

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-20112

EAST TEXAS BAPTIST UNIVERSITY, HOUSTON BAPTIST UNIVERSITY,

Plaintiffs - Appellees

WESTMINSTER THEOLOGICAL SEMINARY,

Intervenor Plaintiff - Appellee

v.

SECRETARY SYLVIA MATTHEWS BURWELL; DEPARTMENT OF HEALTH
AND HUMAN SERVICES; DEPARTMENT OF LABOR; DEPARTMENT OF
TREASURY; SECRETARY OF LABOR THOMAS PEREZ; SECRETARY
JACOB LEW

Defendants - Appellants

Consolidated w/No. 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 Treasury; JACOB J.
LEW, in his official capacity as Secretary of the United States Department of Labor;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR; UNITED STATES

DEPARTMENT OF TREASURY,

Defendants – Appellants

Consolidated w/No. 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 Treasury; JACOB J. LEW, in his official capacity as Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF TREASURY,

Defendants – Appellants

Consolidated w/No. 14-10661

CATHOLIC CHARITIES, DIOCESE OF FORT WORTH, INCORPORATED,

Plaintiff – Appellee

v.

SYLVIA MATTHEWS BURWELL, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the U.S. Department of Labor; JACOB J. LEW, in his official capacity as Secretary, U.S. 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 Eastern District of Texas, and the Southern District of Texas

PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

No. 14-20112, *East Texas Baptist Univ. v. Burwell*, consolidated with No. 14-10241, *University of Dallas v. Burwell*, No. 14-40212, *Catholic Diocese of Beaumont v. Burwell*, and 14-10661, *Catholic Charities, Diocese of Fort Worth, Inc. v. Burwell*

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 so that the judges of this Court may evaluate possible disqualification or recusal.

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The University of Dallas; Catholic Charities, Diocese of Fort Worth, Incorporated; Catholic Diocese of Beaumont; and Catholic Charities of Southeast Texas, Incorporated have no parent corporations and no publicly-held companies hold 10% or more of their stock.

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STATEMENT OF COUNSEL

Pursuant to Fifth Circuit Rule 35.2.2 and Federal Rule of Appellate Procedure 35(b)(1), I express a belief, based on reasoned and studied professional judgment, that the panel decision directly conflicts with the decision of the United States Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court.

Appellees challenge regulations that force them to violate their religion by offering health plans to their employees, students, and other beneficiaries through companies that will provide or procure coverage for abortifacients, contraceptives, and sterilizations. By holding that the regulations do not substantially burden Appellees' religious exercise, the panel directly contradicted binding Supreme Court precedent. The Government "substantially burdens" the "exercise of religion" whenever it forces plaintiffs to "engage in conduct that seriously violates their religious beliefs" on pain of "substantial" penalties. *See Hobby Lobby*, 134 S. Ct. at 2775-76. The regulations do just that: they threaten massive penalties unless Appellees violate their religion by (1) submitting a "self-certification" or "notification" and (2) offering health plans through companies that will provide the objectionable coverage.

As six circuit judges have recognized, "it is black-letter law" that such coercion imposes a substantial burden. *See, e.g., Priests for Life v. U.S. HHS*, No. 13-5368, 2015 U.S. App. LEXIS 8326, at *49 n.3 (D.C. Cir. May 20, 2015) (Kavanaugh, J.,

dissenting).¹ That explains why the Supreme Court has granted emergency relief from these regulations to every nonprofit that has requested it.²

This issue is also of exceptional importance, as evidenced by the number of amici from which this case has drawn interest, the nationwide litigation regarding the issue, and the fact that the panel's opinion drew nationwide press attention.³ If allowed to stand, the panel's decision will deal a massive blow to private religious associations and radically constrict the realm of religious exercise protected against encroachment by the federal Government. The panel's logic would allow courts to impermissibly second-guess plaintiffs' religious beliefs and could be used to effectively preclude religious organizations from vindicating their right to provide services in a manner consistent with their beliefs.

Because that result is contrary to Supreme Court precedent, and is of exceptional importance, this Court should grant rehearing en banc.

/s/ Thomas F. Allen, Jr.
Thomas F. Allen, Jr.

¹ See *id.* at *16-17 (Brown, J., dissenting, joined by Henderson, J.); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 626 (7th Cir. May 19, 2015) (Flaum, J., dissenting); *Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1345 (11th Cir. 2014) (Pryor, J., concurring); *Little Sisters of the Poor v. Burwell*, No. 13-1540, 2015 U.S. App. LEXIS 12145, at *143 (10th Cir. July 14, 2015) (Baldock, J., dissenting).

² See *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014); *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014); *Zubik v. Burwell*, No. 14A1065, -- S.Ct. --, 2015 WL 3947586 (U.S. June 29, 2015).

³ See, e.g., *Religious Groups May Appeal Birth Control Mandate Ruling*, ASSOCIATED PRESS, June 24, 2015, available at <http://www.nytimes.com/aponline/2015/06/24/us/ap-us-health-overhaul-contraceptives.html>; Y. Peter Kang, *5th Cir. Nixes Religious Groups' Contraception Challenge*, LAW360, June 22, 2015, available at <http://www.law360.com/articles/671104/5th-circ-nixes-religious-groups-contraception-challenge>.

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STATEMENT OF ISSUE FOR EN BANC CONSIDERATION

Whether the panel’s decision—holding that Appellees’ compelled participation in a regulatory scheme to provide coverage for abortifacients, contraception, and sterilization does not substantially burden their religious exercise—can be reconciled with *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

COURSE OF PROCEEDINGS AND STATEMENT OF FACTS

The Patient Protection and Affordable Care Act of 2010 requires employers’ group health plans to cover women’s “preventive care.” 42 U.S.C. § 300gg-13(a)(4) (2012); 45 C.F.R. § 147.130(a)(1)(iv) (the “Mandate”). The Government has defined such care to include contraceptives, sterilization, and abortifacients. *See Hobby Lobby*, 134 S. Ct. at 2762-63, 2763 n.7. In *Hobby Lobby*, the Supreme Court applied the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1 (2012), to hold that the Mandate cannot be enforced against employers with religious objections. 134 S. Ct. at 2785.

Tacitly acknowledging that the Mandate burdens religious exercise, the Government has exempted “churches, their integrated auxiliaries, and . . . associations of churches” from compliance, regardless of whether they object to facilitating the provision of contraceptive coverage. 26 U.S.C. § 6033(a)(3)(A)(i) & (iii) (2012); 45 C.F.R. § 147.131(a). The Government has declined to extend a similar exemption, however, to religious nonprofits, such as Appellees here, that actually do object to such conduct. Instead, the Government has offered these organizations a so-called

“accommodation,” which purports to relieve objecting organizations of their obligation to *pay* for the objectionable coverage, but still requires them to ensure that their plan beneficiaries receive the coverage in connection with their plan. *See, e.g.*, 26 C.F.R. § 54.9815-2713A(a); *id.* § 54.9815-2713AT (“the Nonprofit Mandate”). In reality, the Nonprofit Mandate merely gives these organizations an opportunity to violate their religious beliefs in a different way.

Under the Nonprofit Mandate, an objecting religious nonprofit must either provide a “self-certification” directly to its insurance company or third-party administrator (“TPA”), or submit a “notice” to the Government giving detailed information on the nonprofit’s plan name and type, along with “the name and contact information for any of the plan’s [TPAs] and health insurance issuers.” 26 C.F.R. § 54.9815-2713A(a); *id.* § 54.9815-2713AT(b)(1)(ii)(B), (c)(1)(ii). If a nonprofit submits either document, its insurer or TPA becomes obligated and incentivized to arrange “separate” “payments for contraceptive services.” *Id.* In other words, Appellees’ actions ensure that their employees receive the exact same objectionable coverage, from the exact same insurer or TPA, as under the ordinary contraceptive Mandate.

