No. 14-20112

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EAST TEXAS BAPTIST UNIVERSITY; HOUSTON BAPTIST UNIVERSITY,

Plaintiffs – Appellees

WESTMINSTER THEOLOGICAL SEMINARY,

Intervenor Plaintiff – Appellee

v.

SYLVIA MATTHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the United States Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the United States Department of Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF TREASURY,

Defendants – Appellants

Consolidated with 14-10241

UNIVERSITY OF DALLAS,

Plaintiff – Appellee

v.

SYLVIA MATTHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of

the United States Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the United States Department of Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF TREASURY,

Defendants – Appellants

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consolidated w/ 14-40212

CATHOLIC DIOCESE OF BEAUMONT; CATHOLIC CHARITIES OF SOUTHEAST TEXAS, INCORPORATED,

Plaintiffs – Appellees

v.

SYLVIA MATTHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the United States Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the United States Department of Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF TREASURY,

Defendants – Appellants

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consolidated w/ 14-10661

CATHOLIC CHARITIES, DIOCESE OF FORT WORTH, INCORPORATED,

Plaintiff – Appellee

v.

SYLVIA MATTHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the United States Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the United States Department of Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF TREASURY,

Defendants – Appellants.

On Appeal from the United States District Courts for the
Northern District of Texas,
the Southern District of Texas, and the Eastern District of Texas

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**BRIEF OF PLAINTIFFS-APPELLEES
EAST TEXAS BAPTIST UNIVERSITY AND
HOUSTON BAPTIST UNIVERSITY**

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RULE 28.2.1 CERTIFICATE OF INTERESTED PERSONS

(1) Appeal No. 14-20112, *East Texas Baptist University et al. v. Sylvia Matthews Burwell, et al.*

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

American Civil Liberties Union (Amicus Curiae)

American Civil Liberties Union of Texas (Amicus Curiae)

Americans United for Separation of Church and State (Amicus Curiae)

Megan Barbero (counsel for Defendants-Appellants)

Daniel Blomberg (counsel for Plaintiffs-Appellees)

Sylvia Matthews Burwell (Secretary of Health and Human Services; Defendant-Appellant)

Becket Fund for Religious Liberty (counsel for Plaintiffs-Appellees)

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Houston Baptist University (Plaintiff-Appellee)

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/s/ *Eric C. Rassbach*
Eric C. Rassbach
Attorney of record for Plaintiffs-Appellees East Texas Baptist University and Houston Baptist University

Dated: November 19, 2014

STATEMENT REGARDING ORAL ARGUMENT

Appellees East Texas Baptist University and Houston Baptist University respectfully request oral argument in this appeal. Appellees believe oral argument would be helpful because this appeal presents issues of exceptional importance currently pending before this and several other circuits.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and § 1361, as the action arose under the Constitution and laws of the United States. ROA 14-20112.300. The district court had jurisdiction to render declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 2000bb-1. *Id.*

The district court granted summary judgment for ETBU, HBU, and Westminster Theological Seminary on December 27, 2013, and issued a permanent injunction. ROA.14-20112.2314-2316. On January 21, 2014, the district court entered partial final judgment for Plaintiffs. ROA.14-20112.2325-2326. Defendants filed a timely notice of appeal on February 24, 2014. ROA.14-20112.2333.

This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Does the government's contraceptive mandate substantially burden the religious exercise of East Texas Baptist University and Houston Baptist University?

If so, is the government's interest in applying the mandate to the Universities compelling?

Is the specific application of the mandate against the Universities the least restrictive means available to the government to achieve its interest in delivering four forms of contraceptives to the Universities' employees?

STATEMENT OF THE CASE

I. East Texas Baptist University

East Texas Baptist University ("ETBU") is a Christian university that exists to "prepare students to accept the obligations and opportunities to serve humanity and the Kingdom of God." ROA.14-20112.463 (URE3). Located in Marshall, Texas, ETBU is affiliated with the Baptist General Convention of Texas. *Id.* ETBU's Christian identity informs all aspects of its community. ETBU's motto is "A World of Opportunity in a Community of Faith," and it lives out that motto by serving over 1,250 students in 30

undergraduate degree programs and 4 graduate degree programs. *Id.* As a Christian school, ETBU employs "administrators, academic officers, faculty, and staff who have a personal relationship with Christ, who are familiar with truth as revealed in the Bible, who live out this truth in the presence of others, [and] who can create an environment where Christ is lived out in the life of the individual" in both "their initial and continuing employment[.]" ROA.14-20112.464 (URE4). ETBU is governed by a 36-member Board of Trustees, all of whom must be active members of Baptist churches. *Id.*

ETBU holds and follows traditional Christian beliefs about the sanctity of life. It believes that Scripture calls Christians to uphold the God-given worth of human beings, as the unique image-bearers of God, from conception to death. ROA.14-20112.522 (URE20). ETBU affirms that "[w]e should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death." ROA.14-20112.465 (URE5). ETBU believes and teaches that abortion ends a human life and is a sin. ROA.14-20112.466 (URE6).

It is undisputed that it would violate ETBU's teachings and beliefs for ETBU to provide insurance for, fund, sponsor, underwrite, or otherwise facilitate access to abortion-inducing drugs, abortion procedures, and related services. ROA.14-20112.466 (URE6). Specifically, ETBU has a sincere religious objection to covering the emergency contraceptive drugs Plan B, Ella, and certain abortifacient IUDs. *Id*. ETBU believes that those drugs and devices could prevent a human embryo—including specifically an unimplanted fertilized egg—from implanting in the wall of the uterus, causing the death of the embryo. *Id*. Similarly, ETBU cannot deliberately provide health insurance that would facilitate access to abortion-causing drugs, abortion procedures, and related services, even if those items were paid for by an insurer or a third-party administrator and not by ETBU. ROA.14-20112.466-67 (URE6-7).

ETBU's religious convictions also require it to provide for the well-being and care of the employees who further its mission and make up an integral part of its community. ROA.14-20112.467 (URE7). Consistent with these religious beliefs, ETBU's employee

health insurance plans do not cover abortions or emergency contraception such as Plan B, Ella, or abortion-causing IUDs. *Id.* ETBU is self-insured. ROA.14-20112.468 (URE8). Because it is self-insured, ETBU controls the terms of its plan, and its TPA administers the plan according to those terms.

II. Houston Baptist University

Houston Baptist University ("HBU") is a Christian liberal arts university located in Houston, Texas. ROA.14-20112.521 (URE19). Founded by the Baptist General Convention of Texas, and connected with the Southern Baptist Convention, its Christian roots are a part of its identity. *Id.* HBU's "central confession" is "Jesus Christ is Lord." *Id.* HBU educates over 2,800 students in 33 undergraduate degree programs and 15 graduate degree programs. *Id.*

As a part of its mission to "express Christ's Lordship," HBU's bylaws provide that "'all those who become associated with [HBU] as a trustee, officer, member of the faculty or of the staff, and who perform work connected with the educational activities of the University, must believe in the divine inspiration of the Bible . . .

Jesus Christ, our Lord and Savior, as the Son of God, that He died for the sins of all men and thereafter arose from the grave, that by repentance and the acceptance and belief in Him, by the grace of God, the individual is saved from eternal damnation and receives eternal life in the presence of God . . . .'" ROA.14-20112.521-22 (URE19-20).

Like ETBU, HBU holds and follows traditional Christian beliefs about the sanctity of life. ROA.14-20112.522-23 (URE20-21). HBU believes that Scripture calls Christians to uphold the God-given worth of human beings, as the unique image-bearers of God, from conception to death. ROA.14-20112.522 (URE20). HBU affirms that "'[w]e should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death.'" ROA.14-20112.523 (URE21). HBU believes and teaches that abortion ends a human life and is a sin, and accordingly expects all of its faculty to affirm and teach these beliefs. *Id.*

Consequently, it is a violation of HBU's teachings and religious beliefs to deliberately provide insurance coverage for, fund, sponsor, underwrite, or otherwise facilitate access to abortion-inducing

drugs, abortion procedures, and related services. *Id*. Specifically, HBU has a sincere religious objection to covering Plan B, Ella, and abortion-causing IUDs. ROA.14-20112.524 (URE22). HBU believes that those drugs could prevent a human embryo—which it understands to include an unimplanted fertilized egg—from implanting in the wall of the uterus, causing the death of the embryo. *Id*. It is similarly a violation of HBU's beliefs to deliberately provide health insurance that would facilitate access to abortion-causing drugs, abortion procedures, and related services, even if those items were paid for by an insurer or third-party administrator and not by HBU. *Id*.

It is also a part of HBU's religious convictions to provide for the well-being and care of the employees who further its mission and make up an integral part of the community. ROA.14-20112.525 (URE23). Consistent with these religious beliefs, HBU's employee health insurance plans do not cover abortions or emergency contraception such as Plan B, Ella, or abortion-causing IUDs. ROA.14-20112.524-25 (URE22-23). HBU cannot, in good

conscience, participate in the mandate. ROA.14-20112.522 (URE20).

