NO. 15-119

In the Supreme Court of the United States

SOUTHERN NAZARENE UNIVERSITY, et al.,
Petitioners,

v.

SYLVIA MATHEWS BURWELL, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

All Petitioners are nonprofit religious corporations. No Petitioner has a parent corporation. No publicly held corporation owns any portion of any of Petitioners.

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INTRODUCTION

As five judges explained in dissenting from the denial of rehearing en banc in this case, the Tenth Circuit "panel majority is clearly and gravely wrong—on an issue that has little to do with contraception and a great deal to do with religious liberty." *Little Sisters of the Poor v. Burwell*, Nos. 13-1540, 14-6026, 14-6028, 2015 WL 5166807, at *1 (10th Cir. Sept. 3, 2015) (Hartz, J., dissenting). This Court held in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), that "[w]hen a law demands that a person do something the person considers sinful, and the penalty for refusal is a large financial penalty, then the law imposes a substantial burden on that person's free exercise of religion." *Little Sisters*, 2015 WL 5166807, at *1.

Because the Universities sincerely believe it is sinful to comply with the HHS Mandate via the accommodation and they will incur millions of dollars in fines annually if they refuse, the government has levied a substantial burden on their religious exercise under RFRA. *See Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 14-1507, 2015 WL 5449491, at *9 (8th Cir. Sept. 17, 2015) (reaching this conclusion in conflict with the Tenth Circuit's ruling here).

Nonetheless, in its Opposition, the government repeats the lower court's errors by ignoring the concrete ways in which the accommodation actively involves them in the "delivery of [abortifacient] contraceptives" and by second-guessing "the

reasonableness" of the Universities' moral view of what is "sinful and acceptable." *Little Sisters*, 2015 WL 5166807, at *1; *see* Pet. 11-13, 29-31. Despite such obfuscation, the government cannot answer one simple yet vital question: If it is true that religious nonprofits are totally removed from providing abortifacient contraceptives, why force them to participate in the accommodation scheme? *E. Tex. Baptist Univ. v. Burwell*, Nos. 14-20112, 14-10661, 14-10241, 14-40212, 2015 WL 5773560, at *3 (5th Cir. Sept. 30, 2015) (Jones, J., dissenting).

The answer is that the so-called accommodation does not isolate the Universities from the provision of abortifacients at all. Rather, as Petitioners have explained, *see* Pet. 11-13, 29-31, the accommodation is a "long and winding extension cord the government uses to power its contraceptive mandate," which not only "gets its power from … nonprofits' health plans," but which the government forces "nonprofits to plug in … themselves by signing the self-certification or providing the alternative notice." *Grace Sch. v. Burwell*, Nos. 14-1430, 14-1431, 2015 WL 5167841, at *17 (7th Cir. Sept. 4, 2015) (Manion, J., dissenting); *see* 45 C.F.R. § 147.131(c)(1) (explaining religious nonprofits comply with the contraception Mandate by fulfilling the accommodation's requirements); 78 Fed. Reg. 39,870, 39,879 (July 2, 2013) (same).

No amount of government *ipse dixit* can alter these essential facts. The governing regulations prove that the accommodation form and notice: (1) alter the Universities' health plans to allow for the provision of abortifacients, (2) require the

Universities to notify or identify for the government their insurers or TPAs so that they can provide abortifacients on their behalf, (3) authorize the self-insured Universities' TPAs as a plan and claims administrator (*i.e.*, an agent) solely for the purpose of providing abortifacients, (4) place abortifacient coverage directly into the self-insured Universities' ERISA plans, and (5) require the self-insured Universities to locate and hire a TPA willing to provide abortifacients on their behalf. In practice, "[t]he government has turned the act of objecting into the act of designating and it cannot escape the consequences of that conflation by calling it an act of law." *Grace*, 2015 WL 5167841, at *21.

That is why the Eighth Circuit recently held that the Mandate via the accommodation imposes a substantial burden on religious nonprofits' free exercise of religion. *Sharpe*, 2015 WL 5449491, at *9 ("If TPAs had a wholly independent obligation to provide contraceptive coverage to religious objectors' employees and plan beneficiaries, there would be no need to insist that [they] compl[y] with the accommodation process."); *see Dordt Coll. v. Burwell*, No. 14-2726, 2015 WL 5449504, at *1-2 (8th Cir. Sept. 17, 2015) (relying on *Sharpe*'s analysis in a case involving both insured and self-insured plans).