Thus, the Nonprofit Mandate leaves no way for objecting nonprofits to “provid[e] insurance coverage in accordance with their religious beliefs.” *See* 134 S. Ct. at 2779. If they provide plans without the mandated coverage, they will incur penalties of \$100 per day per affected beneficiary. 26 U.S.C. § 4980D(b) (2012). And if they drop their plans altogether to avoid the Nonprofit Mandate, they will incur penalties

of \$2,000 per year per employee after the first thirty employees. 26 U.S.C. § 4980H(a), (c)(1), (c)(2)(D) (2012). In short, objecting organizations have no choice but to violate their beliefs and comply, or to pay massive fines.

The Appellees seeking rehearing are the University of Dallas, a Catholic university; the Catholic Diocese of Beaumont; and two Catholic charitable organizations, Catholic Charities, Diocese of Fort Worth, Inc. and Catholic Charities of Southeast Texas, Inc.⁴ They offer a variety of health plans (including insured plans, a self-insured plan, and a self-insured “church plan”) for eligible employees and other beneficiaries. Op. at 9-10. It is undisputed that even under the so-called “accommodation,” Appellees must take actions that, in their sincere religious judgment, make them complicit in the delivery of objectionable coverage in violation of their Catholic faith. (ROA.14-40212.76, 109-15, 115-17, 1077-78; ROA.14-10661.1068-69, 1130, 1184-89.) Appellees object to (1) submitting the self-certification or notification and (2) contracting with a company that will provide the mandated coverage to their plan beneficiaries.

The University of Dallas and Catholic Charities of Fort Worth obtained preliminary injunctions against the enforcement of the Nonprofit Mandate and any related fines and penalties. (ROA.14-10661.2175-79, 2453-54.) In a separate lawsuit,

⁴ On October 21, 2014, former Appellees Roman Catholic Diocese of Fort Worth and Our Lady of Victory Catholic School were dismissed from this appeal, but the panel’s opinion erroneously treats them as if they were still parties. Op. at 9-10.

the Diocese of Beaumont and Catholic Charities of Southeast Texas obtained a permanent injunction, after which the district court entered final judgment. (ROA.14-40212.1032-52.) The Government appealed these rulings.⁵ On June 22, 2015, this Court reversed the rulings of the district courts, holding that the Nonprofit Mandate did not substantially burden Appellees’ religious exercise.

ARGUMENT AND AUTHORITIES

RFRA prohibits the Government from imposing a “substantial burden” on religious exercise unless doing so “is the least restrictive means of furthering [a] compelling governmental interest.” 42 U.S.C. § 2000bb-1. The panel’s conclusion that the Nonprofit Mandate does not substantially burden Appellees’ religious exercise cannot be squared with Supreme Court precedent.

I. The panel’s decision conflicts with *Hobby Lobby*.

Under *Hobby Lobby*, the test for a “substantial burden” on religious exercise is whether the Government has imposed substantial pressure on religious adherents to take (or forgo) any action contrary to their sincere religious beliefs. *See* 134 S. Ct. at 2770 (explaining that religious exercise includes the “performance of (or abstention from) physical acts . . . for religious reasons.” (citation omitted)). That test is met

⁵ These appeals—Nos. 14-10241 (Univ. of Dallas), 14-10661 (Catholic Charities of Fort Worth), and 14-40212 (Diocese of Beaumont and Catholic Charities of Southeast Texas)—were consolidated with No. 14-20112, the Government’s appeal from *E. Texas Baptist Univ. v. Sebelius*, No. H-12-3009 (S.D. Tex.). The Appellees in No. 14-20112 have not joined this petition; instead, they have filed a petition for writ of certiorari in the United States Supreme Court.

when the Government “demands that [plaintiffs] engage in conduct that seriously violates their religious beliefs” or suffer “substantial” consequences. *Id.* at 2775-76; *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (concluding that petitioner “easily satisfied” the substantial-burden standard where he was “put . . . to the choice” of violating his beliefs or suffering “serious disciplinary action”); *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 718 (1981) (defining “substantial burden” as “substantial pressure on an adherent to modify his behavior and to violate his beliefs”).

Applying that test here leads inexorably to the conclusion that the regulations substantially burden Appellees’ religious exercise. Appellees exercise their religion in two ways. First, they refuse to file the required “self-certification” or “notification.” And second, they refuse to hire or maintain a contract with any company that will provide or procure the objectionable coverage for their plan beneficiaries. Appellees believe either action would make them complicit in sin under Catholic principles of material cooperation and scandal. (ROA.14-40212.107-18, 1077-78; ROA.14-10661.1163-70, 1184-89.) There is no dispute that if they refuse to take those actions, they will suffer heavy penalties. Thus, just as in *Hobby Lobby*, if Appellees “comply with the [regulations],” “they will be facilitating” immoral conduct in violation of their religion. *See* 134 S. Ct. at 2759. And just as in *Hobby Lobby*, if Appellees “do not comply” “they will pay a very heavy price.” *Id.* In short, because the Government “forces [Appellees] to pay an enormous sum of money . . . if they insist on providing insurance coverage in accordance with their religious beliefs, [it has] clearly impose[d]

a substantial burden” on their religious exercise. *Id.* at 2779.

It does not matter that Appellee’s religious exercise and beliefs here are different from those in *Hobby Lobby*. As Judge Kavanaugh recognized, forcing entities like Appellees to comply with the Nonprofit Mandate is no different from forcing religious objectors to shave their beards, send their children to high school, pay Social Security taxes, or work on the Sabbath—all substantial burdens according to the Supreme Court. *Priests for Life v. U.S. HHS*, Nos. 13-5368, 13-5371, 14-5021, 2015 U.S. App. LEXIS 8326, at *49-51 (D.C. Cir. May 20, 2015) (Kavanaugh, J., dissenting). “The essential principle is crystal clear: When the Government forces someone to take an action”—any action—“contrary to his or her sincere religious belief . . . or else suffer a financial penalty . . . , the Government has substantially burdened the individual’s exercise of religion.” *Id.* at *62.

Federal law compels Appellees “to maintain a relationship with an issuer or TPA that will provide the contraceptive coverage and to execute the self-certification or alternative notice.” *Id.* at *27 (Brown, J., dissenting). But the panel’s pronouncement that these acts “do not include providing or facilitating access to contraceptives,” Op. at 15, ignores the fact that “this is not a question of legal causation but of religious faith.” *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting). “What amounts to ‘facilitating immoral conduct,’ [or] ‘scandal,’ . . . are inherently theological questions which objective legal analysis cannot resolve and which ‘federal courts have no business addressing.’” *Priests for Life*, 2015 U.S. App.

LEXIS 8326, at *29 (Brown, J., dissenting) (citations omitted). Courts may not arrogate unto themselves the authority to “answer” the “religious and philosophical question” of “the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.” 134 S. Ct. at 2778. Thus, *Hobby Lobby* held that religious plaintiffs, not courts, determine whether a particular act is “connected to” wrongdoing “in a way that is sufficient to make it immoral.” *Id.* By stating that compliance with the Nonprofit Mandate would not “facilitate” the provision of contraceptive coverage, the panel substituted its own moral judgment for that of Appellees, effectively telling them “that their beliefs are flawed.” *Id.*

Indeed, the opinion is replete with examples of the panel’s replacing Appellees’ moral calculus with its own. The panel says that Appellees need not worry about contracting with insurers or TPAs that will provide contraceptive coverage to their beneficiaries, because “the contracts are solely for services to which the plaintiffs do not object.” Op. at 19. But the Court’s characterization of the scope of the contracts is wrong; even the Government concedes that in the self-insured context, “the contraceptive coverage is part of the [employer’s health] plan.” *Roman Catholic Archbishop of Wash. v. Sebelius*, 19 F. Supp. 3d 48, 80 (D.D.C. 2013) (citation omitted). And even if the panel’s assertion were true, the important question—whether certain actions are impermissibly “connected” to immoral conduct—is a religious one, for Appellees to decide. Does contracting with a company that will provide objectionable

coverage to one's plan beneficiaries "impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the Catholic Church? No civil authority can decide that question." *Korte v. Sebelius*, 735 F.3d 654, 685 (7th Cir. 2013) (Sykes, J.). Likewise, the panel provides a number of reasons why, in its judgment, the regulations shield Appellees' plans from being used "as vehicles for payments for contraceptives." Op. at 18-19. But again, it is for Appellees, not a court, to decide whether the actions that the regulations compel them to take are "sufficiently insulated" from actions they deem immoral. *Thomas*, 450 U.S. at 715.

