GOING TO HELL IN A HHS NOTICE: THE CONTRACEPTIVE MANDATE'S NEXT IMPERMISSIBLE BURDEN ON RELIGIOUS FREEDOM

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INTRODUCTION

The Affordable Care Act's (ACA) requirement that eligible religious organizations submit a notice objecting to providing their employees contraceptive coverage (Accommodation) if they religiously object to contraception or abortifacients is as simple as filing a piece of paper. But to a collection of Catholic petitioners complying with this requirement gives rise to "scandal" and causes them to "materially cooperate" with sin. Filing a piece of paper may seem far outside any exercise of religion, but these groups sincerely believe that the one page notice burdens their religious beliefs.

Zubik v. Burwell,[1] like *Burwell v. Hobby Lobby Stores*,[2] presents a conflict between the ACA and the Religious Freedom Restoration Act (RFRA), a statute that gives religious groups a shield and a sword against federal laws and regulations that interfere with their free exercise of religion. In *Hobby Lobby* the Supreme Court held that RFRA prohibits the Government from forcing certain closely-held, religious corporations to provide contraceptive coverage to their employees. Here the Court should extend *Hobby Lobby* and hold that the accommodation impermissibly burdens these religious groups' beliefs under the demanding RFRA statute.

I. FACTUAL BACKGROUND

The ACA[3] requires group health plans to provide, without cost sharing,

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1. Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422 (3d Cir.) *cert. granted in part sub nom.* Zubik v. Burwell, 136 S. Ct. 444 (2015) *and cert. granted sub nom.* Geneva Coll. v. Burwell, 136 S. Ct. 445 (2015).

2. Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751, n.28 (2014).

3. Patient Protection and Affordable Care Act, 42 U.S.C § 18001 (2012).

preventive care for women.[4] Under that statutory authority, the Department of Health and Human Services (HHS) adopted regulations that require health plans to cover contraceptive services for women (the "Contraceptive Mandate" or "Mandate"), but it carved out certain religious exceptions and accommodations.[5]

A "religious employer" is exempted.[6] The "religious employer" classification is taken from the Internal Revenue Code's church classification.[7] In contrast, a nonprofit that is religiously opposed to part or all of the contraceptive mandate (eligible organization) is accommodated.[8] If accommodated, an eligible organization is not required to contract or pay for contraceptive coverage.[9] Instead, the eligible organization's third-party administrator (TPA) or health insurance issuer (collectively "Third Party") pays for and administers the service.[10]

To receive the accommodation, the organization must either provide its Third Party a form certifying its religious objection to any or all contraceptive services (Form 700), or send HHS an objection (HHS Notice) alongside information about its insurance provider and plan.[11] In this latter case, HHS notifies the Department of Labor about the eligible organization's objection, and the Department informs the eligible organization's Third Party (DOL Notice).[12] The Government states that this information is "the minimum information necessary . . . to determine which entities are covered by the accommodation, to administer the accommodation, and to implement" the contraceptive mandate.[13]Also, an eligible organization must continually update HHS with any new information.[14] If an eligible organization does not comply with the accommodation or provide contraceptive coverage to its employees, the Government imposes a severe monetary penalty.[15]

When a Third Party receives a Form 700 or DOL Notice, and if it agrees to "remain in a contractual relationship with the eligible

4. *Id*. § 300gg-13(a)(4).
5. *Geneva*, 778 F.3d at 427.
6. *Id*. at 428.
7. *Id*.; *see also* 26 U.S.C. § 6033(a)(3)(A)(i), (iii) (2012); 45 C.F.R. § 147.131(a) (2015).
8. *Geneva*, 778 F.3d at 428.
9. *Id*. at 429.
10. *Id*. at 429.
11. Dordt Coll. v. Burwell, 801 F.3d 946, 948 (8th Cir. 2015).
12. *Id*. at 949.
13. Coverage of Certain Preventive Services Under The ACA, 79 Fed. Reg. 51,092, 51,095 (Aug. 27, 2014).
14. 29 C.F.R. §§ 2590.715–2713A(b)(1)(ii)(B) (2015).
15. *Dordt*, 801 F.3d at 950.