In light of the Eighth Circuit's ruling that the accommodation implicates (and fails) strict scrutiny under RFRA—a holding that markedly conflicts with the Tenth Circuit's here—the government concedes that this Court should grant review. *See Sharpe*, 2015 WL 5449491, at *10-12; Opp. 18; SUP. CT. R. 10(a). The government does not argue that this case

has any flaw that would prevent the Court from reaching and resolving the question presented. That is because *Southern Nazarene* is an ideal vehicle for resolving it. The Universities are faith-based communities whose members uniformly believe that human life is sacred and that four out of twenty forms of FDA-approved methods of birth control serve to destroy it. They bring a targeted objection not to the government's provision of these contraceptives to employees and students in general but to playing a concrete and indispensable role in the delivery process. And they employ a wide array of insurance arrangements, including insured, self-insured, self-insured church, and student plans.

Neither this Court's precedent nor RFRA creates two standards for free exercise rights: one for churches and their integrated auxiliaries, and another for other religious organizations. *See* Br. of *Amicus Curiae* Council for Christian Colls. & Univs. ("CCCU Br.") 9 (noting that even a religious university affiliated with a church is not considered an "'integrated auxiliary'" because it "receive[s] more than 50% of [its] support from students and outside sources."). This Court should grant review and reverse the Tenth Circuit's extraordinary holding that forcing the Universities to facilitate the delivery of drugs they sincerely believe allow for "abortion on demand," *Sharpe*, 2015 WL 5449491, at *3, does not implicate their free exercise rights under RFRA, Pet. App. 66a.

ARGUMENT

I. The So-Called Accommodation Delivers Abortifacients Through the Universities' Health Plans.

Under the so-called accommodation, the government argues that abortifacients are delivered through "separate coverage" to religious universities' employees and students in a manner wholly unrelated to them. Opp. I. But that is not how the accommodation functions, and the government cannot make it so by repeating platitudes, such as the Universities "'will not contact, arrange, pay, or refer for contraceptive coverage.'" Opp. 7 n.5 (quotation omitted); *see Sharpe*, 2015 WL 5449491, at *9 (recognizing that whether nonprofits "arrange or pay for objectionable contraceptive coverage is not determinative" of the substantial burden question).

As the government recently conceded, "[i]f the objecting employer has a self-insured plan, the contraceptive coverage provided by its TPA is … part of the *same ERISA plan as the coverage provided by the employer*." *E. Tex. Baptist Univ. v. Burwell*, Br. for Resp'ts in Opp. at 19 (No. 15-35) (Sept. 9, 2015) (emphasis added) (citing 78 Fed. Reg. at 39,879-80). This eliminates any possibility that the accommodation provides "separate coverage" for the delivery of abortifacients. It becomes part and parcel of the Universities' own plans.

Religious universities and other nonprofits submitted comments imploring the government to fashion an accommodation that delivers truly

separate abortifacient coverage. 80 Fed. Reg. 41,318, 41,328 (July 14, 2015). But the government refused to do so because it credited hypothetical "obstacles to access to seamless [abortifacient] coverage" over certainly eliminating the Universities' ability to practice what they preach. *See E. Tex. Baptist*, 2015 WL 5773560, at *3 (recognizing that "[c]onscience is the essence of a moral person's identity").

After opting to require abortifacient coverage "*in accommodated health plans*," 80 Fed. Reg. at 41,828-29 (emphasis added), the government cannot credibly argue that this coverage is entirely separate from the Universities' plans. The accommodation conscripts the Universities' existing insurance contracts to provide payments for abortifacients, only provides such payments as long as an employee is enrolled in the Universities' health plan, and solely relies on the Universities' plan enrollment procedures. *Grace*, 2015 WL 5167841, at *22. Indeed, the government's EBSA Form 700 frankly states that a completed Form or Notice becomes "*an instrument under which the plan is operated*." Pet App. 125a. (emphasis added). And this insertion of abortifacients into the Universities' health plans takes place only if the Universities submit the Form to their insurers/TPAs or the Notice disclosing their plan information to the government. *Sharpe*, 2015 WL 5449491, at *9 ("[S]elf-certification under the accommodation process accomplishes what [the Universities'] prior instructions had specifically prevented: the provision of objectionable coverage through their group health plans.").