The panel held that Appellees' actions would not make them complicit in sin because, in its view, "the acts that violate [Appellees'] faith are those of third parties." Op. at 12-16 (citing *Bowen v. Roy*, 476 U.S. 693 (1986), *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), and *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008)). That is incorrect. As Judge Rosenthal recognized, Appellees "vigorously object on religious grounds to the act[s] that the government requires *them* to perform, not merely to later acts by third parties." *E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743, 765 (S.D. Tex. 2013) (emphasis added). "Make no mistake: the harm Plaintiffs complain of" is "their inability to conform *their own actions* and inactions to their religious beliefs without facing massive penalties from the government." *Priests for Life*, 2015 U.S. App. LEXIS 8326, at *21 (Brown, J., dissenting) (emphasis added).

To be sure, Appellees object to submitting the objectionable "self-certification" or "notification" and maintaining the objectionable contractual relationship *because*

those actions would make them complicit in a third party's efforts to provide or procure the mandated coverage. But the fact that a plaintiff objects to his own compelled act because it "enabl[es] or facilitat[es] the commission of an immoral act by another" does not transform that objection into a challenge to third party conduct. 134 S. Ct. at 2778. Indeed, *Hobby Lobby* rejected this very argument. There, the Government contended that plaintiffs' claim failed because the moral wrong—"the destruction of an embryo"—would come about only due to actions taken by others. *Id.* at 2777. As the Court explained, this "dodges the question that RFRA presents." *Id.* at 2778. Rather than deferring to the plaintiffs' belief that their compelled conduct was "connected to the destruction of an embryo in a way . . . sufficient to make it immoral," the Government asserted that the belief was not "reasonable." *Id.* The panel's analysis suffers from the same flaw.

Ultimately, *Bowen*, *Lyng*, and *Kaemmerling*—on which the panel heavily relies—stand for nothing more than the proposition that an individual cannot challenge what is "entirely" the activity of a third party, in which he or she plays "no role." *Lyng*, 485 U.S. at 449 (government building road on public land); *Bowen*, 476 U.S. 693 (government use of Social Security number in its possession); *Kaemmerling*, 553 F.3d at 679 (government extraction of DNA from sample it possessed involved "no action or forbearance" by plaintiff).⁶ While "RFRA confers no right to challenge the

⁶ The panel appears astonished at the purported "breadth of the plaintiffs' position,"

independent conduct of third parties,” Op. at 16, that is not this case. It is undisputed that the Nonprofit Mandate “compels” Appellees themselves “to act,” *Eternal Word Television Network, Inc. v. Sec’y, U.S. Dep’t of Health & Human Servs.*, 756 F.3d 1339, 1339 (11th Cir. 2014)(Pryor, J., concurring), and that those actions violate Appellees’ beliefs. In that scenario, a court has “no choice but to decide that compelling [Appellees] participation . . . is a substantial burden on [their] religious exercise.” *Id.*

II. The objectionable coverage is not provided “independently” of Appellees.

In reaching its conclusion, the panel relied in part on its view that Appellees’ TPAs and insurers have “independent” obligations to provide the objectionable coverage. Op. at 15-17. This is incorrect, but even if the regulatory scheme worked exactly as the panel stated, it would make no difference because Appellees object to contracting with any TPA or insurer obligated to provide the objectionable coverage to Appellees’ plan beneficiaries, regardless of how that obligation is triggered. *See Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 627 (7th Cir. 2015) (Flaum, J., dissenting) (stating that the existence of an independent obligation “really is of no moment here,

suggesting that Congress could not possibly have intended RFRA to protect plaintiffs with religious objections to actions “that would,” for example, “facilitate the [Government’s] use of a number” to identify an individual. Op. at 19-20. But by its very terms, RFRA protects “*any* exercise of religion.” 42 U.S.C. § 2000cc-5(7)(A) (2012) (emphasis added). And *Bowen* itself instructs that objections to such acts of facilitation fall within RFRA’s scope. The plaintiffs in *Bowen* objected not only to the *Government’s use* of their daughter’s Social Security number (to which the Court held they could not object), but also to the separate requirement that *they submit a form* containing their daughter’s Social Security number in order for her to receive benefits. 476 U.S. at 701-12, 701 n.7 (opinion of Burger, C.J.). While the Court did not rule on the second question due to a dispute over mootness, “five justices . . . expressed the view that the plaintiffs [would have been] entitled to an exemption from [that] administrative requirement.” *Notre Dame*, 743 F.3d at 566 (Flaum, J., dissenting) (citation and internal quotation marks omitted).

because Notre Dame also [objects to] being driven into an ongoing contractual relationship with an insurer” that provides the objectionable coverage).

In any event, the panel was mistaken to suggest that Appellees’ TPAs and insurers somehow have an “independent” obligation to provide the objectionable coverage to Appellees’ employees. In fact, the law is clear that no such obligation exists *unless* Appellees (1) maintain a contractual relationship with their insurers or TPAs and (2) submit the objectionable self-certification or notification. It is equally clear that if Appellees stopped offering health plans, their insurers and TPAs would have no obligation to provide Appellees’ beneficiaries with the objectionable coverage.⁷ The Government has never suggested otherwise. It is thus undeniable that the provision of the objectionable coverage by Appellees’ TPAs and insurers is entirely contingent on Appellees’ actions.

In addition, once Appellees decide to offer health plans, their TPAs and insurers cannot provide the objectionable coverage unless Appellees invoke the “accommodation” by submitting the self-certification or notification. In the self-certification context, the Government has conceded that compliance with the accommodation is necessary to “ensure[] that there is a party with legal authority” to provide the objectionable coverage. 78 Fed. Reg. 39,870, 39,880 (July 2, 2013).

⁷ 26 C.F.R. § 54.9815-2713AT(b)(2) (TPA’s obligation to provide coverage arises only if it is “in a contractual relationship” with an eligible organization); *id.* § 54.9815-2713A(c)(2)(B) (issuers must provide coverage only “for so long as [beneficiaries] remain enrolled in the plan”).

“After all, if the form were meaningless, why would the government require it?”

Priests for Life, 2015 U.S. App. LEXIS 8326, at *58 (Kavanaugh, J. dissenting). Indeed, in the ordinary course of business, a TPA merely administers the health plan as established by the employer. The only way this changes is *if* an eligible organization invokes the “accommodation.” Only *then* does the TPA “provide or arrange payments for contraceptive services.” 26 C.F.R. § 54.9815-2713AT(b)(2). The regulations’ unequivocally conditional language makes clear that a TPA “bears the legal obligation to provide contraceptive coverage *only* upon receipt of a valid self-certification” or notification. *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2814 n.6 (2014) (Sotomayor, J., dissenting) (emphasis added) (citation omitted). The panel cites no statutory or regulatory authority for its contrary conclusion because there is none. *See* Op. at 17.

Moreover, all parties agree that the “accommodation” creates a unique incentive for a TPA to provide the objectionable coverage, because once a self-insured nonprofit invokes the “accommodation,” its TPA is eligible to be reimbursed for 115% of the cost of coverage. *See* 45 C.F.R. § 156.50; 79 Fed. Reg. 13,744 (Mar. 11, 2014). Even the Government acknowledges this incentive is available *only if* an eligible organization invokes the “accommodation.” *See, e.g.*, 26 C.F.R. § 54.9815-2713AT(b)(3); 79 Fed. Reg. 51092, 51095 n.8 (Aug. 27, 2014).

Likewise, in the context of an insured plan, a religious organization’s insurance issuer has no enforceable obligation to provide the mandated coverage unless the organization submits the self-certification or notification form. Without the form, the

regulations purport to require the religious organization *itself* to pay for the coverage as part of its plan, *see* 45 C.F.R. § 147.130(a)(1)(iv), an arrangement precluded by *Hobby Lobby*. Thus, the only way the Government can require a religious objector’s insurer to provide the coverage is if the objector invokes the “accommodation,” which obligates the insurer to pay for the “contraceptive services.” *Id.* § 147.131(c)(2). Needless to say, Appellees object *both* to paying for the objectionable coverage (*Hobby Lobby*) *and* to facilitating its provision by submitting the form (this case).