organization," it must "provide or arrange[] payments for contraception services" for the plan's beneficiaries.[16] A Third Party must also provide notice to the eligible organization's plan beneficiaries that it—not the eligible organization—is administering and funding the beneficiaries' contraceptive coverage.[17] The Third Party may seek reimbursement and additional compensation from the federal government for providing these services.[18]

Petitioners (Catholic Groups)[19] are twenty-nine employers that religiously object to the contraceptive mandate and the mandate's accommodation.[20] The Catholic Groups want to provide their employees[21] health insurance.[22] But the Catholic Groups contend that complying with the contraceptive mandate's accommodation violates their religious beliefs.[23]

The Catholic Groups' object to the contraceptive mandate because they believe that "human life begins at conception, and that certain 'preventive' services that interfere with conception or terminate a pregnancy are immoral" or sinful.[24] Furthermore, the Catholic Church prohibits "material cooperation"—i.e., "facilitating the wrongdoing of others."[25] And it prohibits "giving scandal"—i.e., "tempting others, by words or actions, to engage in immoral conduct."[26] The Catholic Groups believe that complying with the contraceptive mandate directly or via the accommodation causes them to violate these tenants of faith because filing a notice triggers an obligation for Third Parties to provide the objectionable coverage to the Catholic Groups' female employees.[27] Also, they object to the

16. 29 C.F.R. §§ 2590.715–2713A (2015) (describing requirements for TPAs); *see also* 45 C.F.R. § 147.131(c)(1)(i) (2015) (describing similar requirements for insurance issuers).

17. Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422 (3d Cir. 2015).

18. *Id*.

19. For simplicity, Petitoners are referred to as Catholic Groups although some belong to different Christian denominations.

20. Brief for the Respondents at 19, Zubik v. Burwell, Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191 (U.S. Feb. 10, 2016) [hereinafter Brief for the Respondents]; Brief for Petitioners in Nos. 14-1418, 14-1453 & 14-505 at 19, Zubik v. Burwell, No. 14-1418 (U.S. Jan. 4, 2016) [hereinafter Brief for *Zubik* Petitioners].

21. "Employees" is used for simplicity even though some beneficiaries are students.

22. Brief for *Zubik* Petitioners, *supra* note 20, at 16–18 (noting they have been providing their employees three types of high-quality health plans without coverage for abortifacients or contraception: self-insured plans, self-insured church plans, and insured plans).

23. *Id*. at 18–19.

24. *Id*. at 17.

25. *Id*.

26. *Id*.

27. *Id*. at 19. "Female employees" is used throughout the commentary to include any male employee with female relatives or dependents covered under his health care plan.

accommodation because it forces them to maintain a contractual relationship with abortifacient providers.[28]

II. LEGAL BACKGROUND

A. Enacting RFRA

Congress enacted RFRA[29] after the Supreme Court in *Employment Division v. Smith*[30] overturned, in most contexts, *Sherbert v. Verner*[31] and *Wisconsin v. Yoder.*[32] *Sherbert* and *Yoder* held that a law that substantially burdens a person's religious exercise is strictly scrutinized. Now under *Smith* generally applicable laws that incidentally burden religious exercise but are otherwise valid are typically constitutional.[33]

In response to *Smith*, Congress passed RFRA, which purports to reinstate the *Sherbert* and *Yoder* strict scrutiny test. Under RFRA, "[the Federal] Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[34]

Importantly, this test only applies to sincere *and* religious claims.[35] Claims that are a pretext for avoiding complying with the law and claims that are "nonreligious in motivation" do not receive special privileges.[36] However, the Supreme Court has been reluctant to question a claimant's religious beliefs, even if the beliefs are not mainstream. For example, the claimant in *Thomas v. Review Board* was substantially burdened when building part of a turret, although he did not religiously object to fabricating sheet steel for a variety of industrial uses or object to producing raw materials that would be used to build a tank.[37] His religious objections were "not articulated with . . . clarity and precision," but the Court allowed him to draw this line stating that it was "ill equipped" to judicially

