonomy—which would limit religious exercise to the freedom to worship, rather than the freedom to *practice* one's faith, J.A.71-73 (Cardinal Dolan testimony)—is not

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[6] *E.g.*, Defs. Opp'n at 25 n.13, *Zubik v. Sebelius*, No. 12-cv-00676 (Oct. 15, 2012) (Dkt. 48); Pet.Br.52 ("Gov.HL.Br."), *Hobby Lobby* 134 S. Ct. 2751 (Jan. 10, 2015), 2014 WL 173486.

based on any tradition of *conscience protection*, but rather on an obscure paperwork provision buried in the tax code, 26 U.S.C. § 6033(a)(3)(A)(i) & (iii). That provision was never intended to demarcate any sphere of religious autonomy, or to identify the types of entities protected from Government coercion. *See* Dominican Sisters Amicus Br.5-18. Instead, it was designed to reduce administrative hassle by excusing churches from filing unnecessary tax returns. *Id.* Although other religious nonprofits must file returns, they qualify for *the same tax exemption* churches receive. Cato Inst. Amicus Br.18. Thus, if anything, § 6033(a)(3)(A) suggests that once Petitioners give notice of their objection, they should receive the same treatment as "religious employers."

The Government's view of religious autonomy appears to be based not on any "longstanding" tradition, but on litigation tactics. Only two years ago—when litigating against for-profit corporations—the Government described a "special solicitude for the rights of *religious organizations*," broadly defined to include "churches *and other religious non-profit institutions*." Gov.HL.Br.20 (emphases added). As the Government understood then, such "organizations" have long enjoyed the "autonomy to shape their own missions, conduct their own ministries, and generally govern themselves in accordance with their own doctrines." Gov.HL.Br.52; 207 Members of Congress Amicus Br.13-15.

Notably, to illustrate the types of "religious organizations" entitled to special solicitude, the Government pointed to "Title VII's exemption for religious employers," which broadly grants

"'autonomy'" for *religious nonprofits*—not merely churches—"'in ordering their internal affairs.'" Gov.HL.Br.20, 52-53. In fact, in the very case the Government cites in support of its newly restrictive position, Gov.Br.67-68, the defendant was a religious *school*, and this Court broadly recognized a "special solicitude [for] the rights *of religious organizations*." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (emphasis added); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834 (6th Cir. 2015) ("special solicitude" not limited to "a church, diocese, or synagogue," but includes those whose "mission is marked by clear or obvious religious characteristics").

The Government now claims to have relied on § 6033(a)(3)(A) because it supplied "a bright line that was already statutorily codified and frequently applied." Gov.Br.71. But the same is true of the Title VII exemption, for which all Petitioners qualify. That exemption has existed for fifty years, provides a "statutorily codified" line, and was actually *designed* to respect the autonomy of religious organizations. By refusing to adhere to that traditional standard, the Government placed Petitioners in a peculiar position: Congress, via Title VII, allows them to require their employees to *be* Catholic, but the mandate, promulgated by agencies, forces Petitioners to offer those same employees health plans that come with "seamless" coverage that violates Catholic teachings.

The Government nevertheless contends that it would be "perverse" to hold that "an exemption for houses of worship" requires an exemption for other religious nonprofits. Gov.Br.68. But there is nothing

"perverse" about questioning whether the Government has a "compelling" need to deny one religious exemption while granting another. Indeed, that is exactly what this Court did in *O Centro*, concluding that an exemption allowing Native Americans to use peyote undermined any compelling need to deny a similar exemption for Christian Spiritists to use hoasca. 546 U.S. at 433. Just as in that case, "[e]verything the Government says" here about exempt religious employers "applies in equal measure to" religious nonprofits like Petitioners. *Id.* It is thus "difficult to see how" the Government can "preclude any consideration of a similar exception for" Petitioners. *Id.*

2. The Government also cannot explain its need to enforce the mandate against Petitioners given the grandfathering exemption that applies to tens of millions of people, and Congress's decision *not* to include contraceptive coverage among the "'particularly significant'" protections grandfathered plans *must* provide. Pet.Br.7, 61-62.