III. The panel’s decision radically constricts religious liberty.

This case is exceptionally important because the panel’s opinion, if allowed to stand, will radically shrink the realm of religious exercise protected by RFRA. Indeed, the decision departs from decades of Supreme Court precedent by inviting—indeed, requiring—judicial inquiry into the validity of private religious beliefs about which actions rise to the level of complicity in sin.

Courts have routinely recognized religious liberty claims when the objection involves facilitation of immoral conduct. *See, e.g., Hobby Lobby*, 134 S. Ct. 2751; *United States v. Lee*, 455 U.S. 252 (1982); *Thomas*, 450 U.S. at 715. The panel’s approach would recast any such objection as a challenge to third-party conduct. For example, in *Thomas*, a court could have concluded that “fabricating turrets for military tanks” would not offend the plaintiff’s pacifist sensibilities, *id.* at 710, because the *real* “acts that violate [his] faith”—use of those tanks in war—involve “the independent conduct of third parties.” *See* Op. at 15-17. Likewise, in *Lee*, the Court could have

dispensed with the plaintiff's objection to the payment of Social Security taxes by claiming that his *real* objection was to the conduct of third parties—namely, that by paying the tax, he would “enable *other Amish* to shirk their duties toward the elderly and needy.” *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1139 (10th Cir. 2013) (en banc) (emphasis added) (citation omitted). Of course, the Court did no such thing. It recognized a substantial burden on religious exercise in both cases, 455 U.S. at 257; 450 U.S. at 717, and explained that “[t]he narrow function of a reviewing court” in such contexts “is to determine whether” plaintiffs have “an honest conviction” that the required acts are “forbidden by [their] religion.” 450 U.S. at 716.

Moreover, as the Government may now compel the purchase of products, *cf. NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), under the panel's view, religious objectors could be forced to purchase products that include services that violate their beliefs—so long as someone else pays for the “unwanted” items. For example, the Government could require parents to purchase health insurance for their minor daughters that entitles them to coverage for abortions—so long as the insurance company picks up the tab for the procedure. *Cf. Wieland v. HHS*, No. 13-3528, 2015 U.S. App. LEXIS 12463 (8th Cir. July 20, 2015). By the panel's logic, religious objectors would have no RFRA claim in this or similar circumstances because hiring the company that will provide the objectionable products and services apparently “ha[s] nothing to do with providing” such items, and the objectors would be seeking only to “block third parties from engaging in conduct with which they disagree.” Op.

at 19-21. In reality, of course, hiring and contracting with a company that will provide objectionable products or services is not “the conduct of third parties.” The act of hiring and contracting is the conduct of the objectors themselves.⁸ *See Priests for Life*, 2015 U.S. App. LEXIS 8326, at *41 (Brown, J., dissenting) (“If the government coopts [Appellees’] contractors and administrative structures to dispense advice, drugs, and services that contravene their religious views, in effect, it has written contraceptive care [into Appellees’ health plans.]”).

CONCLUSION

Once plaintiffs have drawn a line between actions consistent with their religious beliefs and actions they find morally objectionable, “it is not for [courts] to say” that line is “an unreasonable one.” *Hobby Lobby*, 134 S. Ct. at 2778. Supreme Court precedent precludes courts from second-guessing a plaintiff’s religious belief that a particular act would facilitate wrongdoing. Accordingly, this Court should grant rehearing en banc. As Appellees explained in their brief to the panel, the analyses of the district courts below regarding substantial burden, as well as the other issues the panel did not reach (including strict scrutiny under RFRA), were correct. Thus, Appellees further pray that this Court en banc vacate the panel’s opinion and judgment, and affirm the rulings of the district courts below.

⁸ Just as the Government cannot mandate that “all supermarkets must sell alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets),” *Hobby Lobby*, 134 S. Ct. at 2781 n.37, it cannot mandate that all health plans come with “seamless” access to abortifacient and contraceptive coverage, and thereby exclude Catholic nonprofits from offering health insurance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2015, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals, Fifth Circuit, using the electronic case filing system of the court. The electronic case filing system sent a “Notice of Electronic Filing” to all the attorneys of record for Appellants who have consented in writing to accept this notice as service of this document by electronic means.

/s/ Thomas F. Allen, Jr.
Thomas F. Allen, Jr.

CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that on August 3, 2015, this Petition for Rehearing En Banc was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit through the Court’s CM/ECF document filing system. I further certify that; (1) required privacy redactions have been made pursuant to this Court’s Rule 25.2.13, (2) the electronic submission is an exact copy of the paper document pursuant to this Court’s Rule 25.2.1, and (3) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Thomas F. Allen, Jr.
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

June 22, 2015

Lyle W. Cayce
Clerk

No. 14-20112

EAST TEXAS BAPTIST UNIVERSITY; HOUSTON BAPTIST UNIVERSITY,
Plaintiffs–Appellees,
WESTMINSTER THEOLOGICAL SEMINARY,
Intervenor Plaintiff–Appellee,

versus

SYLVIA MATHEWS 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.

Appeal from the United States District Court
for the Southern District of Texas

* * * * *

Nos. 14-20112, 14-10241, 14-40212, 14-10661

No. 14-10241

UNIVERSITY OF DALLAS,

Plaintiff–Appellee,

versus

SYLVIA MATHEWS 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.

Appeal from the United States District Court
for the Northern District of Texas

* * * * *

Nos. 14-20112, 14-10241, 14-40212, 14-10661

No. 14-40212

CATHOLIC DIOCESE OF BEAUMONT;
CATHOLIC CHARITIES OF SOUTHEAST TEXAS, INCORPORATED,
Plaintiffs–Appellees,

versus

SYLVIA MATHEWS 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.

Appeal from the United States District Court
for the Eastern District of Texas

* * * * *

No. 14-10661

Nos. 14-20112, 14-10241, 14-40212, 14-10661

CATHOLIC CHARITIES, DIOCESE OF FORT WORTH, INCORPORATED,
Plaintiff–Appellee,

versus

SYLVIA MATHEWS BURWELL, in her official capacity as
Secretary of the U.S. Department of Health and Human Services;

THOMAS PEREZ, in his official capacity as
Secretary of the U.S. Department of Labor;

JACOB J. LEW, in his official capacity as
Secretary, U.S. Department of Treasury;

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

UNITED STATES DEPARTMENT OF LABOR;

UNITED STATES DEPARTMENT OF TREASURY,

Defendants–Appellants.

Appeal from the United States District Court
for the Northern District of Texas

Before REAVLEY, SMITH, and GRAVES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

In these consolidated appeals, religious organizations challenge, under the Religious Freedom Restoration Act (“RFRA”),¹ a requirement that they either offer their employees health insurance that covers certain contraceptive services or submit a form or notification declaring their religious opposition to that coverage. The district courts held that the requirement violates RFRA or,

¹ 42 U.S.C. §§ 2000bb to 2000bb-4, *invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997).

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in one case, that the plaintiffs had demonstrated a substantial likelihood of establishing that it does, so they enjoined the government from enforcing it. Because the plaintiffs have not shown and are not likely to show that the requirement substantially burdens their religious exercise under established law, we reverse.

I.

A.

Under the Affordable Care Act (“ACA”),² employers with fifty or more full-time employees generally must offer their employees a group health plan³ that provides “minimum essential coverage.” *See* 26 U.S.C. §§ 4980H(a), (c)(2), 5000A(f)(2). Plans typically must cover all FDA-approved contraceptive methods and sterilization procedures for women⁴ without copayments or deductibles.⁵ Two types of plans are automatically exempt from the so-called contraceptive mandate: grandfathered plans, meaning those that have not made certain specified changes since March 2010, *see* 42 U.S.C. § 18011(a), and plans offered by religious employers, defined by reference to the Tax Code to include mostly churches themselves, as distinguished from associated educational or

² Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

³ The term “group health plan” includes both insured plans, in which an insurer writes a policy and bears the risk of claims, and self-insured plans, in which the employer bears the risk but may contract with a third-party administrator to perform administrative tasks such as processing claims.