28. *Id*. at 48.
29. 42 U.S.C. § 2000bb (2012).
30. Emp't Div. Dept. of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).
31. Sherbert v. Verner, 374 U.S. 398 (1963).
32. Wisconsin v. Yoder, 406 U.S. 205 (1972).
33. *Smith*, 494 U.S. at 878.
34. 42 U.S.C. § 2000bb-1(b).
35. Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751, n.28 (2014); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981).
36. *Hobby Lobby*, 134 S. Ct. at n.28; *Thomas*, 450 U.S. at 715.
37. *Thomas*, 450 U.S. at 710, 715.

investigate specific religious creeds.[38]

B. Hobby Lobby

In *Burwell v. Hobby Lobby* the Supreme Court used RFRA to invalidate certain ACA provisions.[39] In that case, for-profit, closely-held corporations religiously objected to the ACA requirement that they pay for their employees' contraceptive coverage or face a penalty.[40] In applying RFRA, the Court held that RFRA's broad protection for religious liberty extends to for-profit, closely-held corporations.[41]

The Government in *Hobby Lobby* argued that the contraceptive requirement did not burden the companies because the connection between paying for an employee's contraception coverage and the destruction of a beneficiary's embryo was too attenuated.[42] The Court rejected this argument because it does not inquire whether a belief is reasonable.[43] In effect, the Court held that it must credit the companies' beliefs about 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."[44] Thus, it held that the mandate was a substantial burden and proceeded to apply strict scrutiny.[45]

The Court assumed that "guaranteeing cost-free access to the . . . challenged contraceptive methods [was] compelling."[46] Next, the Court held that least-restrictive alternative test is "exceptionally demanding"[47] and was not satisfied because the Government could have possibly paid for contraceptive coverage.[48] Also, the Court stated that the accommodation would be a less restrictive alternative, but it did not hold that the accommodation was permissible per se.[49]

In sum, in light of *Hobby Lobby*, it is clear that mandating a nonprofit when it has a sincere religious objection to contraception to either pay for its employees' contraception coverage or face a financial penalty violates

38. *Id*. at 715.
39. *Hobby Lobby*, 134 S. Ct. at 2759.
40. *Id*.
41. *Id*. at 2775.
42. *Id*. at 2777.
43. *Id*. at 2778.
44. *Id*.
45. *Id*. at 2779.
46. *Id*. at 2780.
47. *Id*.
48. *See id*. at 2780–81 (reasoning that the most "straight-forward" way for women to obtain contraception was for the Government to pay for it, without relying on this alternative).
49. *Id*. at 2782.

RFRA. But it is unclear whether the Accommodation is permissible under RFRA.

C. Procedural History

The Catholic Groups filed suits in nine district courts within the Third, Fifth, Tenth, and D.C. Circuits challenging the accommodation under RFRA.[50] Seven of the suits were at least partially successful in their respective district courts.[51] On appeal, the Third, Fifth, Tenth, and D.C. Circuits all rejected the Catholic Groups' claims.[52] The only dissenting panel judge was Judge Baldock in the Tenth Circuit.[53] Moreover, all four circuits denied rehearing en banc.[54] Yet multiple judges in the Fifth, Tenth, and D.C. Circuits dissented from the denial orders.

After the rehearing denials, the Catholic Groups filed writs of certiorari.[55] The Supreme Court granted certiorari for each case on November 6, 2015 and consolidated the appeals.[56]

Also, the Second, Sixth, Seventh, Eighth, and Eleventh Circuits have addressed this issue in cases not consolidated before the Supreme Court.[57] The Eight Circuit is the only circuit that ruled for the Catholic Groups.[58]