HBU's health benefits plan ("plan") is provided through GuideStone Financial Resources of the Southern Baptist Convention ("GuideStone"). ROA.14-20112.525 (URE23). GuideStone's mission is "to assist churches, denominational entities, and other evangelical ministry organizations by making available" a variety of retirement, investment, and insurance programs. ROA.14-20112.566 (URE33). Although GuideStone provides preventive services—including most FDA-approved contraceptives—without cost sharing, GuideStone "does not provide coverage for abortions and abortion-causing drugs, as this violates [its] Biblical convictions on the sanctity of life." ROA.14-20112.564. GuideStone is a church plan. ROA.14-20112.525 (URE23).[1] A "church plan" is a benefit plan established by a church or a convention or association of churches covering employees of the

[1] GuideStone is currently a plaintiff in a separate case challenging the mandate. That case is pending on appeal at the Tenth Circuit. *See Reaching Souls Int'l, Inc. v. Burwell*, No. 14-6028 (10th Cir., oral argument scheduled for Dec. 8, 2014).

church or convention of churches (or organizations controlled by or associated with the church or convention or association of churches). *See* 29 U.S.C. § 1002(33). Unless they choose otherwise, church plans are exempt from regulation under ERISA. 29 U.S.C. § 1003(b)(2). HBU's plan is not grandfathered. ROA.14-20112.526 (URE24).

III. The mandate

The Affordable Care Act requires coverage for certain preventive services for women without "any cost sharing." 42 U.S.C. § 300gg-13(a)(4). HHS in turn consulted the Institute of Medicine, a nonprofit group of volunteer advisers, to determine which preventive services to require. 77 Fed. Reg. 8725-01, 8726 (Feb. 15, 2012)). HHS adopted the Institute's recommendations, including all FDA-approved contraceptives and sterilization procedures. *Id.* This included abortifacient "emergency contraception" such as Plan B (the "morning-after" pill) and ella (the "week-after" pill). ROA.14-20112.587. According to HHS, such drugs and devices "may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus." *Burwell v.*

Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2754 (2014). ROA.14-20112.587-88.

Unless an employer is exempted from providing this coverage, failure to provide it triggers a "substantial" penalty. *Hobby Lobby*, 134 S. Ct. at 2775. A non-exempt employer who offers group health insurance that does not include the mandated coverage is "required to pay $100 per day for each affected 'individual.'" *Id.* at 2762 (citing 26 U.S.C. § 4980D(b)(1)). And if the non-exempt employer ceases "providing health insurance altogether . . . the employer must pay $2,000 per year for each of its full-time employees." *Id.* at 2762 (citing 26 U.S.C. § 4980H(c)(1)).

IV. "Exempt" employers

Congress and HHS have completely exempted "a great many employers from most of [the Affordable Care Act's] coverage requirements"—including the mandate. *Hobby Lobby*, 134 S. Ct. at 2763-34.

First, to save employers "the inconvenience of amending an existing plan," *id.* at 2780, Congress specifically exempted "grandfathered" plans which "have not made specified changes

after" March of 2010. *Id.* at 2764 (citing 42 U.S.C. § 18011 (2010)). Even grandfathered plans must still "provide what HHS has described as 'particularly significant protections,'" but the mandate is not one of those protections. *Hobby Lobby*, 134 S. Ct. at 2780 (quoting 75 Fed. Reg. 34538-01, 34540 (June 17, 2010)). Grandfathered plans cover "tens of millions" of Americans, *id.* at 2764, and may remain grandfathered "indefinitely." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1124 (10th Cir. 2013) (en banc), *aff'd sub nom. Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014).

Congress also exempted "small employers" (employers with fewer than fifty employees), who need not offer health insurance at all. *See Hobby Lobby*, 134 S. Ct. at 2764; 26 U.S.C. § 4980H (c)(2)(A); 26 U.S.C. § 4980D (d). Small employers employ an estimated 34 million Americans. *Hobby Lobby*, 134 S. Ct. at 2764; ROA14.20112.416.

Finally, HHS issued regulations exempting a subset of "religious employers" that are "organized and operate[d]" as non-profit entities and are "referred to in section 6033" of the Internal

Revenue Code. *See* 45 C.F.R. § 147.131(a); *see also* HRSA Woman's Preventive Services Guidelines, http://hrsa.gov/womensguidelines/ (last visited Nov. 19, 2014). This religious exemption covers only institutional "churches, their integrated auxiliaries, conventions and associations of churches," and "the exclusively religious activities of a religious order." *Hobby Lobby*, 134 S. Ct. at 2763. HHS explained that it exempted these religious organizations because it believed they are "more likely than other employers" to hire "people of the same faith" who would be "less likely" to use "contraceptive services." 78 Fed. Reg. 39870-01, 39874 (July 2, 2013). The government has admitted that it does not have any evidentiary basis for that prediction about the religious beliefs of people who work for religious ministries. Dep. Trans. at 34:9-24, *Roman Catholic Archdiocese of N.Y. v. Sebelius*, Doc. 51-1, No. 1:13-cv-00303 (E.D.N.Y. Nov. 12, 2013).

All three types of exempt employers—grandfathered, small business, and religious—are completely exempt from the mandate. Grandfathered employers need only confirm that their healthcare plan qualifies as grandfathered, 26 C.F.R. § 54.9815-1251T(a)(2)

(2010); small businesses may choose not to offer insurance; and exempt "religious employers" need do nothing at all.

V. Non-Exempt employers, EBSA Form 700, and the new rule

Religious entities such as ETBU and HBU—which do not qualify as "religious employers" because they are not integral parts of an institutional church such as a Catholic diocese or Methodist congregation—sought an exemption. ROA.14.20112.316. Instead, the government developed an "accommodation" for non-exempt religious organizations. 77 Fed. Reg. 16501-01, 16501 (Mar. 21, 2012).

The resulting "accommodation" is available if a non-exempt religious organization self-certifies that it meets the regulatory criteria. *See* 45 C.F.R. § 147.131(b) (2014). In order to comply with the "accommodation," self-certifying organizations must execute EBSA Form 700 and deliver it to their insurer or third-party administrator. 78 Fed. Reg. at 39875; 26 C.F.R. § 54.9815-2713A (2014). Form 700 contains the following language:

The organization or its plan must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:

(1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

This certification is an instrument under which the plan is operated.

By signing this Form, employers with self-insured plans and Church plans expressly designate their TPAs as the "plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39879; 26 C.F.R. § 54.9815-2713A. Receipt of an executed Form 700 triggers a TPA's legal obligation to "[p]rovide payments for contraceptive services for plan participants and beneficiaries" 26 C.F.R. § 54.9815-2713AT(b)(2)(i). Forcing the non-exempt employer to designate the TPA in this manner "ensures that there is a party with legal authority" to make payments to beneficiaries for contraceptive services, 78 Fed. Reg. at 39880, and ensures that employees of

employers with religious objections receive these drugs "so long as [they remain] enrolled in [the] group health plan." *See* 26 C.F.R. § 54.9815-2713A(d) (2014); 29 C.F.R. § 2590.715-2713A(d) (2014); *see also* 45 C.F.R. § 147.131(c)(2)(i)(B) (2014).

The form, through legally operative language, (a) directs the TPA to the mandate's Form-triggered requirement that the TPA "shall be responsible for" payments for contraceptive services (b) instructs the TAP as to the TPA's "obligations," and (c) makes the Form "an instrument under which the . . . plan is operated." *Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1349 (11th Cir. 2014) (Pryor, J., concurring) ("*EWTN*"). In sum, "without the form, the administrator has no legal authority to step into the shoes of [a religious objector] and provide contraceptive coverage to the employees and beneficiaries of the [objector]." *EWTN*, 756 F.3d at 1347 (Pryor, J., concurring).

To encourage TPAs to provide the coverage, the regulations pair these regulatory sticks with a "carrot": an extra government payment to help make the scheme profitable. If a TPA receives

Form 700, the TPA becomes eligible for government payments that will both cover the costs and include an additional payment (equal to at least 10% of costs) for margin and overhead. 45 C.F.R. § 156.50 (2013).[2]

In August 2014, in reaction to the *Hobby Lobby* decision and the Supreme Court's decision to grant injunctive relief to Wheaton College, *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), and long after final judgment had already issued in this case, the government "augmented" the mandate with interim final rules that allow non-exempt religious organizations to submit notice to the government instead of to their plan administrators. 79 Fed. Reg. 51092-01 (Aug. 27, 2014). Though the Supreme Court held that Wheaton College "need not use . . . EBSA Form 700, and need not send copies to health insurance issuers or third-party administrators[,]" 134 S. Ct. at 2807, the interim final rules require that a religious organization "must" submit a form identifying its religious objection, the name and type of its plan, and—for the first

[2] HHS has set this payment rate at 15% for 2015. *See* 79 Fed. Reg. 13744-01, 13809 (Mar. 11, 2014).

time—"the name and contact information for any of the plan's [TPAs]." 79 Fed. Reg. at 51094-095. If the organization submits this "necessary" information, the government "will send a separate notification to" its TPA creating the "obligations of the [TPA] under . . . this section and under § 54.9815-2713A"—which includes the TPA's obligation to deliver contraceptives to participants in the organization's health plan. *Id.* at 51098; *see* 26 C.F.R. § 54.9815-2713AT(b)(1)(ii)(B). With respect to the Universities, which both use TPAs, this would mean that the Universities submit their self-certification to the Secretary of Health and Human Services, including the required information. 26 C.F.R. § 54.9815-2713AT(b)(1)(ii)(B). The Department of Labor would then provide notification to the Universities' third-party administrators. *Id.* According to the government, the DOL's notice "shall be an instrument under which the plan is operated." 29 C.F.R. § 2510.3-16(b) (2014). The notification purports to designate the third-party administrator as a "plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered." *Id.* If the third-party administrator then chooses to remain in a

contractual relationship with the religious ministry, it "shall provide or arrange payments" for the objectionable drugs and services. 26 C.F.R. § 54.9815-2713AT(b)(2).