Rather than providing the Universities with "an exit" from the Mandate, the accommodation thus provides "a revolving door with only one opening"—a gateway that inserts abortifacients into their health plans. *Grace*, 2015 WL 5167841, at *21. This fact is doubly apparent if one considers how the accommodation functions in relation to self-insured plans like those used by Southern Nazarene and Mid-America Christian Universities. As Judge Manion recently explained, "the government can only require [the Universities'] TPAs to cover contraceptive services if [they] give the government the legal authority to do so. The government has hidden that legal authority in [the] self-certification and alternative notice." *Id.* at *20.

Submitting the Notice or the Form thus designates the Universities' TPAs as a plan and claims administrator solely to provide abortifacients on their behalf. 29 C.F.R. § 2510.3-16(b)&(c); 78 Fed. Reg. at 39,879. If the TPAs are disinclined to provide abortifacients for any reason, the accommodation compels the Universities to seek out and hire TPAs who will do so on their behalf. 26 C.F.R. § 54.9815-2713A(b)(1); 78 Fed. Reg. at 39,880-81. The accommodation thus forces the Universities to ensure the distribution of abortifacients rather than distancing them from the delivery of items that "seriously violate[] their religious beliefs." *Hobby Lobby*, 134 S. Ct. at 2775.

II. The Government's Substantial Burden Analysis Conflicts with *Hobby Lobby*.

The government's defense of the Tenth Circuit's remarkable conclusion that the Universities "fail[ed] to establish any burden on [their] religious exercise," Pet. App. 66a, squarely conflicts with *Hobby Lobby*. Opp. 12. As the Eighth Circuit explained,

> When the government imposes a direct monetary penalty to coerce conduct that violates religious belief, there has never been a question that the government imposes a substantial burden on the exercise of religion…. As noted by the Court in *Hobby Lobby*, if these consequences do not amount to a substantial burden, it is hard to see what would.

Sharpe, 2015 WL 5449491, at *5 (internal citations and quotations omitted); *see E. Tex. Baptist*, 2015 WL 5773560, at *1*; Grace*, 2015 WL 5167841, at *18.

The government avoids this straightforward conclusion by citing the Tenth Circuit's holding that the Universities' religious objection is focused not on what the accommodation requires of them but on the government's dealings with third parties. Opp. 12. Not only is this proposition incorrect as a factual matter, *see supra* Part I, but, as the Eighth Circuit recognized, this Court rejected the exact same attenuation "argument in *Hobby Lobby*, characterizing it as tantamount to telling the religious objectors that their beliefs about complicity in the provision of contraceptive coverage were

flawed, mistaken, or insubstantial—moral and philosophical judgments that are not for the courts to make." *Sharpe*, 2015 WL 5449491, at *9 (quotations and alterations omitted); *see E. Tex. Baptist*, 2015 WL 5773560, at *2-3.

Simply put, this case is not about the government's internal operations or its delivery of abortifacients to others. The Universities object to the government's enforcement of the Mandate *on them* via the accommodation and *their own* intimate involvement in the delivery of abortifacients under that scheme. *See supra* Part I; *E. Tex. Baptist*, 2015 WL 5773560, at *3; *Grace*, 2015 WL 5167841, at *21.

If it was determinative that the Universities' religious objection affects—in some infinitesimal sense—the government's abortifacient-delivery scheme, this Court would have decided *Thomas v. Review Board*, 450 U.S. 707 (1981), differently. Thomas' religious objection surely hampered the government's military efforts. *Id.* at 710-11. But his religious liberty claim prevailed because those efforts *personally involved* him. *Id.* at 715. Just as working on tank turrets did not "sufficiently insulate[] [Thomas] from producing weapons of war," the accommodation fails to insulate the Universities from the delivery of abortifacients and "it is not for [the government] to say" that their moral position is "unreasonable." *Id.*; *see Hobby Lobby*, 134 S. Ct. at 2778 (citing *Thomas'* analysis).

III. The Accommodation Cannot Withstand Strict Scrutiny Under RFRA.

The government contends that the accommodation withstands strict scrutiny but its analysis is deeply flawed. Opp. 16. Generally speaking, the government has not proven that the accommodation improves women's health or serves a compelling interest. *Grace*, 2015 WL 5167841, at *24-28 (citing Helen Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 VILL. L. REV. 379 (2013)).