III. HOLDING

The Third,[59] Fifth,[60] Tenth,[61] and D.C. Circuits[62] rejected the Catholic

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50. Brief for the Respondents, *supra* note 20, at 20.
51. *Id*. at 21.
52. *Id*.
53. *Id*. at 23.
54. *Id*.
55. *Id*. at 4.
56. Geneva Coll. v. Burwell, 136 S. Ct. 445 (2015); Zubik v. Burwell, 136 S. Ct. 444 (2015); Priests for Life v. Dep't of Health & Human Servs., 136 S. Ct. 446 (2015); Little Sisters of the Poor Home v. Burwell, 136 S. Ct. 446 (2015); E. Texas Baptist Univ. v. Burwell, 136 S. Ct. 444 (2015).
57. Brief for the Respondents, *supra* note 20, at 24; *see also* Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't Health & Human Servs., No. 14-12696, 2016 WL 659222, at *1 (11th Cir. Feb. 18, 2016) (deciding this case for the Government after briefing here).
58. Brief for the Respondents, *supra* note 20, at 24, n.12.
59. Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422 (3d Cir.) *cert. granted in part sub nom*. Zubik v. Burwell, 136 S. Ct. 444 (2015) *and cert. granted sub nom*. Geneva Coll. v. Burwell, 136 S. Ct. 445 (2015).
60. *E. Texas Baptist Univ. v. Burwell*, 793 F.3d 449, 452 (5th Cir.) *cert. granted*, 136 S. Ct. 444, (2015).
61. Little Sisters of the Poor Home, 794 F.3d 1151, 1162 (10th Cir.) *cert. granted sub nom*. S. Nazarene Univ. v. Burwell, 136 S. Ct. 445 (2015) *and cert. granted in part sub nom*. Little Sisters of the Poor Home v. Burwell, 136 S. Ct. 446 (2015).
62. Priests For Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229 (D.C. Cir. 2014) *cert. granted sub nom*. Roman Catholic Archbishop of Washington v. Burwell, 136 S. Ct. 444 (2015) *and cert. granted sub nom*. Priests for Life v. Dep't of Health & Human Servs., 136 S. Ct. 446 (2015).

Groups' RFRA claims. Each circuit held that the accommodation does not substantially burden the groups' exercise of religion.[63] The circuit courts purported not to question the sincerity of the Catholic Groups' beliefs.[64] However, they refused to accept the the Catholic Groups' characterization of the accommodation.[65] In other words, the courts purported to believe the Catholic Groups when the groups claimed that they *felt* as though their religious beliefs were substantially burdened, but as a matter of law the courts determined that they were not substantially burdened.[66]

The courts held that once an eligible organization "avails itself of the accommodation, that organization has discharged its legal obligations under the challenged regulations."[67] The accommodation is a de minimis burden.[68] The circuits reasoned that the Catholic Groups were attempting to religiously veto the "legally required conduct of third parties" because the accommodation provides the Catholic Groups an "op-out mechanism that shifts to third parties the obligation[s]" under the contraceptive mandate. [69] This opt-out "fastidiously relieves Plaintiffs" of anything that might constitute a substantial burden under RFRA.[70]

In addition, the D.C. Circuit held the accommodation survived strict scrutiny under RFRA because it is the least restrictive means of furthering the Government's "compelling interest in providing women full and equal benefits of preventative health coverage."[71] The D.C. Circuit stated that the Government could only ensure seamless employee contraceptive coverage if eligible organizations communicate their religious objections via the accommodation.[72] And, even though the mandate exempts some organizations, the exemptions are limited to the Government's interest in a uniform system of laws.[73]

IV. ARGUMENTS

A. Petitioners Must Prove The Accommodation Substantially Burdens

63. *See, e.g.*, *Geneva Coll*, 778 F.3d at 444.
64. *See, e.g.*, *id*. at 436.
65. *See, e.g.*, *id*.
66. *See, e.g.*, Priests For Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 247 (D.C. Cir. 2014).
67. *Id*. at 250.
68. *See, e.g.*, *id*. at 249.
69. *Id*. at 251.
70. *Id*. at 251– 52.
71. *Id*. at 264.
72. *Id*.
73. *Id*. at 266.