VI. The Universities' undisputed religious exercise

Although they share the same religious beliefs as exempt churches and other Baptist organizations, neither ETBU nor HBU fall within the mandate's exemption for "religious employers" because they are not a church, an integrated auxiliary of a church, or a religious order. *See* 26 U.S.C. § 6033(a).

In accordance with their sincerely held beliefs, neither ETBU nor HBU can provide the mandated coverage or execute and deliver notice to their TPAs because they believe that taking those actions would make them complicit in grave sin. ROA.14-20112.466 (URE6); ROA.14-20112.523 (URE21). The sincerity of their beliefs is entirely undisputed. ROA.14-20112.2289. The mandate penalizes the Universities' religious decision. ETBU has about 227 full time employees. ROA.14-20112.467 (URE7). If ETBU does not comply with the mandate and maintains its conscience-compliant employee health coverage, it will be subject to fines of over $8 million per

year. 26 U.S.C. § 4980D(b)(1). HBU has about 355 full time employees. ROA.14-20112.525 (URE23). If HBU does not comply with the mandate and maintains its conscience-compliant employee health coverage, it will be subject to fines of nearly $13 million annually. 26 U.S.C. § 4980D(b)(1).

VII. Procedural History

The Universities brought suit against the original version of the mandate on October 9, 2012. ROA.14-20112.20. On December 20, 2012, the district court stayed the case while the government conducted rulemaking in response to the controversy surrounding the mandate. ROA.14-20112.7. On June 28, 2013, Defendants issued a final rule regarding the mandate. 78 Fed. Reg. 8456-01 (Feb. 6, 2013). The district court lifted the stay on July 31, 2013. ROA.14-20112.10. On March 8, 2013, Westminster Theological Seminary moved to intervene in the case. The motion was granted over the government's opposition on August 30, 2013.

The Universities filed a motion for partial summary judgment and a preliminary injunction on their RFRA, Free Exercise, Establishment Clause, and Free Speech claims. ROA.14-20112.391.

Westminster filed a similar motion for summary judgment. ROA.14-20112.807. The defendants filed a cross motion to dismiss or for summary judgment. ROA.14-20112.940. On December 27, 2013, the district court granted the Plaintiffs' motion for summary judgment on their RFRA claim and denied summary judgment on their remaining claims as moot. ROA.14-20112.2314-15. Plaintiffs moved for partial summary judgment with the consent of all parties. ROA.14-20112.2317. On January 21, 2014, the district court certified its December order as a permanent injunction and partial final judgment. ROA.14-20112.2325-26. The court further ordered that the Plaintiffs' remaining claims be stayed pending resolution of the anticipated appeal. ROA.14-20112.2326. The government filed a timely notice of appeal on February 24, 2014. ROA.14-20112.2333.

In this Court, the Universities filed a petition for initial hearing *en banc* on March 14, 2014. The petition has not yet been ruled upon.

On March 17, the government filed a motion to consolidate this case with two other appeals from injunctions against the mandate,

Nos. 14-10241, and 14-40212. The Universities opposed consolidation. On April 18, 2014, Judge Dennis granted the motion to consolidate and ordered that the government file a single brief in each of the appeals, that the various appellees file separate briefs, and that the appeals be argued before the same panel on the same day. The Court also suspended briefing pending consolidation of the records of appeal. On May 9, briefing resumed, and on May 16, Defendants requested and received a 30-day extension. On June 26, Defendants moved to consolidate Appeal No. 14-10661 with the previously consolidated cases. Judge Dennis granted the motion on July 21, 2014.

On July 10, 2014, Defendants filed an opposed motion requesting a second thirty day extension from their July 18 deadline. On July 18, Judge Dennis granted the motion and ordered the brief due September 2, 2014. On August 20, the government filed an opposed motion to further extend the time to file its opening brief until September 16, 2014. Judge Dennis granted the motion on August 21.

On October 3, Judge Dennis granted a thirty day extension for the Appellants' response briefs, due November 19.

Two additional mandate-related cases in the Fifth Circuit have resulted in losses for the government. Minute Entry, *Insight for Living Ministries v. Burwell*, No. 4:14-cv-00675-DDB (E.D. Tex. Nov. 12, 2014), ECF No. 22 (bench ruling); Memorandum Ruling, *La. Coll. v. Sebelius*, No. 1:12-cv-00463, 2014 WL 3970038 (W.D. La. Aug. 13, 2014), ECF No. 106 (granting summary judgment for Plaintiff). Defendants have appealed the earlier decision to this Court. *La. Coll. v. Burwell*, No. 14-31167.

STANDARD OF REVIEW

"This court reviews a grant of summary judgment *de novo*." *Izen v. Catalina*, 398 F.3d 363, 366 (5th Cir. 2005). Summary judgment may be affirmed on "grounds other than those offered by the district court." *Id.*

Summary judgment should be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The non-movant's burden to bring forward facts to create a material fact

dispute "is not satisfied with some metaphysical doubt as to the material facts, by unsubstantiated assertions, or by only a scintilla of evidence." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (internal quotation marks and citations omitted). Factual controversies should be resolved in favor of the nonmoving party, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Id.*

RFRA's "compelling interest test is 'a mixed question of fact and law, which is subject to *de novo* review.'" *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 471-72 (5th Cir. 2014) (quoting *Garner v. Kennedy*, 713 F.3d 237, 242 (5th Cir. 2013)). Because strict scrutiny is an affirmative defense, the government had the "burden on summary judgment to establish each element of that defense as a matter of law." *Crescent Towing & Salvage Co. v. M/V Anax*, 40 F.3d 741, 744 (5th Cir. 1994) (citations omitted).

SUMMARY OF THE ARGUMENT

Although seemingly every aspect of the Affordable Care Act has become politicized, and the regulations Defendants have issued pursuant to the act are convoluted, as a legal matter this appeal is

quite straightforward. The mandate, as modified by the accommodation, the augmentation, and at least five other revisions since 2011, violates the Religious Freedom Restoration Act. It does so by requiring the Universities to choose between offering health insurance to their employees on one hand and (1) paying for abortifacient drugs and devices against their sincere religious beliefs; and (2) helping to deliver abortifacient drugs and devices against their undisputed sincere religious beliefs on the other. The specific religious exercise at issue under RFRA is thus the Universities' practice of not paying for or helping to deliver these abortifacients.

The government says that the Universities' religious exercise is not implicated because it has created an "accommodation" scheme the Universities can use. But the "accommodation" is a sham. The Universities still have to pay, albeit indirectly, for the abortifacient drugs and devices, and they still have to help others access the drugs. The accommodation is no accommodation at all.

Having identified the religious exercise in question, the Universities must show that the government has imposed a

substantial burden on that exercise. The substantial burden imposed by the government here is massive fines that the Supreme Court has already found (in *Hobby Lobby*) to constitute a substantial burden under RFRA. With that showing, the Universities have made their case, and the burden of proof shifts to the government to prove up its strict scrutiny affirmative defense.

The government's affirmative defense fails under strict scrutiny because (1) it has not even tried to identify a compelling interest in forcing *the Universities* to comply with the mandate; (2) it has not used the least restrictive means available to further its stated interest; and (3) the means it has chosen does not in fact further its stated interest. In short, there are many different ways the government could provide the morning-after pill and other abortifacients without involving Baptist universities or making them pay for it.

Yet despite the RFRA's command to tread as lightly as possible when it comes to religion, the government's many changes to the mandate over the past three years have included one constant variable: religious employers must remain part of the system for

paying for and delivering these drugs and devices, regardless of how many other ways the government's ostensible goals might be achieved. Forcing religious employers to participate in paying for and delivering abortifacient drugs appears to be a feature, not a bug. But the Court need not play along, any more than Judge Rosenthal did. Applying the law to the facts in the record requires the Court to affirm the decision below.

ARGUMENT

I. The mandate violates the Religious Freedom Restoration Act.

The mandate violates RFRA by imposing a substantial burden (onerous fines) on the Universities' religious exercise (refusal to pay for or assist in the delivery of abortifacients). The government has not met its burden to prove up its affirmative defense of strict scrutiny.

A. It is undisputed that the Universities sincerely exercise religion by abstaining from paying for or otherwise facilitating access to abortion-causing drugs and devices.