But more importantly, the government cannot establish even a "marginal interest in enforcing the contraceptive mandate in [this] case[]." *Id.* at *23 (quotation omitted). The Universities' employees and students share their religious belief that use of the four FDA-approved contraceptives in question is sinful because they may have an abortifacient effect. Pet. App. 167a-68a. Asserting a compelling interest in providing women with contraceptives they will not use simply defies logic. *Cf. March for Life v. Burwell*, No. 14-cv-1149, 2015 WL 5139099, at *6 (D.D.C. Aug. 31, 2015). That is why the government exempted churches and their integrated auxiliaries from the Mandate in the first place. 78 Fed. Reg. at 39,874 (opining that churches are likely to employ people who "share the same objection"). And it is why the government should have exempted the Universities, which have membership requirements, teach the faith, pray, and engage in corporate worship just like churches. CCCU Br. 10-11; *see Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J, concurring) ("RFRA is inconsistent with the

insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally ….").

Furthermore, many less restrictive means of delivering abortifacients exist to which the Universities have no religious objection. The government could readily: (1) provide subsidies, reimbursements, tax credits, or tax deductions to affected women, (2) assume the cost of providing abortifacients by opening up Medicaid or Title X programs, and (3) make abortifacients available on its own healthcare exchanges. *Sharp*, 2015 WL 5449491, at *11-12; *Grace*, 2015 WL 5167841, at *30. Under RFRA, the government "must not assume" that any of these "plausible, less restrictive alternative[s] would be ineffective." *Holt v. Hobbs*, 135 S. Ct. 853, 866 (2015) (quotations omitted).

IV. **This Case is an Ideal Vehicle for Resolving the Question Presented.**

The Universities are religious bodies whose employees and students share their beliefs in the sanctity of human life and opposition to the four forms of FDA-approved contraceptives in question. Pet. App. 167a-68a. Their purpose no less than churches is "the propagation of a religious faith," *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 503 (1979) (quotation omitted). In both form and function, they are indistinguishable from churches and their integrated auxiliaries, which the government "automatic[ally] exempt[s]" from the Mandate. Opp. 22; *see* CCCU Br. 11-12. The

Universities are thus well situated to challenge the accommodation and claim the "independence from secular control or manipulation" that this Court has long accorded to "religious organizations," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 704 (2012) (quotations omitted), not simply to "'house[s] of worship,'" Opp. 22 (quoting 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011)).

Although the government weakly suggests that this Court should consider the merits of a different case, its reasoning lacks merit. The government, for instance, admits that it "has no reason to doubt" the Universities' description of their insurance arrangements. Opp. 19. So any lack of clarity on this matter in the district court is beside the point.

It is also hardly unusual for this Court to decide a RFRA claim at a preliminary stage. Opp. 19. Both of the underlying cases in *Hobby Lobby* were ruled on at the preliminary injunction stage and the lack of a summary judgment record made no difference. 134 S. Ct. at 2765-66. This is hardly surprising, as the government has never controverted the sincerity of religious objectors' beliefs or any other relevant facts. *See, e.g.*, Opp. 15; Pet. App. 57a n.24 & 60a. Tellingly, the government points to no facts missing from the record that might prove useful to the Court because there are none.

Moreover, the district court thoroughly analyzed the government's compelling interest argument and rejected it because (1) the government only provided generalized interests to justify imposing the

accommodation on the Universities, (2) the government did not explain how these generic interests would be undermined by granting the Universities a narrow religious exemption, and (3) the Mandate is riddled with categorical exemptions for others. Pet. App. 179a-81a.

The district court also rejected the government's least restrictive means analysis, noting that it offered "no developed argument on the issue" and that its position lacked merit. Pet App. 181a. On appeal, Judge Baldock further clarified this point in dissent. Pet App. 153a-54a. Any suggestion that consideration of strict scrutiny is wanting in this case is therefore off base. *See* Opp. 20.

Other concerns expressed by the government about "uncertain extra-record facts" apply only to the *Little Sisters* Petition and have no bearing on the Petition in *Southern Nazarene*. Opp. 21. This case presents a clean vehicle for resolving the question presented. And the Universities' employment of insured, self-insured, self-insured church (ERISA-exempt), and student health plans gives the Court a solid basis to examine how the accommodation functions in all contexts. Pet. App. 36a.

In sum, the simplicity of *Southern Nazarene*'s facts, the unity of the Universities' and their members' religious beliefs about the sanctity of human life, and the Universities' proximity in mission, organization and function to houses of worship, renders the Universities the ideal plaintiffs to litigate religious nonprofits' challenge to the accommodation and the underlying Mandate.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, this Court should grant review.

Respectfully submitted,

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