Despite the President's promise, the Government insists that grandfathering is "temporary and transitional." Gov.Br.63. But "there is no legal requirement that grandfathered plans ever be phased out." *Hobby Lobby*, 134 S. Ct. at 2764 n.10. And employers may add employees to grandfathered plans and adjust costs based on medical inflation. Pet.Br.7. These are not the hallmarks of "temporary" exemptions.

In any event, it is not merely the duration or size of an exemption that matters, but the reasons for it. Many laws have exemptions, and those exemptions do not always undermine the Government's interest

in enforcing those laws. Gov.Br.62. "Even a compelling interest may be outweighed in some circumstances by another even weightier consideration." *Hobby Lobby*, 134 S. Ct. at 2780. Here, however, the grandfathering exemption serves nothing more than a desire to "avoid[]" administrative "inconvenience," *id.*, or "undue disruption." Gov.Br.63. If the Government's interests can be outweighed by such mundane considerations, they surely are outweighed by Petitioners' interest, enshrined in RFRA, in not being forced to violate their beliefs. The Government has cited exemptions in Title VII to argue the contrary. But given the Government's compelling interest in eliminating racial discrimination, it is inconceivable that Congress would adopt a "grandfathering" option allowing discriminatory hiring policies to continue indefinitely as long as they remain unchanged. That, however, is precisely what the grandfathering provision does here.

3. The Government's interest in enforcing the mandate against Petitioners with self-insured church plans is further undermined because it concededly cannot compel their TPAs to provide the mandated coverage. While the Government maintains that it can have "a compelling interest in a program that relies in part on voluntary participation," Gov.Br.60, this Court must assess "the marginal interest in enforcing the contraceptive mandate" against each Petitioner. *Hobby Lobby*, 134 S. Ct. at 2779. And that interest is greatly diminished where the Government cannot guarantee—and certainly offers no evidence—that contraceptive coverage will be provided. *See Brown*, 131 S. Ct. at 2739 (Government

"bears the risk of uncertainty"). Ultimately, church-plan Petitioners—which include most Petitioners here—cannot be forced to violate their beliefs where it is entirely speculative whether the Government's interest will be advanced *at all*.

B. The Mandate Is Seriously Overinclusive

The Government has also failed to show that forcing Petitioners to violate their beliefs is "actually necessary," *id.* at 2738, because it "can readily arrange for other methods of providing contraceptives, without cost sharing, to employees" of religious objectors, *Hobby Lobby*, 134 S. Ct. at 2781 n.37. The Government's refusal to meaningfully consider these "other methods"—which it routinely employs for the health-care needs of millions of Americans, and which would not force Petitioners to violate their faith, Pet.Br.3, 82—is not the "serious, good faith consideration" of workable alternatives RFRA requires. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2420 (2013).

1. The Government depicts Petitioners' proposals as "radically different alternatives" requiring a fundamental reordering of the "existing regulatory regime." Gov.Br.84. Petitioners, however, propose only minor modifications to "existing, recognized, workable, and already-implemented" programs. *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

Most obviously, if the employees of a religious objector want contraceptive coverage, the Government can treat them the same way it treats the millions of employees without employer-based coverage: allow them to sign up for subsidized plans

on the existing network of Affordable Care Act (ACA) exchanges. Pet.Br.77-80. Amidst all its bluster about "new government-administered benefit" programs, Gov.Br.73, the Government appears to have forgotten that it spent the better part of the last six years and pledged "more than $1.3 trillion," *Hobby Lobby*, 134 S. Ct. at 2781, to establish a system of "real simple" "website[s] where you can compare and purchase affordable health insurance plans, side-by-side, the same way you shop for a plane ticket on Kayak [or] a TV on Amazon."[7] Petitioners merely ask the Government to *use*, not "depart from," the "comprehensive statutory framework adopted in the [ACA]." Gov.Br.73.