In order to determine if there is a substantial burden on the Universities' religious exercise, the court must first identify the specific sincere religious exercise at issue: "[T]he 'exercise of

religion' involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.' Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770 (2014) (quoting *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990)). The religious exercise at issue in this case is the Universities' abstention from paying for and helping to deliver abortion-inducing drugs or devices. ROA.14-20112.462 (URE2), 467 (GRE 158, 159); ROA.14-20112.520 (GRE 162) (URE18).

The mandate, as combined with the accommodation and the augmentation, interferes with this religious exercise in two ways: it requires them to pay for the abortifacients and it requires them to assist in the delivery of the abortifacients.

B. The accommodation does not enable the Universities to engage in this religious exercise.

The government relies on its promulgation of the "accommodation" to deny that the Universities' religious exercise is limited. Br. 24-25. But the accommodation simply doesn't work. As to funding, the accommodation is a sham—the Universities still

have to pay for the abortifacient drugs and devices through their plans' third-party administrators. And the accommodation still requires the Universities to assist in delivering the drugs and devices. Defendants say that the Universities should reconcile themselves to the accommodation, but the government is hardly in a position to tell the Universities what their religious beliefs are or ought to be.

1. *The accommodation is a sham: the Universities must still pay for abortifacients.*

The government has argued throughout this and parallel litigation that the accommodation will suffice to ensure that objecting religious organizations will not have to pay for abortifacient drugs and devices. *See*, *e.g.*, Br. 7; ROA.14-20112.2487 (URE35). But the accommodation is a sham. Any sober examination of how the accommodation is supposed to work in practice reveals that the Universities will be paying for abortifacient coverage, accommodation or no.

First, with respect to religious institutions that use a non-ERISA self-insured church plan (in this appeal, HBU), the government has specifically disclaimed any authority to regulate how the plan's

third-party administrators react to the government's rules. Br. 35. The reason for that disclaimer is that church plans are specifically exempted from ERISA. 29 U.S.C. § 1003(b)(2). The government does offer church plan TPAs an illusory incentive to provide abortifacients to religious institutions' employees, but it admittedly has no way of preventing church plan TPAs from passing along the cost of the abortifacients to religious employers. The government is thus saying, in effect, "We'll suggest that the TPAs not make you pay for the abortifacients." But without legal force, such a suggestion does nothing to prevent the TPA from making the religious employer pay.

Second, with respect to self-insured plans like ETBU's that are subject to ERISA, the government is also without authority to prevent the TPA from passing along the cost of the abortifacients to the religious employer.[3] Unlike its position with respect to non-ERISA church plans, the government does not admit that it has no

[3] Although the ERISA-exempt church plans at issue are also viewed as a form of self-insured plan, for ease of reference we will in this brief refer to non-church-plan self-insured plans as "self-insured plans."

regulatory authority to prevent pass-through costs with respect to self-insured plans. However, under ERISA, the government does not actually have power to declare that a government notification is a plan "instrument" under ERISA § 3(16), or to appoint a TPA as a "plan administrator" as it purports to do with respect to the accommodation. 29 C.F.R. § 2510.3-16(b).[4]

Indeed, what the government has done here is attempt to arrogate to itself the power to declare (over the employer's objection) new terms for an ERISA-governed issuer plan and graft

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[4] The term "plan administrator" under ERISA refers to the plan sponsor, which in the case of self-insured plans is typically the employer. 29 U.S.C. § 1002(16). This can lead to confusion because third-party administrators of self-insured plans are typically ***not*** "plan administrators" under ERISA § 3(16). *See*, *e.g.*, Pete Swisher, *15 Misconceptions About the Three Principal Fiduciary Roles in a Retirement Plan* at 4, *available at* http://www.pentegra.com/upload/Misperceptions%20about%20the%20three%20Principal%20Fiduciary%20Roles%20in%20a%20Retirement%20Plan.pdf ("Misconception No. 9: The TPA or Recordkeeper is the Administrator"). What the government seeks to do under the accommodation is thus highly unusual—take a non-fiduciary third-party administrator with a carefully defined contractual role (a "ministerial" "recordkeeper," *id.*), and turn that non-fiduciary into a fiduciary for a separate mini-plan covering just four abortifacient drugs and devices. However, nothing in ERISA gives the government the power to create a new plan and name a new plan administrator as a fiduciary.

those terms onto the objecting religious employer's existing self-insurance plan. Thus Defendants would transform a notification from the government into a plan "instrument" under ERISA § 3(16) (29 U.S.C. § 1002(16)) designating a new plan administrator:

> [T]he Department of Labor, working with the Department of Health and Human Services, shall separately provide notification to each third party administrator that such third party administrator shall be the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds, with respect to benefits for contraceptive services that the third party administrator would otherwise manage. Such notification from the Department of Labor shall be an instrument under which the plan is operated and shall supersede any earlier designation.

29 C.F.R. § 2510.3-16(b). The government is thereby claiming—without any identified statutory authorization—the power to author plan documents so as to unilaterally declare a new plan administrator, a right reserved solely for the plan sponsor under ERISA § 3(16) (29 U.S.C. § 1002(16)). The new plan provisions are designed to be completely parasitical upon the original plan issued

by the employer.[5] If one cuts through the regulatory murk (it takes reading at least three cross-referenced regulations to find out what Defendants are purporting to do here), what one has in the accommodation plus augmentation is a government attempt to declare a new plan official—a plan administrator—who will be responsible for certain aspects of administering a private benefit plan. This goes well beyond the government's power under ERISA. And without the authority to designate—much less regulate—a new plan administrator, the government is left suggesting rather than requiring that third-party administrators not pass on the cost of abortifacients to religious institutions.

Third, even if one accepts *arguendo* the government's premise that it has the power to author terms of employee health plans for

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[5] The D.C. Circuit repeatedly referred to this feature of the accommodation-cum-augmentation by using the word "seamless" or variants thereof seven times in its opinion. *See generally Priests for Life v. U.S. Dep't of Health & Human Servs.*, --- F.3d ---, 2014 WL 5904732 (D.C. Cir. Nov. 15, 2014). Indeed, for the D.C. Circuit, this was precisely the point of setting up the accommodation so that it was just another part of the religious employer's plan: in its view the government has a compelling interest in ensuring that the delivery of the objected-to drugs and devices are "seamless from the beneficiaries' perspective." *Id.* at *10.

religious employers, there is another obvious problem: the accommodation with respect to self-insured plans depends entirely on the voluntary decisions of third parties. The accommodation mechanism requires the TPA to enlist an "issuer" (an insurance company) to provide just the four abortifacients and to bear the financial risk of doing so. *See* 29 C.F.R. § 2590.715-2713A(b)(2)(ii); 45 C.F.R. § 156.50(d).[6] The issuer, according to Defendants, can then obtain a rebate of user fees it would otherwise have to pay on federally-facilitated exchanges.[7]

But it turns out that few, if any, insurance companies are interested in participating in this scheme. Last July, the trade

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[6] The TPA can also choose to pay directly for the contraceptive costs, but it must still enlist an issuer in order to seek reimbursement. *See* 29 C.F.R. § 2590.715-2713A(b)(2)(i); 45 C.F.R. § 156.50(d).

[7] The reason, of course, for this awkward and convoluted system for funneling money to the TPA is that Defendants cannot appropriate themselves money to compensate the TPA. Federally-facilitated exchange user fees are one of the few sources of value Defendants can access without recourse to Congress. But only issuers that are already paying federal exchange user fees can obtain rebates, forcing TPAs to find and contract with specifically that kind of issuer in order to obtain compensation for the abortifacients the government wants to force them to pay for.

association of self-insurance third-party administrators, the Self-Insurance Institute of America, wrote to the Defendants, complaining that the Defendant departments have not been able to line up sufficient issuers to enable the accommodation to work. Indeed, because of the lack of issuers willing to participate in the contraceptive accommodation, the self-insurance industry is specifically concerned about what they view as the Supreme Court's suggestion that the contraceptive mandate accommodation might be extended to for-profit employers: "[T]o date, the Departments have been unable to locate the necessary number of insurance issuers that could partner with all of the TPAs currently paying for certain contraceptive coverage services to facilitate reimbursements for amounts expended." Letter from Michael Ferguson, President & CEO, Self-Insurance Institute of America, to Sylvia Matthews Burwell et al. (July 7, 2014), *available at* http://www.siia.org/files/SIIA-HHS%20Contraceptive%20Mandate-July7-2014.pdf (last visited Nov. 19, 2014). The letter makes it clear that the regulations have an "adverse impact" on TPAs financially, who are attempting to comply with the regulations, but

who require that "the Departments take steps to make these TPAs whole by providing direct reimbursements to TPAs." *Id.* Otherwise, extending the current accommodation to for-profits "will only exacerbate the burdens TPAs are already facing." *Id.* This should not be surprising. The amount of money at stake is quite small for a large insurance issuer; providing contraceptives valued at only a few thousand dollars annually makes little commercial sense, especially since the cost of complying with Defendants' convoluted regulations would be quite high. Michael Ferguson has further explained that "[s]ince the birth-control benefit began Jan. 1, the costs to independent TPAs are potentially in the millions of dollars . . . with no certainty they'll ever be paid back." Alex Wayne, *Hobby Lobby Ruling Complicates Obamacare Birth Control*, Bloomberg, July 2, 2014, http://www.bloomberg.com/news/2014-07-01/hobby-lobby-ruling-complicates-obamacare-birth-control.html (last visited Nov. 19, 2014).