⁴ We refer to the contraceptive methods and sterilization procedures collectively as “contraceptives” unless otherwise indicated.

⁵ *See* 42 U.S.C. § 300gg-13(a)(4); Group Health Plans and Health Insurance Insurers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725–26 (Feb. 15, 2012).

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charitable institutions.⁶ An employer that does not comply with these requirements faces draconian penalties: \$2,000 per full-time employee per year for not offering a plan at all⁷ and \$100 per affected individual per day for offering a plan that provides insufficient coverage, 26 U.S.C. § 4980D(a), (b)(1).

An “accommodation” is available to religious entities that do not qualify as religious employers but seek exemption from the mandate. To avail itself of that option, (1) an organization must oppose, on religious grounds, providing coverage for some or all contraceptives; (2) it must be organized as a nonprofit; (3) it must hold itself out as religious; and (4) it must certify that it satisfies the foregoing criteria.⁸ It can certify in two ways.

The first way is to complete EBSA⁹ Form 700 and send it to its insurer or third-party administrator.¹⁰ The person signing the form must certify that the organization meets the requirements and that the form is believed to be correct.¹¹ The form requires the name of the organization, the name and title of the person signing it, and contact information. DEP’T OF LABOR, *supra* note 11, at 1. The second way in which an organization can certify is to submit a notice to the Department of Health and Human Services (“HHS”).¹² The

⁶ See 45 C.F.R. § 147.131(a) (citing 26 U.S.C. § 6033(a)(3)(A)(i), (iii)).

⁷ 26 U.S.C. § 4980H(a), (c)(1). The penalty applies if at least one employee enrolls in a subsidized plan through an exchange. See *id.* § 4980H(a)(2).

⁸ 26 C.F.R. § 54.9815-2713A(a); 29 C.F.R. § 2590.715-2713A(a); 45 C.F.R. § 147.131(b).

⁹ “EBSA” stands for “Employee Benefits Security Administration,” which is part of the Department of Labor.

¹⁰ 29 C.F.R. § 2590.715-2713A(b)(1)(ii), (c)(1); 45 C.F.R. § 147.131(c)(1).

¹¹ DEP’T OF LABOR, EBSA FORM 700 1 (2014), <http://www.dol.gov/ebsa/preventiveserviceseligibleorganizationcertificationform.doc>.

¹² 29 C.F.R. § 2590.715-2713A(b)(1)(ii), (c)(1); 45 C.F.R. § 147.131(c)(1).

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notice need not take a particular form but must include the name of the organization; a statement that it opposes, on religious grounds, providing coverage for some or all contraceptives; the name and type of the plan; and the name and contact information of the plan's insurer or third-party administrator, if applicable.¹³

The effect of applying for the accommodation depends on the type of plan and method of certification. If an employer with an insured plan uses Form 700, the insurer must exclude the objectionable coverage from the plan and provide "separate payments" for contraceptives for plan participants.¹⁴ The insurer may not impose any direct or indirect costs for contraceptives on the employer or participants.¹⁵ In addition, it must send a notice to participants, separately from plan materials, explaining that the employer does not administer or fund contraceptives but that, instead, the insurer provides separate payments.¹⁶ If an employer with an insured plan submits a notice to HHS, then HHS notifies the insurer of its obligations, which are the same as if the employer had used Form 700.¹⁷

The process for self-insured plans is somewhat different. If an employer with a self-insured plan uses Form 700, the third-party administrator, if there is one, must either provide separate payments (as an insurer would) or arrange for an insurer or other entity to do so. *See* 29 C.F.R. § 2590.715-2713A(b)(2).

¹³ *See* 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii); 45 C.F.R. § 147.131(c)(1)(ii).

¹⁴ 29 C.F.R. § 2590.715-2713A(c)(2)(i); 45 C.F.R. § 147.131(c)(2)(i).

¹⁵ 26 C.F.R. § 54.9815-2713A(c)(2)(ii); 29 C.F.R. § 2590.715-2713A(c)(2)(ii); 45 C.F.R. § 147.131(c)(2)(ii).

¹⁶ 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(d).

¹⁷ *See* 29 C.F.R. § 2590.715-2713A(c)(1)(ii), (2)(i); 45 C.F.R. § 147.131(c)(1)(ii), (2)(i).

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Third-party administrators and insurers that pay for contraceptives in this circumstance are eligible for government reimbursement of 115% of their expenses.¹⁸ The prohibition on imposing costs and the notice requirement are the same as for insured plans.¹⁹ Moreover, the form “shall be an instrument under which the plan is operated, shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for [contraceptives], and shall supersede any earlier designation.” *Id.* § 2510.3-16(b).

If an employer with a self-insured plan submits a notice to HHS, then HHS notifies the Department of Labor, which in turn notifies the third-party administrator of its obligations. *See id.* § 2590.715-2713A(b)(1)(ii)(B). The result is the same as if the employer had used Form 700, *id.* § 2590.715-2713A(b)(1)(ii)(B), (2), except that it is the notice from the Department of Labor, instead of Form 700, that is treated as an instrument under which the plan is operated and as designation of the plan administrator, *id.* § 2510.3-16(b).

B.

The plaintiffs are religious organizations that oppose the use of some or all contraceptives. The sincerity of their beliefs is undisputed. The Dioceses of Fort Worth and Beaumont are automatically exempt from the mandate as religious employers, and the other plaintiffs are eligible for the accommodation.

¹⁸ 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50(d); Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13744, 13809 (Mar. 11, 2014).

¹⁹ *See* 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(b)(2), (d).

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The plaintiffs in *East Texas Baptist University* are East Texas Baptist University and Houston Baptist University, which have self-insured plans²⁰ for their employees, and Westminster Theological Seminary, which offers an insured plan to its employees. Houston Baptist University's plan is a church plan, which is exempt from ERISA. The plaintiffs oppose abortion and believe that emergency contraceptives and intrauterine devices, which are included in the contraceptive mandate, can cause abortions. They are unwilling to provide or facilitate access to those products. They sued in the Southern District of Texas, and the court entered partial final judgment²¹ and a permanent injunction against the government.

The plaintiffs in *University of Dallas*²² are several Catholic organizations. The University of Dallas has a self-insured plan for its employees and an insured plan for its students. The Diocese of Fort Worth provides coverage to its employees through a church plan, and Our Lady of Victory Catholic School offers coverage to its employees through the diocese's plan.²³ Catholic Charities, Diocese of Fort Worth, has an insured plan for its employees. The plaintiffs oppose the use of any contraceptives to prevent pregnancy or induce abortion,²⁴ and providing or facilitating access to them for those purposes

²⁰ All self-insured plans at issue in these appeals have third-party administrators.

²¹ The court stayed other claims not at issue on appeal.

²² The *University of Dallas* and *Diocese of Fort Worth* appeals arise from the same district-court case. We refer to those appeals collectively as "*University of Dallas*."

²³ The diocese is automatically exempt from the mandate as a religious employer, but Our Lady of Victory is not. The diocese is a plaintiff because it alleges that the regulations will require it either to sponsor a plan that complies with the mandate or to remove Our Lady of Victory from its plan.

²⁴ The Catholic plaintiffs do not oppose the use of contraceptives to treat medical conditions so long as the purpose is not to prevent pregnancy or induce abortion.

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would violate their faith. They sued in the Northern District of Texas, and the court entered preliminary injunctions against the government.

The plaintiffs in *Diocese of Beaumont* are the Diocese of Beaumont, which provides coverage to its employees through a church plan, and Catholic Charities of Southeast Texas, which offers coverage to its employees through the diocese's plan.²⁵ Like the plaintiffs in *University of Dallas*, they oppose the use of any contraceptives to prevent pregnancy or induce abortion, and they object to providing or facilitating access to them for those purposes. They sued in the Eastern District of Texas, and the court entered final judgment and a permanent injunction against the government.

II.