Indeed, twelve pages before dismissing this proposal, Gov.Br.77-78, the Government *endorsed* the exchanges as a means for small-business employees to access cost-free contraceptive coverage. Gov.Br.65; Pet.Br.77-78. If the exchanges adequately further the Government's interest for the "34 million workers" employed by small businesses, *Hobby Lobby*, 134 S. Ct. at 2764, it is impossible to understand why they are somehow inadequate for those who choose to enroll in Petitioners' health plans. Pet.Br.79.

The Government contends that employees who want contraceptives would have to pay the "cost of those policies entirely out of pocket." Gov.Br.82. But that is no different than the situation facing millions

[7] Remarks by the President, White House Office of the Press Sec'y (Sept. 26, 2013), https://www.whitehouse.gov/the-press-office/2013/09/26/remarks-president-affordable-care-act.

of individuals on grandfathered plans, or plans sponsored by religious employers. And the Government can fully mitigate that concern by offering subsidies as it does for people whose employers do not offer health plans. *See* Pet.Br.11, *Dep't of HHS v. Florida*, No. 11-398 (U.S. Jan. 6, 2012) ("on average," federal subsidies "will cover nearly two-thirds of the premium" for an exchange-based plan), 2012 WL 37168. In fact, the Government previously informed this Court that its interests would be satisfied if religious objectors dropped coverage altogether, sending *all* of their employees to the exchanges "where many would qualify for subsidies." Gov.HL.Br.57. By comparison, allowing Petitioners to continue offering religiously-sponsored plans would be far *better* for their employees, because it would allow them to *choose* whether to stay on their current plans or go to the exchanges.

The Government protests that requiring it to shoulder these costs is "scarcely a reasonable proposal," Gov.Br.82, but *this Court* explained that "[t]he most straightforward way" of providing the mandated coverage would be "for the Government to assume the cost," 134 S. Ct. at 2780. "Speaking bluntly, RFRA makes the Government put its money where its mouth is." *EWTN, v. Dep't of HHS*, No. 14-12696, 2016 WL 659222, at *51 (11th Cir. Feb. 18, 2016) (Tjoflat, J., dissenting). The Government can hardly claim to be pursuing an interest of the highest order when it imposes an unfunded mandate, and then balks when it might have "to expend additional funds to accommodate citizens' religious beliefs." 134 S. Ct. at 2781.

These protestations ring particularly hollow because "the Government is *already* committed to fund the contraceptive mandate" through the "accommodation." *EWTN*, 2016 WL 659222, at *51 (Tjoflat, J., dissenting). In 2014, the Government paid 115% of the costs "for making contraceptive coverage available to more than 600,000" people. Gov.Br.18-19; Pet.Br.12-13. Under Petitioners' proposal, the Government need only subsidize the subset of individuals who seek contraceptive coverage yet choose to enroll in health plans sponsored by a small fraction of religious nonprofits that conspicuously object to the so-called "accommodation." Pet.Br.63-65, 78-79. The cost of these subsidies plainly would be less than the cost of forcing religious objectors to drop their health plans to avoid violating their beliefs, which could leave *all* of their beneficiaries in need of subsidies "to find individual plans on government-run exchanges." *Hobby Lobby*, 134 S. Ct. at 2783; Pet.Br.78.

Regardless, if the Government is looking for cheaper alternatives, Petitioners have proposed several. For example, the Government could authorize and subsidize contraceptive-only policies on the exchanges. Pet.Br.75-77. The Government claims exchanges only offer plans providing "comprehensive coverage," Gov.Br.82-83, but that is false. Federal law authorizes stand-alone plans for pediatric dental care, 42 U.S.C. § 18031(d)(2)(B)(ii), which it deems "essential" coverage, *id.* § 18022(b)(1)(I)-(J). Offering contraceptive-only plans, therefore, would not "fundamentally chang[e] the type of coverage available on the Exchanges," Gov.Br.82-83, but would instead make contraceptive

coverage available in the same way as another "essential" benefit.