Take ETBU and HBU. The Universities object only to four of the twenty government-mandated forms of contraception. Their respective third-party administrators would therefore have to

enlist insurers to take on a politically fraught issue for a small dollar amount. Why bother? If we assume that five ETBU employees out of 227 want to use Plan B in a year, there would be drug cost of approximately $250 per year.[8] The government's additional payment of 15% for overhead and other costs would thus amount to $37.50. That might pay for ten minutes of an ERISA attorney's time, which is not even enough to read the accommodation regulations, much less analyze and explain them to a client.[9]

There is simply no commercial value proposition for an insurance company to get involved in this scheme, which is why many TPAs of self-insured plans complain that they are currently paying these costs without reimbursement through an issuer

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[8] Plan B can currently be purchased online for approximately $50 from a variety of outlets. *See*, *e.g.*, Walgreens, http://www.walgreens.com/store/c/plan-b-one-step-emergency-contraceptive/ID=prod6212563-product (last visited Nov. 19, 2014) (Plan B available for $49.99).

[9] The *Priests for Life* court oddly called the "paperwork" at issue here "straightforward." 2014 WL 5904732, at *3. The mandate, accommodation, and augmentation are many things, but straightforward is not one of them; their sheer complexity means that true compliance requires a TPA to hire an ERISA specialist.

pursuant to 45 C.F.R. § 156.50(d). And if they are not reimbursed by the government, eventually these third party administrators will be forced to pass along the costs of the abortifacients to their customer, the religious employer. Eventually someone, somewhere, has to pay for the drugs.

Fourth, even if a TPA wanted to jump through the many regulatory hoops created by Defendants in order to continue serving its customers, it would likely still have to pass along costs to the objecting religious organizations because the amount of reimbursement available under the accommodation will, for many smaller TPAs, not be nearly enough to cover the costs of providing contraceptives. Specifically the 15% premium that Defendants have allowed for overhead won't be nearly enough to reimburse many TPAs, requiring them to pass along the costs to the religious employer. *See* 79 Fed. Reg. 13744-01, 13809 (Mar. 11, 2014) ("We received several comments expressing concern that the proposed allowance would not adequately cover administrative costs."). If we use the example above, a small TPA could possibly get reimbursed for $250 in annual direct costs and $37.50 for overhead. But the

remaining costs of providing the abortifacients-only insurance coverage will not be reimbursed, meaning that in one form or another they will be passed along to the Universities.

* * *

The simple fact of the matter is that someone has to pay for the abortifacients—either the employee, the government, or the employer. The mandate does not allow the employee to pay the cost. Within their mandate scheme, Defendants don't have the statutory authority or funding sources to pay for the abortifacients.[10] That leaves the employer to pay—either directly or through a TPA that passes along the costs, as it must to remain profitable. The accommodation is, in short, a convoluted sham: a way of having the employer pay while pretending the employer isn't paying. But this pretense does not relieve the Universities' consciences.

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[10] *But see* Section I.D.2, *infra*, showing that Defendants could provide the abortifacients via alternative means, such as Title X, that do not require the participation of the Universities. Nor can the government pin any inadequacies of its scheme on the Universities. *See McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 479 (2014) ("The [government] cannot infringe on [a religious objector's] rights by creating and maintaining an inefficient system and then blame those inefficiencies for its inability to accommodate [the objector].").

2. The mandate requires the Universities to help deliver abortifacients.

Aside from paying for the abortifacients, the mandate also requires the Universities to help deliver the abortifacients in violation of their consciences. On the record before the district court, ETBU and HBU were required by the then-applicable regulation to submit Form 700 to their respective third-party administrators. But ETBU and HBU cannot in good conscience sign and submit a Form that authorizes and obligates their third-party administrators to provide objectionable drugs and devices. ROA.14-20112.469 (URE9); ROA.14-20112.527 (URE25). As Judge Rosenthal put it, "The plaintiffs have demonstrated that the mandate and accommodation will compel them to engage in an affirmative act and that they find this act—their own act—to be religiously offensive." ROA.14-20112.2305 (GRE 136).

The augmentation does not change this moral calculus. Whether they submit the form to a third party administrator, to a church plan administrator, or to the government, the Universities will be taking action to authorize and obligate their third-party administrators to deliver the drugs and devices. Indeed, the

augmentation to the mandate includes the same morally relevant features as the original "accommodation":

- It uses the same vehicle—the Universities' plans. *See* 29 C.F.R. § 2510.3-16(b) (Either Form 700 or its "alternative" are "instrument[s] under which the plan is operated."); *Roman Catholic Archbishop of Wash. v. Sebelius*, 2013 WL 6729515, at *22 (D.D.C. Dec. 20, 2013) (Government admits that "the contraceptive coverage is part of the [self-insured organization's health] plan."). It would be provided subject to the same network and medical management limitations as all other coverage under the plan. 78 Fed. Reg. at 39873. *See* ROA.14-20112.469 (URE9); ROA.14-20112.527 (URE25).
- It has the same effect: "Regardless of whether the eligible organization" uses Form 700 or "provides notice to HHS in accordance with the August 2014 [augmentation], the obligations of insurers and/or TPAs . . . are the same." CCIIO Fact Sheet: Women's Preventive Services Coverage, Non-Profit Religious Organizations, and Closely-Held For-Profit Entities, http://www.cms.gov/CCIIO/Resources/Fact-Sheets-

and-FAQs/womens-preven-02012013.html; *accord* 26 C.F.R. § 54.9815-2713AT(b)(2) (whether Form 700 or the alternative is used, "the [TPA] shall provide or arrange payments for [the objectionable drugs and devices]"). *See* ROA.14-20112.2225; ROA.14-20112.528-29 (URE26-7).

- It places the same duty on the Universities: they must maintain a contractual relationship with a TPA that will provide objectionable coverage through their plans. 78 Fed. Reg. at 39880. *See* ROA.14-20112.472 (URE12); ROA.14-20112.529 (URE27).
- It uses the same incentives: upon receipt of either Form 700 or notification triggered by the Universities' submission of an alternative form—and only upon such receipt—the TPA becomes eligible for 115% reimbursement for the costs of providing contraceptives. *See* 26 C.F.R. § 54.9815-2713AT(b)(3); ROA.14-20112.474 (URE 14); ROA.14-20112.531 (URE29); *accord Reaching Souls Int'l, Inc. v. Sebelius*, No. CIV–13–1092–D, 2013 WL 6804259, at *3, *7 & n.8 (W.D. Okla. 2013) (noting that HBU's TPA, Highmark,

has said that it will avail itself of the reimbursement if it receives the requisite documentation from church-plan participants like HBU).[11]

In sum, the augmented accommodation is just as bad as before. To use this alternative, objecting faith institutions "must" submit a form identifying their religious objection, the name and type of their plan, and—for the first time—"the name and contact information for any of the plan's [TPAs]." 79 Fed. Reg. at 51094-095. If—and only if—the organization submits this "necessary" information, the government "will send a separate notification to" the organization's TPA creating the "obligations of the [TPA] under . . . this section and under § 54.9815-2713A"—which includes the TPA's obligation to deliver emergency contraceptives to participants in the organization's health plan. *Id.* at 51098; *see* 26 C.F.R. § 54.9815-2713AT(b)(1)(ii)(B). This paperwork shuffling merely adds another

[11] In fact, the accommodation puts TPAs like Highmark in a no-lose situation: either they profit from the 15% bonus or they pass any cost overruns on to religious objectors. By contrast, the Universities face a no-win situation, since they must violate their faith both by triggering the incentives *and* by paying for any costs not covered by the reimbursement.

link in the causal chain between the actions the Universities would have to take and coverage of abortifacients under their plans. It does nothing to solve the underlying moral problem.

That problem is twofold. First, the Universities' compliance by providing a plan and submitting either Form 700 or its alternative are "necessary condition[s]" for coverage of abortifacients. *Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1343 (11th Cir. 2014) (Pryor, J., concurring).

Second, the government would be co-opting the Universities' plans. Imagine if the government ordered hospitals to perform elective surgical abortions. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2783 (raising a similar illustration). If religious hospitals object, the government allows their doctors to "opt out" of performing the elective abortions *if* the objecting hospitals allow external doctors to perform the abortions in the hospital. Because the "opt-out" still requires using the hospital's facilities for the abortions, the hospital would still be participating. In the same way, the government's insistence on hijacking the plans of schools like ETBU and HBU to

provide abortifacients forces them to be complicit in ending human life, a grave sin. ROA.14-20112.466 (URE6); ROA.14-20112.523 (URE21).

The district court found that the "plaintiffs have established a sincere religious belief that they cannot support, endorse, or facilitate the use of emergency contraceptives." ROA.14-20112.2294. The Defendants do not dispute that finding; they simply assert that the Universities should be satisfied with the accommodation instead. But the measure of the effectiveness of a religious accommodation for its religious purposes is in the eye of the religious believer, not the secular government.