We review a summary judgment *de novo*. *LaBarge Pipe & Steel Co. v. First Bank*, 550 F.3d 442, 449 (5th Cir. 2008). We review the grant of a preliminary or permanent injunction for abuse of discretion and the underlying legal conclusions *de novo*.²⁶

III.

Under RFRA, the “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless “it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is

²⁵ As with the Diocese of Fort Worth and Our Lady of Victory, the diocese is automatically exempt from the mandate as a religious employer, but Catholic Charities is not. The diocese is a plaintiff because it alleges that the regulations will require it either to sponsor a plan that complies with the mandate or to remove Catholic Charities from its plan.

²⁶ See *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 528 (5th Cir. 2013) (en banc) (permanent injunction), *cert. denied*, 134 S. Ct. 1491 (2014); *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 195 (5th Cir. 2003) (preliminary injunction).

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the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1(a) to (b). We begin and end our analysis with the substantial-burden prong.²⁷ The plaintiffs must show that the challenged regulations substantially burden their religious exercise,²⁸ but they have not done so or, in *University of Dallas*, have not established a substantial likelihood of doing so. Because their claims fail on the merits, we need not consider the other requirements for an injunction.²⁹

A.

A preliminary question—at the heart of this case—is the extent to which the courts defer to a religious objector’s view on whether there is a substantial burden. The inquiry has three components: (1) What is the adherent’s religious exercise? (2) Does the challenged law pressure him to modify that exercise? (3) Is the penalty for noncompliance substantial? It is well established that the court accepts the objector’s answer to the first question upon finding that

²⁷ Westminster claims that the government waived its argument on this issue by failing to present it to the district court. We disagree. The government explained at length why it believes that the regulations do not substantially burden the plaintiffs’ religious exercise.

²⁸ See *City of Boerne*, 521 U.S. at 533–34 (noting that the burden is on the religious objector); *Diaz v. Collins*, 114 F.3d 69, 71–72 (5th Cir. 1997) (same).

²⁹ “To be entitled to a preliminary injunction, the applicant must show (1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) granting the preliminary injunction will not disserve the public interest.” *Lake Charles Diesel*, 328 F.3d at 195–96. “[A] plaintiff seeking a permanent injunction must . . . demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

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his beliefs are sincerely held and religious.³⁰ It is also undeniable that the court evaluates the third question as one of law.³¹ Although we have not directly addressed who decides the second question,³² all of our sister circuits that have considered contraceptive-mandate cases have come to the same conclusion: The court makes that decision.³³ We agree.

Two free-exercise cases are especially instructive.³⁴ In *Bowen v. Roy*, 476

³⁰ See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2777–79 (2014); *Thomas v. Review Bd.*, 450 U.S. 707, 713–16 (1981).

³¹ See, e.g., *Hobby Lobby*, 134 S. Ct. at 2775–77; *Sherbert v. Verner*, 374 U.S. 398, 403–06 (1963).

³² East Texas Baptist University cites two Fifth Circuit cases applying the Texas version of RFRA, but those decisions merely confirmed that the court defers to the adherent’s answer to the first question upon finding that his beliefs are sincerely held and religious. See *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 263–66 (5th Cir. 2010); *Merced v. Kasson*, 577 F.3d 578, 590–91 (5th Cir. 2009).

³³ See *Univ. of Notre Dame v. Burwell*, No. 13-3853, 2015 WL 2374764, at *6 (7th Cir. May 19, 2015) (“Although Notre Dame is the final arbiter of its religious beliefs, it is for the courts to determine whether the law actually forces Notre Dame to act in a way that would violate those beliefs.”); *Geneva Coll. v. Sec’y U.S. Dep’t of Health & Human Servs.*, 778 F.3d 422, 435 (3d Cir.) (“Without testing the appellees’ religious beliefs, we must nonetheless objectively assess whether the appellees’ compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contraceptive coverage.”), *mandate recalled and stayed sub nom. Zubik v. Burwell*, 135 S. Ct. 1544 (2015); *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229, 247 (D.C. Cir. 2014) (“Accepting the sincerity of Plaintiffs’ beliefs, however, does not relieve this Court of its responsibility to evaluate the substantiality of any burden on Plaintiffs’ religious exercise, and to distinguish Plaintiffs’ duties from obligations imposed, not on them, but on insurers and [third-party administrators]. Whether a law substantially burdens religious exercise under RFRA is a question of law for courts to decide, not a question of fact.”). The Sixth Circuit used the same approach in a pre-*Hobby Lobby* case, but the Supreme Court has since vacated and remanded that decision for reconsideration in light of *Hobby Lobby*. See *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 385 (6th Cir. 2014) (“[A]lthough we acknowledge that the appellants believe that the regulatory framework makes them complicit in the provision of contraception, we will independently determine what the regulatory provisions require and whether they impose a substantial burden on appellants’ exercise of religion.”), *cert. granted and judgment vacated sub nom. Mich. Catholic Conference v. Burwell*, 135 S. Ct. 1914 (2015).

³⁴ Congress passed RFRA in response to *Employment Division v. Smith*, 494 U.S. 872 (1990), and one of the statute’s purposes is “to restore the compelling interest test as set forth

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U.S. 693 (1986), parents challenged the government’s use of a Social Security number for their daughter because they believed that the use of the number would “rob her spirit.” *Id.* at 695–97. The Court ruled for the government, reasoning that the parents were challenging the government’s acts, not a burden on them, *id.* at 699–701, and that “[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens,” *id.* at 699. The Court decided for itself whether the policy in question pressured the parents to modify their religious exercise, noting that, although

Roy’s religious views may not accept this distinction between individual and governmental conduct[,] [i]t is clear . . . that the Free Exercise Clause, and the Constitution generally, recognize such a distinction; for the adjudication of a constitutional claim, the Constitution, rather than an individual’s religion, must supply the frame of reference.

Id. at 701 n.6 (citation omitted).

The Court used the same approach in *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988). The plaintiffs complained of the government’s plan to construct a road and permit logging on federal land, which they had used for religious purposes. *Id.* at 441–42. Relying on *Roy*, the Court rejected their claim. *Id.* at 447–49. It accepted the plaintiffs’ statement of their religious beliefs, *id.* at 449–51, but concluded that the project involved only the government’s management of its own property, which did not implicate the plaintiffs’ constitutional rights, *id.* at 453. The Court stressed that, “[w]hatever may be the exact line between unconstitutional prohibitions

in [*Sherbert*, 374 U.S. 398,] and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)[,] and to guarantee its application in all cases where free exercise of religion is substantially burdened.” 42 U.S.C. § 2000bb(b)(1). Accordingly, pre-*Smith* caselaw is relevant in interpreting RFRA. See, e.g., *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 *passim* (5th Cir. 2014); *Tagore v. United States*, 735 F.3d 324, 330 (5th Cir. 2013).

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on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Id.* at 451.

In addition, one RFRA case from the District of Columbia Circuit illustrates that the court decides the second question. In *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008), an inmate objected to a requirement that he participate in the collection of a tissue sample, which the FBI would use to create a DNA profile, because he opposed on religious grounds the extraction and storage of DNA information. *Id.* at 673–74. The court ruled for the government. *Id.* at 686. It “[a]ccept[ed] as true the factual allegations that Kaemmerling’s beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened.” *Id.* at 679. Applying that rule, it held that his religious exercise was not substantially burdened, because “[t]he extraction and storage of DNA information are entirely activities of the FBI, in which Kaemmerling plays no role and which occur after the BOP has taken his fluid or tissue sample (to which he does not object).” *Id.*

The Court did not address the issue in *Hobby Lobby*. There, closely held for-profit corporations challenged the contraceptive mandate based on their owners’ religious opposition to some contraceptives. *Id.* at 2764–66. The corporations were neither automatically exempt from the mandate as religious employers nor eligible for the accommodation; they had to offer insurance that covered contraceptives or face large penalties. *Id.* at 2775–76. The Court held that the mandate violated RFRA as applied to the corporations. *Id.* at 2785. The substantial-burden analysis addressed only the first and third questions.