Alternatively, the Government could use tax incentives to refund the cost of contraceptive services. Pet.Br.81. For example, it could issue cards allowing employees of religious objectors to easily obtain free contraceptives from pharmacies or physicians, and then allow the *pharmacies or physicians* to obtain reimbursement via tax credits. EPPC Amicus Br 28-29. Or the Government could modify and further subsidize existing programs such as Title X, Medicare, or Medicaid. Pet.Br.80-81. With respect to the latter, the Government acknowledges that obtaining contraceptives through "Medicaid or another government program" places employees of small businesses on an equal footing with those receiving that coverage through employer-based plans. Gov.Br.65. And one of the Government's amici has suggested that Title X clinics are particularly effective at providing access to contraceptives. Knights of Columbus Amicus Br.31 (citing Guttmacher Institute report). There is no evidence suggesting such programs would not be similarly effective for Petitioners' employees.

2. The Government's primary objection to these proposals is that access to contraceptive coverage would not be "seamless." Gov.Br.73-76. Specifically, the Government rejects any alternative that would require individuals to "seek out or sign up for a new program" or that might create "'minor obstacles to obtaining contraception.'" Gov.Br.74.

To adopt this standard would eviscerate the least-restrictive-means test. As this Court has explained, "[i]t is no response that [Petitioners' proposed

alternatives would] require[individuals] to take action, or may be inconvenient, or may not [work] perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume [that individuals], given full information, will fail to act." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 824 (2000); Pet.Br.69-72.

Here, not a scintilla of evidence supports the Government's claim that individuals would be "dissuade[d]" from obtaining *free* contraceptive coverage if they simply had to "learn about," and "sign up for," a free benefit apart from a religiously-sponsored plan. Gov.Br.74. Indeed, the Government expressly declined the *Zubik* district court's invitation to supplement the record on this issue, instead relying on ipse dixit in the Federal Register. Pet.Br.74.

The Government now claims that "IOM's expert judgment" reveals that "logistical" or "administrative hurdles" would have a "deterrent effect." Gov.Br.74. The IOM Report, however, states only that "cost sharing"—which Petitioners' proposals likewise eliminate—can be a "barrier to effective contraception." Gov.Br.74. It says nothing about the "minor" "administrative" steps at issue here. Pet.Br.70-71. And without evidence, the "the relative efficacy" of a less-restrictive alternative cannot be established through "conclusory statement[s]." *Playboy*, 529 U.S. at 822.

Moreover, the Government's argument makes no intuitive sense. Nowhere does the Government explain how these alleged "obstacles" are any more onerous than those facing millions of people who

"take steps to learn about, and to sign up for" policies on federal exchanges—a process the Government elsewhere describes as "'easy and fast,'" CNS Amicus Br.16-17—or for "Medicaid or []other government program[s]." *Compare* Gov.Br.65, *with* Gov.Br.74. Nor does the Government discuss how these "burdens" differ from those confronting countless employees who "take steps to learn about, and to sign up for" separate dental, vision, and health coverage under employer-based plans. Pet.Br.75-76. In fact, elsewhere, the Government concedes that giving employees "two insurance cards, one for contraceptive benefits, and one for other benefits … would [not] constitute a barrier to accessing … contraceptive services." 80 Fed Reg. at 41,328. Ultimately, if Petitioners' proposed alternatives are adequate for employees of small business, employees of "religious employers," employees on grandfathered plans, the self-employed, and the unemployed, it is inexplicable why these alternatives suddenly become *inadequate* for Petitioners' employees.

3. The Government further contends that it lacks statutory authority to implement these alternatives, and questions whether RFRA could ever contemplate a less-restrictive means requiring "congressional action." Gov.Br.79-84. This claim that RFRA enacted some "water[ed] down" version of strict scrutiny, *Smith*, 494 U.S. at 888, is doubly wrong.

As an initial matter, RFRA cannot give agencies a free hand to impose substantial burdens simply because proposed alternatives exceed their statutory authority. While the Government claims that the mandate confers a "statutory benefit," Gov.Br.28, it

was agencies, not Congress, that both defined "preventive services" to include contraceptive coverage, and then decided that Petitioners' free-exercise rights were not important enough to warrant an exemption. Pet.Br.5-9. Had Congress itself imposed the mandate, RFRA would necessarily require consideration of legislative alternatives. And it cannot be that an agency's rulemaking is subject to less scrutiny than a congressional enactment.