Their Religious Exercise

1. Catholic Groups' Arguments

The Catholic Groups argue that the contraceptive mandate forces them "to engage in conduct that seriously violates their religious beliefs on pain of substantial penalties," and therefore the mandate is a quintessential example of a substantial burden to religious exercise.[74] It is undisputed that the non-compliance penalties are severe. The Catholic Groups will be exposed to the same penalties as the plaintiffs in *Burwell v. Hobby Lobby* and there the Court determined that such penalties are substantial.[75] Also, the Mandate requires them to act.[76] In fact, HHS regulations state that actions by eligible organizations are "necessary" for employees to get contraceptive coverage.[77]

It is not for the Court to question the sincerity of the Catholic Groups' beliefs. It must accept the Petitioners' beliefs about private religious questions like when an innocuous act becomes burdensome—or gives rise to scandal and material cooperation—as a result of its connection with a proscribed religious act.[78] The Catholic Groups believe that they exercise religion when they contract with insurance companies and when they refuse to submit the accommodation notices.[79] The Petitioners' sincerely held religious beliefs are violated because they are forced to take an action that facilitates the Government's conscription of the Catholic Group's health care plan infrastructures and TPAs to provide objectionable coverage.[80] The Catholic Groups' beliefs should not questioned by the Court.[81]

Nevertheless, the Government argues and the circuits below held that (1) the Catholic Groups' "act" is not a legally recognizable harm because they are only "opting out" of requirements; and (2) the groups are objecting to independent, third-party acts. The Catholic Groups respond to this criticism in two ways.

First, they contend that the Government and circuit courts

74. Brief for *Zubik* Petitioners, *supra* note 20, at 27.
75. *Id*. at 38–39.
76. Brief for Petitioners in Nos. 15-35, 15-105, 15-119, & 15-191 at 47, E. Texas Baptist Univ. v. Burwell, No. 14-1418 (U.S. Jan. 4, 2016) [hereinafter Brief for *ETBU* Petitioners].
77. *Id*.
78. Brief for *Zubik* Petitioners, *supra* note 20, at 32.
79. *Id*. at 35–36.
80. Brief for *ETBU* Petitioners, *supra* note 76, at 49.
81. *Id*.

mischaracterize the accommodation as an "opt-out."[82] In fact, the Catholic Groups believe the term "accommodation" is also a mischaracterization.[83] They prefer to call it the "alternative compliance mechanism" because the accommodation is actually "a way for religious organizations to 'compl[y] with the mandate.'"[84] Regardless, the accommodation's characterization is not fundamental to their argument because the Court should not inquire into whether the "opt-out" relieves the Catholic Groups of moral culpability because that is an inherently religious question.[85]

Ultimately, the Catholic Groups argue that the opt-out mischaracterization occurs because the Government and circuits "badly distort[] the substantial-burden inquiry" by questioning the sincerity of the groups' beliefs.[86] Circuits have done this by focusing on the de minimis amount of effort required to complete the accommodation,[87] and by dismissing the Catholic Groups' theological beliefs about "scandal" and "material cooperation" that result from filing the notice.[88] But as one Catholic bishop testified, while the forms only take "a few minutes to sign," "the ramifications are eternal."[89] The potential significance of seemingly minor acts was echoed by a Fifth Circuit dissenting judge: "Thomas More went to the scaffold rather than sign a little paper for the King."[90] "Plainly it was the scaffold, not the toil of signing, that substantially burdened his religious beliefs."[91] The Catholic Groups argue the statute is clear on this point; "RFRA expressly protects '*any* exercise of religion.'"[92] The Government may not compel the Catholic Groups to file paperwork, call that paperwork necessary for the mandate, and then dismiss the Catholic Groups' objections to these requirements, if they are crediting the Petitioners' beliefs as sincere.[93]

Second, the Catholic Groups' claims are not precluded even though their religious exercise involves interactions with third parties and

82. Brief for *Zubik* Petitioners, *supra* note 20, at 43.
83. *Id*.
84. *Id*. (quoting 45 C.F.R. § 147.131(c)(1) (2015)).
85. Brief for *Zubik* Petitioners, *supra* note 20, at 44.
86. *Id*. at 41.
87. *Id*. at 41–42.
88. Brief for *ETBU* Petitioners, *supra* note 76, at 48.
89. Brief for *Zubik* Petitioners, *supra* note 20, at 43.
90. E. Texas Baptist Univ. v. Burwell, 807 F.3d 630, 635 (5th Cir. 2015) (Jones, J., dissenting) *reh'g denied*.
91. Brief for *ETBU* Petitioners, *supra* note 76, at 47–48.
92. Brief for *Zubik* Petitioners, *supra* note 20, at 42 (quoting Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751, 2762 (2014)).
93. Brief for *ETBU* Petitioners, *supra* note 76, at 47.