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The Court rejected the government’s theory “that the connection between what the objecting parties must do (provide health-insurance coverage for [contraceptives]) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated,” *id.* at 2777, explaining that drawing the line between acceptable and unacceptable levels of involvement was the owners’ prerogative, *id.* at 2778–79. In doing so, the Court reaffirmed that courts defer to the objector’s description of his religious exercise upon finding that his beliefs are sincerely held and religious. And the Court analyzed the substantiality of the penalties for noncompliance itself, rather than automatically accepting the corporations’ position. *Id.* at 2775–77.

But the Court said nothing about the second question. It had no reason to, because there was no doubt that imposing large penalties for not offering insurance that covered contraceptives pressured the corporations to facilitate the use of contraceptives.

In the absence of further guidance from the Supreme Court, we are bound to follow *Roy* and *Northwest Indian Cemetery* by deciding, as a question of law, whether the challenged law pressures the objector to modify his religious exercise. The other circuits’ decisions confirm the continued vitality of that approach.³⁵

B.

Although the plaintiffs have identified several acts that offend their religious beliefs, the acts *they* are required to perform do not include providing or facilitating access to contraceptives. Instead, the acts that violate their faith

³⁵ See *Notre Dame*, 2015 WL 2374764, at *6; *Geneva*, 778 F.3d at 435; *Priests for Life*, 772 F.3d at 247; *Kaemmerling*, 553 F.3d at 679.

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are those of third parties. Because RFRA confers no right to challenge the independent conduct of third parties, we join our sister circuits in concluding that the plaintiffs have not shown a substantial burden on their religious exercise.³⁶

First, the plaintiffs claim that their completion of Form 700 or submission of a notice to HHS will authorize or trigger payments for contraceptives. Not so. The ACA already requires contraceptive coverage: “A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for . . . with respect to women, such additional preventive care . . . as provided for in comprehensive guidelines” promulgated by HHS, 42 U.S.C. § 300gg-13(a)(4), which includes contraceptives.³⁷ That provision expressly requires insurers to offer coverage.

³⁶ See *Notre Dame*, 2015 WL 2374764, at *6 (“As far as we can determine from the very limited record, the only ‘conduit’ [for payments for contraceptives] is between the [insurer and the third-party administrator] and Notre Dame students and staff; the university has stepped aside.”); *Geneva*, 778 F.3d at 438 (“By participating in the accommodation, the eligible organization has no role whatsoever in the provision of the objected-to contraceptive services.”); *Priests for Life*, 772 F.3d at 256 (“It is as a result of the ACA, and not because of any actions Plaintiffs must take, that Plaintiffs’ employees are entitled to contraceptive coverage provided by third parties and that their insurers or TPA must provide it; RFRA does not entitle Plaintiffs to control their employees’ relationships with other entities willing to provide health insurance coverage to which the employees are legally entitled. A religious adherent’s distaste for what the law requires of a third party is not, in itself, a substantial burden; that is true even if the third party’s conduct towards others offends the religious adherent’s sincere religious sensibilities.”). The Sixth Circuit reached the same result in its now-vacated decision. See *Mich. Catholic*, 755 F.3d at 390 (“The appellants allege that providing, paying for, and/or facilitating access to contraceptive coverage burdens their exercise of religion. . . . [T]he exemption and accommodation framework does not require them to do any of these things. The framework does not permit them to prevent their insurance issuer or third-party administrator from providing contraceptive coverage to their employees pursuant to independent obligations under federal law. However, the inability to ‘restrain the behavior of a third party that conflicts with the [appellants’] religious beliefs,’ does not impose a burden on the appellants’ exercise of religion.” (alteration in original) (citation omitted) (quoting *Mich. Catholic Conference v. Sebelius*, 989 F. Supp. 2d 577, 587 (W.D. Mich. 2013))).

³⁷ Group Health Plans and Health Insurance Insurers, 77 Fed. Reg. at 8725–26.

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And although it does not specifically mention third-party administrators, they administer “group health plan[s],” which must include coverage. Nothing suggests the insurers’ or third-party administrators’ obligations would be waived if the plaintiffs refused to apply for the accommodation. Accordingly, the plaintiffs’ completion of Form 700 or submission of a notice to HHS does not authorize or trigger payments for contraceptives, because the plaintiffs cannot authorize or trigger what others are already required by law to do.³⁸

The plaintiffs offer two variations of that theory, but those are equally unconvincing. The plaintiffs assert that their listing the names and contact information of their insurers and third-party administrators will make it easier for the government to inform those entities of their obligations. It will, but that does not mean the plaintiffs’ religious exercise is burdened. Without the accommodation, the plaintiffs would have to offer a plan that covered contraceptives,³⁹ so the effect of the government’s communications with the insurers and third-party administrators is to shift the burden to those entities. Providing the names and contact information facilitates only the plaintiffs’ exemption, not contraceptive coverage.

Separately, the self-insured plaintiffs contend that their completion of Form 700 or submission of a notice to HHS will make their third-party administrators eligible for the government’s reimbursement. Again, it will,⁴⁰ but that does not mean the plaintiffs’ religious exercise is burdened.

³⁸ See *Notre Dame*, 2015 WL 2374764, at *7–9 (concluding that federal law, not the completion of Form 700 or submission of a notice to HHS, triggers payments for contraceptives); *Geneva*, 778 F.3d at 435–42 (same); *Priests for Life*, 772 F.3d at 252–56 (same).

³⁹ See 26 U.S.C. §§ 4980H(a), (c)(2), 5000A(f)(2); 42 U.S.C. § 300gg-13(a)(4); Group Health Plans and Health Insurance Insurers, 77 Fed. Reg. at 8725–26.

⁴⁰ See 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50(d).

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For the insured plans, the insurers will not lose money by paying for contraceptives, because the savings on pregnancy care at least are expected to equal the costs of contraceptives.⁴¹ There is a potential problem for the self-insured plans, though: The third-party administrators do not bear the risk of claims, so they will not realize any savings on pregnancy care. The regulations prohibit passing on the costs of contraceptives, 29 C.F.R. § 2590.715-2713A(b)(2), but in an efficient market, the third-party administrators would be unable to avoid doing so without additional revenue. The reimbursement is the government's attempt to solve the problem by giving the third-party administrators additional money to cover the costs of contraceptives. Assuming the amount is sufficient, the reimbursement is what will allow the self-insured plaintiffs to avoid paying for contraceptives.

Second, the plaintiffs urge that the accommodation uses their plans as vehicles for payments for contraceptives. But that is just what the regulations prohibit. Once the plaintiffs apply for the accommodation, the insurers may not include contraceptive coverage in the plans.⁴² The insurers and third-party administrators may not impose any direct or indirect costs for contraceptives on the plaintiffs⁴³; they may not send materials about contraceptives together with plan materials⁴⁴; in fact, they must send plan participants a notice

⁴¹ Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39877 (July 2, 2013).

⁴² 29 C.F.R. § 2590.715-2713A(c)(2)(i)(A); 45 C.F.R. § 147.131(c)(2)(i)(A).

⁴³ 26 C.F.R. § 54.9815-2713A(c)(2)(ii); 29 C.F.R. § 2590.715-2713A(b)(2), (c)(2)(ii); 45 C.F.R. § 147.131(c)(2)(ii).

⁴⁴ 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(d).

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explaining that the plaintiffs do not administer or fund contraceptives.⁴⁵ The payments for contraceptives are completely independent of the plans.⁴⁶

Third, the plaintiffs theorize that the requirement that they offer their employees a group health plan pressures them to authorize or facilitate the use of contraceptives. They must contract with the insurers and third-party administrators to offer a plan, and those entities pay for contraceptives. In the plaintiffs' view, the insurers and third-party administrators would not do so absent the contracts, so the contracts facilitate the use of contraceptives.

The plaintiffs misunderstand the role of the contracts. Under the accommodation, the contracts are solely for services to which the plaintiffs do not object; the contracts do not provide for the insurers and third-party administrators to cover contraceptives, do not make it easier for those entities to pay for contraceptives, and do not imply endorsement of contraceptives. *See supra* notes 42–46 and accompanying text. Instead, the plaintiffs are excluding contraceptive coverage from their plans and expressing their disapproval of it, but the government is requiring the insurers and third-party administrators to offer it—separately from the plans—despite the plaintiffs' opposition. The plaintiffs' religious beliefs forbid them from providing or facilitating access to contraceptives, but the requirement that they enter into the contracts does not force them to do so. The acts that violate their faith are the acts of the government, insurers, and third-party administrators, but RFRA does not

⁴⁵ 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(d).