Moreover, the least-restrictive-means test has *always* been understood to consider legislative alternatives. *E.g.*, *Ashcroft v. ACLU*, 542 U.S. 656, 669 (2004); *Playboy*, 529 U.S. at 823-24. And that is the precise test Congress adopted in RFRA when it required "the Government" to use the "least restrictive means," and defined "the Government" to include any "branch … of the United States." 42 U.S.C. §§ 2000bb-1(b); 2000bb-2(1). Consequently, "if the Government *as a whole* has a less-restrictive alternative available, the Government must use it." *EWTN*, 2016 WL 659222, at *52 (Tjoflat, J., dissenting). Indeed, even when applying *intermediate* scrutiny, this Court routinely considers less-restrictive alternatives that require legislation. *E.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371-72 (2002) (proposing alternative legislation); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality opinion) (less-restrictive alternatives include "increased taxation").[8]

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[8] Of course, RFRA plaintiffs cannot prevail simply by pointing to "some imaginable new governmental program," Gov.Br.79, since the creation of a "whole new program" can impose "burden[s] on the Government" that make it too

In any event, the Government's newfound modesty regarding the scope of its regulatory authority is perplexing. For example, while the Government claims that exchange subsidies are limited to "individuals whose employers do *not* offer coverage," Gov.Br.82, the cited provision indicates that employees are subsidy-eligible if their employer does not offer "minimum essential coverage." 26 U.S.C. § 36B(c)(2)(B); *id.* § 5000A(f)(1) (defining minimum essential coverage to include employer-sponsored plans). Using its broad power to implement the ACA's subsidy provisions, 26 U.S.C. §§ 36B(g), 7805; 42 U.S.C. § 18081, the Government could determine that for subsidy-eligibility purposes, a plan does not provide "minimum essential coverage" if it excludes contraceptive coverage. Alternatively, the Government could conclude that such coverage is not "affordable" or does not "provide minimum value." 26 U.S.C. § 36B(c)(2)(C). Or, as under the "accommodation," it could lower the exchange fees it charges insurance companies, enabling them to offer reduced-rate plans (or contraceptive-only plans) to employees of religious objectors. 45 C.F.R. § 156.50(d). Likewise, the Government could interpret Title X's income-based requirements to ensure that the inability to afford contraceptives due to

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(continued…)

"difficult to accommodate" the plaintiff's request, *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). But here, the basic "mechanism[s]" for implementing Petitioners' proposals are "already in place," *id.*, and the Government submitted no evidence that these proposals are unworkable, *infra* p.34.

enrollment in a religious objector's health plan qualifies as an "economic status" warranting priority consideration for free contraceptives. 42 U.S.C. § 300a-4; Pet.Br.80-81; *cf.* 42 C.F.R. § 59.2 (interpreting "low-income families" preference to include "unemancipated minors who wish to receive [contraceptive] services" confidentially). The Government routinely defends far more aggressive assertions of executive power. *E.g.*, *United States v. Texas*, No. 15-674; *Michigan v. E.P.A.*, 135 S. Ct. 2699 (2015); *King v. Burwell*, 135 S. Ct. 2480 (2015).

C. The Government Has Not Met Its Evidentiary Burden

As the Solicitor General recently explained, the Government cannot satisfy strict scrutiny through "unsubstantiated statement[s]." U.S.Amicus.Br.17, *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (No. 13-6827), 2014 WL 2329778. Rather, it must "offer *evidence* … 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.* Such "explanation[s must] relate to the specific accommodation the plaintiff seeks." *Id.* 18. Here, the Government has not even tried to meet this burden.