independent actors.[94] The Supreme Court's precedent is clear: The claimant in *Thomas v. Review Board* was religious burdened when he built a turret although only third parties were going to use the turret in war.[95] And in *Hobby Lobby* the plaintiffs' exercise of religion was burdened because their actions might have enabled a third party to destroy an embryo.[96]

In any event, the Catholic Groups are not objecting to third-party action, but rather their own involvement in a contraception scheme.[97] Contrary to the Government's argument, Third Parties are not under an independent obligation to deliver contraception coverage to the Catholic Groups' employees.[98] No obligation exists unless the Catholic Groups "(a) maintain an objectionable contractual relationship with their insurance companies and then (b) submit the objectionable 'self-certification' or 'notice.'"[99] That is why it is necessary for the Government to penalize Petitioners for not submitting the accommodation notices.[100] Responsibility for providing contraception to employees—and the unique benefit of extra payment from the Government to the Third Party—only arises after an eligible organization's action.[101] Thus, the Catholic Groups' religious objections are tailored to their own action, not third-party action or internal government affairs.[102]

2. Government's Arguments

According to the Government, the accommodation allows the Catholic Groups to opt out of the mandate and relieves them of all recognizable religious burdens.[103] After an objection is filed, Catholic Groups are not "required to exercise any contractual or other authority that they possess to 'authorize, obligate, or incentivize' issuers or TPAs to provide contraception coverage."[104] Instead, the Government mandates that Third Parties provide coverage through the Government's independent

94. Brief for *Zubik* Petitioners, *supra* note 20, at 30.
95. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 715 (1981).
96. *Hobby Lobby*, 134 S. Ct. at 2775.
97. Brief for *Zubik* Petitioners, *supra* note 20, at 45.
98. *Id*. at 4 (The *Zubik* Petitioners also state "the supposed 'independent obligation' is irrelevant because Petitioners object to hiring or a maintaining a relationship with any insurance company that is authorized . . . to deliver the objection coverage . . . regardless of [how] that authority, obligation, or incentive is 'trigged.'").
99. *Id*. at 48–49.
100. *Id*.
101. *Id*. at 49.
102. Brief for *ETBU* Petitioners, *supra* note 76, at 54–55.
103. Brief for the Respondents, *supra* note 20, at 34–35.
104. *Id*. at 37.

authority.[105] Thus, although filing a Form 700 or HHS Notice "gives rise to the *occasion* for the government to act," it does not mean the "issuer's or TPA's legal obligation . . . *derive[s] from*" a Catholic Group's filing—i.e., the Third Parties have an independent obligation.[106]

The Government dismisses the Catholic Groups' argument "that the accommodation is not a true opt-out because an employer that invokes it is deemed to 'comply'" with the contraceptive mandate.[107] According to the Government, this is petty semantics. Were the regulations to use "excused" instead of "complied," the groups would take the same steps to opt out and would not be able to show that those steps result in a religious burden.[108]

This argument is bolstered by the Government's characterization of the Court's holding in *Hobby Lobby*.[109] The Court described the accommodation as an "opt-out," and it wrote that the regulations "effectively exempt" objecting religious employers from the mandate.[110] The Government acknowledges that the Court's description of the accommodation was dicta, but it argues that the Court correctly describes how the accommodation works, and its reasoning is persuasive.[111]

Alternatively, even if the contraceptive mandate burdens the Catholic Groups, the Government argues that it does not substantially burden them.[112] First, the Government notes that it is the Catholic Groups' burden to prove that a regulation substantially burdens their free exercise.[113] Next, the Government points out that pre-*Smith* decisions recognized that claimed religious burdens often do not qualify as legally recognizable substantial burdens. In *Bowen v. Roy*, the parents' free exercise of religion was not legally burdened when the government used their child's social security number—in violation of the parents' sincerely held religious belief that such use of the social security number was burdensome—because the claimants were attempting to change internal government rules.[114] Similarly in *Lyng v. Northwest Indian Cemetary*, Native Americans were not able to prevent the government from building through sacred tribal land, although this "unquestionably substantial[ly] burden[ed]' them in some sense"