In one way the government's insistence that Universities be satisfied with the accommodation is unsurprising. Providing a faux accommodation and then complaining when the believer is unsatisfied is a fairly common governmental response to requests for religious accommodation. For example, it is surprising how often prison officials think that they can decide what is kosher and what isn't and then complain when Orthodox Jews disagree. In *Beerheide v. Suthers*, 286 F.3d 1179 (10th Cir. 2002), Colorado "contend[ed]

[that] the district court failed to address testimony that inmates could obtain an 'alternative religious diet' free of charge through the prison's 'common fare' program." Meals in that program were "prepared with no pork or pork by-products, or [we]re vegetarian." Colorado "claim[ed] that while the diet does not meet the 'strictest orthodox standards,' it 'meets the basic tenants [sic] of a kosher diet.'" The Tenth Circuit rejected this reasoning:

> Testimony showed kosher laws do not deal simply with whether a food item does or does not contain pork or other non-kosher animal products. Kosher laws govern not only the ingredients (both animal and vegetable), but the source, storage, and preparation of those ingredients, and the service of meals. A vegetarian meal prepared in a non-kosher kitchen is not kosher. The DOC's alleged "alternative," then, is not an alternative at all.

Id. (citations omitted). Likewise the government should not be chagrined because the Universities are insufficiently grateful for an "accommodation" that doesn't actually allow them to exercise their religion freely.

In sum, the mandate, accommodation, and augmentation require the Universities to pay for and assist in delivering the abortifacients in violation of their religious beliefs.

C. The mandate imposes a substantial burden of enormous fines on the Universities' religious exercise.

Once a plaintiff has shown a sincere religious exercise, the plaintiff must next show that the government action imposes a "substantial[] burden" on that exercise. 42 U.S.C. § 2000bb-1. The mandate imposes a substantial burden on the Universities' sincere religious exercise.

1. Binding precedent confirms the proper substantial burden analysis.

The Supreme Court in *Hobby Lobby* provided a clear answer to the question of whether the mandate constitutes a substantial burden on religious beliefs. If the Universities do not violate their faith by becoming complicit in the government's scheme, the government will impose enormous penalties of either $100 a day per affected beneficiary, or an annual fine of $2,000 per full-time employee. *See* 26 U.S.C. § 4980D(b) & (e)(1); 26 U.S.C. § 4980H(a), (c)(1). These are the *very same* penalties as those at issue in *Hobby Lobby*. *See* 134 S. Ct. at 2775-76 (citing 26 U.S.C. § 4980D(b) & (e)(1); 26 U.S.C. § 4980H(a), (c)(1)); *see also id.* at 2779 ("Because the contraceptive mandate forces them to pay an enormous sum of money . . . if they insist on providing insurance coverage in

accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs."). According to the Supreme Court, "If these consequences do not amount to a substantial burden, it is hard to see what would." *Id.* at 2759. That should end the matter.

A substantial burden exists where the government "truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs." *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004). Imposing fines on a religious exercise is the paradigmatic substantial burden. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (deprivation of unemployment benefits results in "the same kind of burden upon the free exercise of religion" as a "fine imposed against appellant for her Saturday worship."); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981) ("Where the state . . . put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."); *Wisconsin v. Yoder*, 406 U.S. 205, 208, 218 (1972) (five-dollar fine on religious practice "not only severe, but inescapable"). The fines under the

mandate place enormous pressure on the Universities to "modify [their] religious behavior and significantly violate [their] religious belief." *Adkins*, 393 F.3d at 570. Moreover, the government is well aware that mandating objectionable insurance coverage burdens religious exercise. That is why it included a religious exemption in the first rulemaking, 76 Fed. Reg. 46621 (Aug. 3, 2011), and why it engaged in a lengthy rulemaking process to respond to public outcry from religious organizations, like the Universities, who did not qualify for the exemption. 45 C.F.R. § 147.131.

The government argues that *Hobby Lobby* blessed the original "accommodation," though that argument is belied by the fact that the government "augmented" the regulations just a few weeks later. However, *Hobby Lobby* was clear: the Court expressly declined to decide "whether an [accommodation] of this type complies with RFRA for purposes of all religious claims." 134 S. Ct. at 2782. The Court even reaffirmed its order in *Little Sisters*, which enjoined the accommodation. *Hobby Lobby*, 134 S. Ct. at 2763 & n.9 (citing *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014)). If any doubt remained, the Court erased it three days later when it granted

extraordinary relief to Wheaton College. *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014).

The government struggles to paint its actions as consistent with *Wheaton*, but the Supreme Court merely granted Wheaton the same relief it gave to the Little Sisters of the Poor: Wheaton was required only to notify the Secretary of its objection in order to gain a complete exemption. *Compare* 134 S. Ct. 2806 *with* 134 S. Ct. 1022.[12]

2. The Universities' objections are based on their own forced participation in the government's scheme.

The government attempts to rescue its "substantial burden" argument by reliance on two cases decided before *Hobby Lobby*: *Michigan Catholic* and *Notre Dame*. Br. 29-36. And on reply it will presumably also rely on the D.C. Circuit's recent *Priests for Life* decision. None of these decisions gets *Hobby Lobby* right.

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[12] The 11th Circuit has also issued injunctive relief following *Hobby Lobby*, *EWTN*, 756 F.3d at 1340; *see also Ave Maria Univ. v. Burwell*, No. 2:13-cv-00630, 2014 WL 5471048 (M.D. Fla. Oct. 28. 2014) (granting preliminary injunction); *and Ave Maria Sch. of Law v. Burwell*, No. 2:13-cv-00795, 2014 WL 5471054 (M.D. Fla. Oct. 28, 2014) (injunction granted from augmentation).

First, both decisions incorrectly state that coverage is not attributable to the religious objector's actions, but rather to federal law. *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 554 (7th Cir. 2014); *Mich. Catholic Conference and Catholic Family Servs. v. Burwell*, 755 F.3d 372, 387 (6th Cir. 2014); *Priests for Life v. U.S. Dep't of Health & Human Srvs.*, --- F.3d ---, 2014 WL 5904732, at *11, *15 (Nov. 14, 2014). That analysis, as one judge has put it, is "[rubbish]." *EWTN*, 756 F.3d at 1347 (Pryor, J., concurring). If the Universities neither submit Form 700 nor the new "alternative" form, contraceptive coverage will *not* be provided on the Universities' plan. *See supra*; *see also Wheaton*, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting) (a TPA 'bears the legal obligation to provide contraceptive coverage *only* upon receipt of a valid self-certification.') (emphasis added). The government has admitted as much to the Supreme Court. Resp. to Appl. for Inj., *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014) (No. 13A1284) (U.S. July 2, 2014) (government claim that allowing Wheaton to avoid signing "would deprive hundreds of employees and students" of contraceptive coverage). *See also* Suppl. Gov't Brief at 5, *Little Sisters of the Poor*

v. Burwell, Nos. 13-1540, 14-6026, 14-6028 (10th Cir. Sept. 8, 2014) ("It is crucial that these appeals be resolved now. Because of the injunctions issued in these cases, the women employed by plaintiffs have been and continue to be denied access to contraceptive coverage."). The Universities' submission of Form 700 would thus be a but-for cause of delivery of the drugs and devices. The conclusions on this point in *Notre Dame*, *Michigan Catholic*, and *Priests for Life* are simply wrong.[13]

Second, these decisions mistakenly reason that the *government* can decide the *moral* question of when coverage is "distinct and independent" enough to be permissible. Thus, the *Notre Dame* majority thought that self-certification was not a "substantial" burden because "[t]he form is two pages long," and "[s]igning the

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[13] It is worth noting that both *Notre Dame* and *Michigan Catholic* were decided before *Hobby Lobby* and *Wheaton* and thus could not take those cases' reasoning into account. By contrast, *Priests for Life* simply does not apply *Hobby Lobby* to the question of whether there is a substantial burden. Before reaching the substantial burden analysis it makes the "general observation[]" that "Plaintiffs' case is significantly different" from *Hobby Lobby*. *Priests for Life*, 2014 WL 5904732, at * 10. But otherwise it largely ignores the case except to refer to it once in discussing the accommodation. *Id.* at *14 n.15. It applies none of *Hobby Lobby*'s substantial burden reasoning to the facts before it.

form and mailing it . . . could have taken no more than five minutes." 743 F.3d at 554; *accord Priests for Life*, 2014 WL 5904732, at *3 ("All Plaintiffs must do" is fill out a "bit of" "straightforward" and "minimal" "paperwork" via "a letter or two-page form"). These opinions' focus on the number of pages involved utterly fails to appreciate the gravity of the question of moral complicity, or that complicity in these cases is a religious judgment, not a legal one. *See Notre Dame*, 743 F.3d at 566 (Flaum, J., dissenting) (employer's objection turns not on "legal causation but . . . religious faith"). Would it really make a difference if the form were twenty pages long, or 200? And if the burden was really so meaningless, why does the government exempt churches from it?