Lack of Access: The Government's argument hinges on the need to provide cost-free contraceptive coverage to individuals who want but lack it. The Government, however, has provided *no evidence* on key issues necessary to understand the scope of this problem, how much the Government's solution would mitigate it, and, most importantly, how alternative solutions would compare. For example, how many

individuals want but lack such coverage? That number may or may not be quite large, given the size of the grandfathering exemption (it covers 44 million individuals, Pet.Br.7), the number of exempt "religious employers" (there are hundreds of thousands of churches in the United States), the number of individuals who work for small businesses that may provide no insurance (34 million individuals, Pet.Br.79), and the number of unemployed. Of these individuals who want but lack contraceptive coverage, how many work for religious nonprofits that object to the mandate? How much, therefore, will imposing the mandate against these organizations close the gap between those who lack coverage and those who want it? Even if the Government could muster some modicum of evidence on the foregoing, it certainly has put forth no evidence on whether it could achieve comparable results through less-restrictive alternatives, as it conducted no analysis on the workability of those alternatives *at all*.

To pick at just one thread, the Government has yet to show that a single individual on Petitioners' health plans wants but lacks access to contraceptives, and the *Zubik* district court found that the only evidence in the record is to the contrary. J.A.159, 174-75, 180; *Zubik*.Pet.App.120a. The Government is thus proceeding on the unsubstantiated assumption that large numbers of individuals who choose to enroll in health plans sponsored by organizations like Priests *for Life* not only want coverage for abortifacients and contraceptives, but are also willing to have the Government compel their employer to violate its

religious beliefs to obtain that coverage. Pet.Br.63-65. Perhaps so. But for the same reason one does not walk into a kosher butcher shop and demand a side of bacon, that conclusion is hardly intuitive. The Government needs *evidence*: it cannot compel religious objectors to violate their beliefs based on "what [it] thinks [people] *ought* to want," *Brown*, 131 S. Ct. at 2741.[9]

Self-insured Church Plans: The Government's evidentiary case collapses further regarding self-insured church plans. The Government concedes it cannot require church-plan TPAs to provide the objectionable coverage, and must rely on "financial incentives" to lure them in. Gov.Br.35 n.13. What evidence has the Government provided that this will be effective?

Types of Employees: The Government has consistently defended limiting the "religious employer" exemption to "houses of worship" on the ground that their employees are "more likely to share" their employers' religion. *Supra* p.17. As shown, that is sheer speculation. Pet.Br.67-68. And this case belies that claim, since the Government exempts entities (like Catholic Charities of Erie) that

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[9] No "intrusive" inquiry into employees' contraceptive preferences is required, Gov.Br.59, but the Government must show—via survey, study, or otherwise—that individuals who choose to enroll in health plans sponsored by organizations that "hold[themselves] out as" religious, 26 C.F.R. § 54.9815-2713A(a)(2), would be "harm[ed by the] grant[of] specific exemptions," *O Centro*, 546 U.S. at 430-31. Here, it has adduced *no* evidence.

are *indistinguishable* from non-exempt entities (like Catholic Charities of Pittsburgh).

Administrative Burdens: The Government likewise argues that any alternative other than commandeering Petitioners' health plans would impose "logistical[] and administrative hurdles" that would "dete[r]" individuals from obtaining contraceptive coverage. Gov.Br.74. But again, this is rank speculation: the Government has provided *no evidence* for this deterrent effect, much less how large it would be or whether it could be offset in other ways (i.e., subsidies, penalties, or education). *Supra* p.26-28.

Cost: The Government also contends Petitioners' proposals would be prohibitively expensive. Gov.Br.82. But again, it has submitted no evidence: no "estimate[s] of the average cost per employee of providing access," no figures on how many employees would be affected, and no approximation of the cost of Petitioners' alternatives. *Hobby Lobby*, 134 S. Ct. at 2780. Without such evidence, the Government's claim is impossible to evaluate.

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The respect this Court and Congress have afforded religious liberty requires the Government to proceed with care and to rely on actual evidence before demanding that citizens violate their beliefs. Here, the Government has made no effort to carry this burden. *Fisher*, 133 S. Ct. at 2421.

CONCLUSION

The decisions below should be reversed.

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