⁴⁶ *See Notre Dame*, 2015 WL 2374764, at *5–7 (explaining that the accommodation does not use the plans as vehicles for payments for contraceptives); *Geneva*, 778 F.3d at 438, 441 (same); *Priests for Life*, 772 F.3d at 253–54 (same).

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entitle them to block third parties from engaging in conduct with which they disagree.⁴⁷

A hypothetical illustrates the breadth of the plaintiffs' position. Suppose a person needs a passport for an upcoming trip. She fills out the application, but as she is about to mail it, she learns that the State Department will assign her a number when it approves her request. She opposes, on religious grounds, the use of a number to identify her, *see generally Roy*, 476 U.S. at 695–97, as well as any act that would facilitate the use of a number, so she sues under RFRA.

That case is indistinguishable from the one at bar. The objector does not oppose completing the application but only the State Department's assigning her a number in response even though she need not help the department do so. The idea that she could force the department to justify, under strict scrutiny, its application requirement or use of a number is unreasonable. Yet the plaintiffs here are making the same type of claim. Accepting such claims could subject a wide range of federal programs to strict scrutiny. Perhaps an applicant for Social Security disability benefits disapproves of working on Sundays and is unwilling to assist others in doing so. He could challenge a requirement that he use a form to apply because the Social Security Administration might process it on a Sunday.⁴⁸ Or maybe a pacifist refuses to complete a form to

⁴⁷ *See Nw. Indian Cemetery*, 485 U.S. at 453 (holding that an adherent was not entitled to challenge a third party's actions that offended his beliefs); *Roy*, 476 U.S. at 701 (same); *Notre Dame*, 2015 WL 2374764, at *5–7 (concluding that the requirement to offer a plan does not impose a substantial burden, because the contracts with the insurers and third-party administrators do not facilitate the use of contraceptives); *Geneva*, 778 F.3d at 438 n.13 (same); *Priests for Life*, 772 F.3d at 253 (same); *Kaemmerling*, 553 F.3d at 679 (holding that an adherent was not entitled to challenge a third party's actions that offended his beliefs).

⁴⁸ *See generally Geneva*, 778 F.3d at 439 n.14 (considering an analogous hypothetical).

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indicate his beliefs because that information would enable the Selective Service to locate eligible draftees more quickly.⁴⁹ The possibilities are endless, but we doubt Congress, in enacting RFRA, intended for them to be.

The Court did not resolve the issue in *Hobby Lobby* but, instead, rejected the government’s notion that there was no substantial burden, because the intervening acts of third parties, such as employees’ decisions to use contraceptives, made the connection between the plaintiffs’ providing contraceptive coverage and the destruction of an embryo too attenuated. 134 S. Ct. at 2777–79. The distinction between that case and the instant one is that the regulations compelled the *Hobby Lobby* plaintiffs to participate in providing contraceptives, albeit in an indirect way. What the regulations require of the plaintiffs here has nothing to do with providing contraceptives.

The difference is not just that there are more links in the causal chain here than in *Hobby Lobby*—a difference that would not change the outcome, given that we accept an adherent’s judgment as to how much separation is enough.⁵⁰ It is also that the type of compelled act is quite different—the act at issue in this case is not one that authorizes or facilitates the use of contraceptives.

The *Hobby Lobby* Court did not consider this type of situation and actually suggested in *dictum* that the accommodation does not burden religious exercise: The majority noted that “HHS has effectively exempted certain religious nonprofit organizations” through the accommodation, *id.* at 2763, and

⁴⁹ See generally *Notre Dame*, 2015 WL 2374764, at *18 (discussing a similar hypothetical).

⁵⁰ See, e.g., *Hobby Lobby*, 134 S. Ct. at 2779; *Thomas*, 450 U.S. at 715.

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the concurrence observed that “the accommodation equally furthers the Government’s interest but does not impinge on the plaintiffs’ religious beliefs,” *id.* at 2786 (Kennedy, J., concurring).⁵¹ Thus, *Hobby Lobby* is of no help to the plaintiffs’ position, and the requirement to offer a group health plan does not burden their religious exercise.

Fourth, the self-insured plaintiffs postulate that they will be required to pay for contraceptives despite the regulations to the contrary. They say the government lacks the authority under ERISA to prohibit third-party administrators from passing on the costs, insurers are unlikely to work with the third-party administrators because of the small amounts involved (an insurer must seek reimbursement on behalf of a third-party administrator⁵²), and the 115% reimbursement will not cover the costs.

This issue is not ripe, and we express no view on its merits. “A court should dismiss a case for lack of ‘ripeness’ when the case is abstract or hypothetical.”⁵³ “The key considerations are ‘the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.’”⁵⁴ “A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required.”⁵⁵ “However, ‘even where an issue presents purely legal questions, the plaintiff must

⁵¹ The Court cautioned that it did “not decide . . . whether [the accommodation] complies with RFRA for purposes of all religious claims.” *Hobby Lobby*, 134 S. Ct. at 2782.

⁵² 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50(d).

⁵³ *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586 (5th Cir. 1987)).

⁵⁴ *Id.* (quoting *New Orleans*, 833 F.2d at 586).

⁵⁵ *Id.* (quoting *New Orleans*, 833 F.2d at 587).

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show some hardship in order to establish ripeness.”⁵⁶

The plaintiffs’ prediction that third-party administrators will attempt to charge them for contraceptives may not come to pass, so the matter is not fit for judicial decision. The administrative costs associated with payments for contraceptives may turn out to be low. If so, the insurers and third-party administrators will be eager to take advantage of the 115% reimbursement,⁵⁷ and the third-party administrators will profit from the arrangement and have no occasion to pass on the costs. The plaintiffs say that is unlikely because only a small number of their employees will use contraceptives. But their reasoning overlooks the economies of scale that the insurers and third-party administrators could establish by paying for contraceptives for the employees of many religious organizations.

On this record, there is no basis for assessing which outcome is most likely. And withholding court consideration would not harm the plaintiffs. There is no allegation that any third-party administrator has asked the plaintiffs to pay for contraceptives. If that happened, the plaintiffs could challenge the regulations then and would have had to pay nothing in the meantime. As a result, we decline to reach the issue.

Fifth, the two dioceses, which are automatically exempt from the mandate as religious employers, submit that the regulations will require them either to sponsor a plan that complies with the contraceptive mandate or to remove from their plans affiliated entities that are not religious employers but are eligible for the accommodation. That is a misreading of the regulations,

⁵⁶ *Id.* (quoting *Cent. & S. W. Servs., Inc. v. U.S. EPA*, 220 F.3d 683, 690 (5th Cir. 2000)).

⁵⁷ See *Notre Dame*, 2015 WL 2374764, at *7 (speculating as to why insurers and third-party administrators might want to participate in the scheme).

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which allow those types of organizations to share a plan provided that the entity that does not qualify as a religious employer applies for the accommodation.⁵⁸ Because the accommodation does not burden the plaintiffs' religious exercise, neither does a requirement that the dioceses do nothing and the affiliated entities apply for the accommodation.⁵⁹

In short, the acts *the plaintiffs* are required to perform do not involve providing or facilitating access to contraceptives, and the plaintiffs have no right under RFRA to challenge the independent conduct of third parties. Because the plaintiffs have not shown that the regulations substantially burden their religious exercise or, in *University of Dallas*, have not demonstrated a substantial likelihood of doing so, we need not reach the strict-scrutiny prong or the other requirements for an injunction.

REVERSED.

⁵⁸ See Coverage of Certain Preventive Services, 78 Fed. Reg. at 39886.

⁵⁹ See *Geneva*, 778 F.3d at 443–44 (explaining that the different treatment of dioceses and affiliated organizations does not impose a substantial burden).