A substantial burden must be "measured . . . from the person's perspective, not from the government's." *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 264 (5th Cir. 2010). As *Hobby Lobby* teaches, courts may not "[a]rrogat[e]" unto themselves "the authority" to "answer" the "religious and philosophical question" of when it is wrong to "enable[e] or facilitat[e] the commission of an immoral act by another." 134 S. Ct. at 2778. The

judiciary is ill-suited to opine on theological matters, and should avoid doing so. *Merced v. Kasson*, 577 F.3d 578, 590 (5th Cir. 2009). *Notre Dame*, *Michigan Catholic*, and *Priests for Life* did exactly that. [14]

The government urges this Court to water down the substantial burden standard, raising fear that if courts apply RFRA as written, religious exemptions will come tumbling down. Not even its own

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[14] *Priests for Life* engaged in further judicial theologizing when it blessed the government's discriminatory line-drawing between churches and religious ministries on the grounds that ministries' service "goes far beyond worship or proselytizing" to "many services that are not inherently religious," such as hospitals, schools, and social services. 2014 WL 5904732, at *2. Both religions and courts have directly rejected that emaciated view of what qualifies as religious: "[r]eligious people do not practice their faith in that compartmentalized way; free-exercise rights are not so circumscribed." *See Korte v. Sebelius*, 735 F.3d 654, 681 (7th Cir. 2013) (rejecting the "far-too-narrow view of religious freedom" that protects it in "the home and the house of worship but not beyond"); *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (2008) (rejecting a law that disfavored a religious ministry whose faith "move[d] [its adherents] to engage in" broader religious service); *see also James* 1:27 (NIV) ("Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress"); *Matthew* 25:34-40; *accord Deuteronomy* 15:11 ("I command you to be openhanded toward your brothers, and toward the poor and needy in your land."). *See also* The Koran 662, *Surah* 107:1-7 (Arthur J. Arberry, trans., Oxford Univ. Press 1983) (instructing adherents to provide for the physical needs of the poor).

citations support this outlandish claim. Br. 34-35. In *Thomas*, the plaintiff left his job after determining that all available alternatives also violated his beliefs. *Thomas,* 450 U.S. at 710. It was then entirely up to Thomas' employer, not Thomas, whether and how to employ another person to make tank turrets. Likewise, the EEOC guidelines recognize that even under the Title VII standard—which is far more deferential than RFRA—"it would pose an undue hardship to require employees *involuntarily* to substitute for one another," and "if the employer is on notice that the employee's religious beliefs preclude him not only from working on his Sabbath ***but also from inducing others to do so***, reasonable accommodation requires more than merely permitting the employee to swap." EEOC Compliance Manual (2008), http://www.eeoc.gov/policy/docs/religion.html#_ftnref175 (emphasis added). Prior exemption schemes recognize and account for religious objections to obligating and inducing another to sin on one's behalf. The government's analogy to *Bowen* and *Kaemmerling* thus fails. Br. 30. *Lyng* is inapposite for the same reason: the government could build on its own property without any

participation from the plaintiff tribes. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448 (1988).

Furthermore, the *Notre Dame* majority's analogy to conscientious objectors withstands no scrutiny. *See.* 743 F.3d at 556; *cf. Priests for Life*, 2014 WL 5904732, at * 17. Any force behind the analogy stems not from the question of burden, but from the government's compelling need to raise an army. For *Notre Dame*'s analogy to be accurate, an objector would be forced to:

- designate an otherwise ineligible person to take his place,
- authorize the government to draft the person,
- authorize and obligate the person to enlist,
- trigger financial incentives for the person to enlist,
- pay for part of the financial incentives;
- maintain a continuing relationship with that person to ensure his continued enlistment, and
- seek out and contract with a new substitute should the first substitute quit.

The analogy does not hold up, nor does the rest of these decisions' reasoning. The *Notre Dame*, *Michigan Catholic*, and *Priests for Life*

decisions are based upon legal conclusions that contradict government admissions and binding precedent. Indeed, the government unsuccessfully made precisely the same argument to the Supreme Court. The Universities suffer a substantial burden on their religious exercise, so the mandate must face strict scrutiny.

D. The mandate cannot satisfy strict scrutiny.

1. The government has not met its burden of identifying a compelling interest.

In order to meet the "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), the government must demonstrate why the mandate must be specifically applied *to ETBU and HBU*, even while it exempts thousands of other plans.[15]

However compelling any asserted interest might be in the abstract, the government must prove that it is compelling as applied "to the person." *Hobby Lobby*, 134 S. Ct. at 2779 (quoting *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546

[15] The government claims that each step of the mandate should not be subject to compelling interest analysis. Br. 37. This argument proves too much: if the government can avoid compelling interest analysis by offering a purported compromise—any compromise—then it can easily circumvent RFRA's analysis.

U.S. 418, 430-31 (2006)). In *O Centro*, even the government's obviously compelling interest in enforcing the nation's drug laws faltered when applied to the circumstances of that case. *Id.* Here, RFRA requires the Court "to 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants'—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases." *Hobby Lobby*, 134 S. Ct. at 2779.

The government has already admitted it has *no interest* in enforcing the mandate against institutions like the Universities. It made a regulatory finding that exempting certain religious organizations "does not undermine the governmental interests furthered by the contraceptive coverage requirement" because their employees are more likely to share their faith. But both ETBU and HBU presented uncontradicted evidence that its employees also share its faith. ROA.14-20112.2274, 2276 (GRE 105, 107) (Opinion of Rosenthal, J.). In response, the government offers no evidence to explain why this logic applies to some religious organizations, but

not to ETBU or HBU. Absent such proof, the government cannot establish a compelling interest here.

Although the government claims that its interests are compelling as applied to the Universities' combined total of fewer than 600 employees, the Supreme Court explained that "the contraceptive mandate 'presently does not apply to tens of millions of people.'" *Hobby Lobby*, 134 S. Ct. at 2764.[16] The government's justification for this inconsistency is not public health, but "simply the interest of employers in avoiding the inconvenience of amending an existing plan." *Id.* at 2780. But even high-priority interests are not compelling when the government pursues them only some of the time. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) ("It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'"); *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 472-73 (5th Cir.

[16] Though the government intends that grandfathered plans will be temporary, "there is no legal requirement that grandfathered plans ever be phased out." *Id.* at 2764 & n.10.

2014) ("Where a regulation already provides an exception from the law for a particular group, the government will have a higher burden in showing that the law, as applied, furthers the compelling interest.") (citing *Hobby Lobby*); *Tagore v. United States*, 735 F.3d 324, 331 (5th Cir. 2013) ("categorical approach" to defining a compelling interest is particularly "insufficient" where "the statute includes exceptions to the prohibition").

The Court also noted the government's admission that the mandate is not a "particularly significant" portion of the ACA: "Grandfathered plans are required 'to comply with a subset of the Affordable Care Act's health reform provisions' that provide what HHS has described as 'particularly significant protections.' 75 Fed. Reg. 34540. ***But the contraceptive mandate is expressly excluded*** from this subset. *Ibid.*" *Id.* at 2780 (emphasis added).[17]

[17] *Cf. O Centro*, 546 U.S. at 432-33 ("The fact that the Act itself contemplates that exempting certain people from its requirements would be 'consistent with the public health and safety' indicates that congressional findings . . . should not carry the determinative weight, for RFRA purposes, that the Government would ascribe to them.")

The government urges the Court to ignore the Supreme Court's opinion in *Hobby Lobby*—joined in full by five justices—and instead focus on one line from the concurrence. But that line only reiterates the Court's "assumption" that the mandate generally serves a "legitimate and compelling interest in the health of female employees." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). It sheds no light on the question of whether the interest is compelling as applied "to the person" at issue here—two religious universities.

For the first time in this case, the government on appeal invokes an interest in "ensuring that women seamlessly obtain coverage for contraception alongside their remaining health coverage." Br. 45. This is nothing more than an attempt to conflate the government's least restrictive means argument ("seamless" coverage) into its compelling interest (the interests furthered by the covered items). It fails, for all the reasons discussed below. *See infra* Section I.D.2. The government also lists a number of adverse pregnancy outcomes and medical costs as alleged compelling interests. Br. 38-39. It is not clear how these interests differ from the generalized interests

in public health and gender equality that the government offered in district court, and which the Supreme Court criticized as overbroad. *See Hobby Lobby*, 134 S. Ct. at 2779.[18]

This rule applies even to critically important interests such as enforcing the nation's drug laws, *O Centro*, 546 U.S. at 433; prison safety, *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 533 (11th Cir. 2013); prevention of animal cruelty, *Lukumi*, 508 U.S. at 543-44, 546; traffic safety, *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267-68 (11th Cir. 2005); protecting federal buildings, *Tagore*, 735 F.3d at 330-31; controlling government costs, *Rich*, 716 F.3d at 533*; Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781,

[18] The IOM report the government relies on is missing a critical link: proof that mandatory coverage will produce these outcomes. HHS never asked the IOM to make recommendations about "coverage decisions," which the IOM noted "often consider a host of other issues, such as . . . ethical, legal, and social issues; and availability of alternatives." Institute of Medicine, Clinical Preventive Services for Women: Closing the Gaps at 6-7; *id.* at 2 (HRSA charge). In fact, HHS ordered the IOM to *exclude* coverage-relevant considerations like "cost effectiveness." *Id.* at 3. Nor does the IOM report find that covering emergency contraceptives is essential for women's health. *See* IOM Rep. at 19, AR 317 (not mentioning emergency contraceptives). Indeed, nowhere does the IOM report link the cost of women's health care to emergency contraceptives.

795 (5th Cir. 2012), as corrected (Feb. 20, 2013), and, yes, protecting public health, *Lukumi*, 508 U.S. at 544-45; *Merced*, 577 F.3d at 592.

The government relies on *Bowen* and pre-*Smith* caselaw to argue that the court should consider the impact of exemptions writ large on the government's operations. Br. 38. This is nothing more than a repackaging of its substantial burden argument: the government claims that the Universities seek to control the government's conduct rather than their own. *See* Section I.C.2, *supra*.[19] The government complains that it should not have to "fundamentally restructure its operations"—but it was the government that chose to carve out exemptions covering tens of millions, and then "create entirely new programs," to apply to a narrow class of religious objectors like the Universities. Br. 37, 44. The government has already shown itself willing to create (and repeatedly modify) new programs to deal with a relatively small number of religious

[19] Moreover, the compelling interest analysis of pre-*Smith* cases is not controlling here. Under the strict scrutiny prong, "RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions." *Hobby Lobby*, 134 S. Ct. at 2761 & n.3.

objectors. Refusing to do so here means that it has not met its burden of satisfying strict scrutiny.

To meet the exacting RFRA standard, the government cannot rely on evidence that is "speculative" or "based on assumptions that were unsupported by the record." *Rich*, 716 F.3d at 533. Speculation is all the government has, so its arguments are foreclosed as a matter of law.

2. The government has not used the least restrictive means available to further its stated interests.

Since the government failed to bear its burden under the compelling interest prong, the Court need not address the least restrictive means prong of RFRA. If the Court did so, however, it would find that the government failed to bear its burden there as well. Instead of responding to the numerous less restrictive alternatives that the Universities have proposed, the government relies on what it believes is a less restrictive alternative than the one it proposed in the district court: the augmentation. As an initial matter, the government's ability to issue the augmentation proves that when the government told the district court it couldn't offer

any broader accommodation than it was already offering, it actually could offer quite a bit more.

Leaving that fact to one side, the augmentation still fails on its own terms. The least restrictive means requirement is "exceptionally demanding." *Hobby Lobby*, 134 S. Ct. at 2780 (citing *City of Boerne*, 521 U.S. at 532). If a less restrictive alternative would serve the government's purpose, "the legislature *must* use that alternative." *U.S. v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) (emphasis added); *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014) (even under intermediate scrutiny, "the government must demonstrate that alternative measures . . . would fail to achieve the government's interests, not simply that the chosen route is easier."). To make this showing, the government must *introduce evidence* into the record, *Playboy*, 529 U.S. at 816, 826, such as "the average cost per employee of providing access to [emergency] contraceptives," or "the number of employees who might be affected" should they not receive the coverage required by the mandate. *Hobby Lobby*, 134 S. Ct. at 2780. The government failed to do so. Thus, it failed to meet its burden on strict scrutiny.

The government repeatedly claims that the Universities demand that no "third party" should be allowed to provide emergency contraceptives to its employees. Br. 43. That is false. The Universities have no religious objection to truly independent government actions. Instead they object to their own coerced participation, and to the government's interference in their private health benefit plans and private contracts. They have proposed several alternatives that would meet the government's claimed objectives without their involvement.

More importantly, the government fails to prove that any of the alternatives offered would be ineffective in meeting the government's goals. For example, as the Supreme Court recognized, "[t]he most straightforward way of doing this would be for the Government to assume the cost of providing" the objectionable drugs and devices directly, and "HHS has not shown, *see* § 2000bb-1(b)(2), that this is not a viable alternative." *Hobby Lobby*, 134 S. Ct. at 2780. The government does not offer any evidence why this alternative would be ineffective in meeting its goals.

One way of pursuing this alternative would be through Title X of the Public Health Service Act, through which the government spends millions of dollars a year to "[p]rovide a broad range of acceptable and effective medically approved family planning methods . . . and services." 42 C.F.R. § 59.5(a)(1).[20] The government has not explained why it could not use a pre-existing program such as Title X to redress genuine economic barriers to access to emergency contraceptives. *See, e.g.*, 42 C.F.R. § 59.5(a)(6) ("priority in the provision of [family planning] services will be given to persons from low-income families"). Nor is there any reason the government could not allocate some of the $300 million budget for family planning to providing services to occasional employees of ETBU or HBU. And if ETBU or HBU employees are not considered "low-income" enough, HHS has shown itself more than willing to amend its own regulations to route coverage to the Universities' employees. "If, as HHS tells us, providing all women with cost-free

[20] *See also, e.g.*, RTI International, *Title X Family Planning Annual Report: 2011 National Summary* 1 (2014), http://www.hhs.gov/opa/pdfs/fpar-2011-national-summary.pdf ("In fiscal year 2011, the [Title X] program received approximately $299.4 million in funding.").

access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal." *Hobby Lobby*, 134 S. Ct. at 2781 (emphasis original).

Alternatively, the government could use the exchanges that now exist in every state. Defendants could offer subsidies to University employees who wish to purchase comprehensive policies on the government-run exchanges. *See* ROA.14-20112.844. This is precisely how the government ensures coverage to millions of Americans who work for small employers. The government has failed to prove why the Universities' employees cannot be served by this proposed "modification of an existing program."

The government hints that coverage for the Universities' employees must be "seamless," Br. 26, 36, 38, implying that it must be able to provide abortifacient drugs *through* the Universities' plans, but it has pointed to no evidence that having employees sign up for services outside of their plans would actually impede the government's public health goals. As an initial matter, the

government cannot raise the "seamless" argument for the first time on appeal. *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 449 (5th Cir. 2013) ("This court has repeatedly ruled that it will not consider issues that were not raised before the trial court"); *XL Specialty Ins. Co. v. Kiewit Offshore Servs., Ltd.*, 513 F.3d 146, 153 (5th Cir. 2008) ("An argument not raised before the district court cannot be asserted for the first time on appeal."). Moreover, the government produced no evidence on summary judgment regarding its interest in seamlessness, perhaps because that interest had not yet occurred to it.

Yet even if Defendants had properly raised this argument below, or adduced any summary judgment evidence in the district court, the new seamlessness argument founders as pure speculation. When Congress passed RFRA, it stated that "policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements,'" S. Rep. No. 103-111, at 10. Here, the government has not just failed to put forward any evidence on its general point; it has not made any effort to show

how "seamlessness" would affect (or not affect) the Universities' employees.[21]

The government has also failed to explain why this method is insufficient for the Universities' employees, but perfectly fine for 34 million Americans employed by small businesses. *See* 26 U.S.C. § 4980H(c)(2) (small business exemption); *Tagore*, 735 F.3d at 330-31 ("particularly if, as here, the statute includes exceptions," then "the government must produce evidence justifying its specific conclusion.") (citation omitted).

While *Hobby Lobby* found that the accommodation was a *less* restrictive means than being directly forced to provide and pay for objectionable coverage, nothing in *Hobby Lobby* blessed the accommodation as the *only* less restrictive means, or that it was in

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[21] The *Priests for Life* court presumes away this evidentiary question. *See* 2014 WL 5904732, at *30 ("There is no reason to believe that the health needs of Plaintiffs' employees or spouses and other covered beneficiaries in their families are materially different from those of other women."). But that gets it exactly backwards: strict scrutiny under RFRA must be done "to the person," not by categories of persons. *O Centro*, 546 U.S. at 430-31. The government should not be allowed to wriggle out of its earlier litigation tactical decision (better to win on the law than on the facts) not to find out anything more about the Universities and their employees than what was put in the Universities' complaint.

fact the *least* restrictive means. To the contrary, the Supreme Court was clear that it did not "decide today whether [the accommodation] complies with RFRA for purposes of all religious claims," and it disclaimed even being "permitted to address" the accommodation's viability. *Hobby Lobby*, 134 S. Ct. at 2782 & n.40. There, "the plaintiffs ha[d] not criticized [the accommodation] with a specific objection that has been considered in detail by the courts in this litigation." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). The opposite is true here. And if the Supreme Court had ruled otherwise, then surely it would not have expressly reaffirmed its decision to grant emergency relief to the Little Sisters of the Poor, *id.* at 2763 n.9, and soon after its decision, it would have not granted relief to Wheaton College. 134 S. Ct. 2806. And it is typical for a defendant to fail strict scrutiny when a single less restrictive alternative is found. *See*, *e.g.*, *Tagore*, 735 F.3d at 331.

In sum, the government failed to meet its difficult burden on summary judgment of demonstrating that the mandate satisfies strict scrutiny. It has not remedied that showing on appeal.

CONCLUSION

This Court should affirm the ruling of the District Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 19, 2014, I caused the foregoing to be served electronically via the Court's electronic filing system on the following parties who are registered in the system:

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All other case participants will be served via the Court's electronic filing system as well.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the page limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,928 words excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: November 19, 2014