105. *Id*.
106. *Id*. at 38.
107. *Id*. at 40 (quoting 45 C.F.R 147.131(c)(1) (2015)).
108. Brief for the Respondents, *supra* note 20, at 40.
109. *Id*. at 35–36.
110. *Id*. at 36 (citing Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751, 2763, n.9 (2014)).
111. Brief for the Respondents, *supra* note 20, at 34–35.
112. *Id*. at 41.
113. *Id*. at 42.
114. Bowen v. Roy, 476 U.S. 693 (1986).

because the Government cannot "satisfy every citizen's religious needs and desires."[115]

The Catholic Groups argue that these cases are distinct; here, the regulations pressure them to take action, whereas the litigants in *Roy* and *Lyng* objected to Government action. The Government responds that the claimants in *Roy* made the same argument—i.e., that the government forced them to submit an application with their daughter's social security number on it.[116] The Court in that case distinguished between individual and government action even if the claimants' religion did not.[117]

B. The Government Must Prove A Compelling Interest If The Petitioners Are Substantially Burdened

1. Catholic Groups' Arguments

If the contraceptive mandate substantially burdens the Catholic Groups' exercise of religion, the Government must show that the regulation "is in furtherance of a compelling governmental interest."[118] According to the Catholic Groups, the Government has not done so here.

The Catholic Groups claim that the Government does not have a compelling interest in ensuring that women receive full and equal health coverage, which includes contraceptive coverage, because the Government has granted many exemptions to the contraceptive mandate.[119] When the Government grants any exemption to a regulatory scheme it is difficult for that interest to be considered compelling, even more so when there are multiple exemptions, like here.[120]

2. Government's Argument

The Government argues that there is a compelling interest in female preventive health care coverage, and that exemptions to this rule do not undermine this interest.[121] The Government points out that five justices in *Hobby Lobby* determined that the Government "has a compelling interest in

115. Lyng v. Nw. Indian Cemetery Protective Ass'n., 485 U.S. 439 (1998).

116. Brief for the Respondents, *supra* note 20, at 46–47.

117. *Id*.

118. 42 U.S.C. § 2000bb–1(b) (2012).

119. Brief for *ETBU* Petitioners, *supra* note 76, at 59–68. For example, non-religious small businesses and churches are exempt. *Id*. at 63–64.

120. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 432–33 (2006) (reasoning that exemptions to a law make the government's purported interests in enforcing the law less compelling).

121. Brief for the Respondents, *supra* note 20, at 54–55.

providing insurance coverage that is necessary to protect the health of female employees."[122] The Government writes about the health benefits of contraception, including many non-pregnancy related benefits.[123] Additionally, there is a compelling interest in women having equal access to health care coverage as men.[124]

C. The Accommodation Must Be The Least-Restrictive Means Of Furthering The Government's Compelling Interest

1. Catholic Groups' Arguments

The Catholic Groups argue that even if the Government were to meet its burden of proving a compelling interest in preventive health care coverage for women, the contraceptive mandate is not the least restrictive means of furthering that interest.[125] RFRA's least-restrictive-means test is "exceptionally demanding"[126] and that test is not met here. Instead of burdening the Catholic Groups, the Government could allow their employees to buy contraception-only coverage on an exchange or full coverage through an exchange as it does for employees of exempt organizations.[127]

This would not be difficult for the Government. The Government would only need to tweak the structure of its existing program.[128] Within the grand scheme of the ACA, modifying the exchanges to comply with RFRA for the Catholic Groups' benefit would only be a minor adjustment.[129]

Likewise, employees would only have to take minor steps to sign up for a new health care plan.[130] These steps are no more burdensome than what many people do to receive Medicaid benefits. The Government argues

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122. Brief for the Respondents, *supra* note 20, at 55 (quoting Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751, 2785–86) (Kennedy, J., concurring); *Hobby Lobby*, 134 S. Ct. at 2799–80, n.23 (Ginsburg, J., dissenting)).

123. *See* Brief for the Respondents, *supra* note 20, at 55–58 (discussing how contraception prevents unintended pregnancy, complications from pregnancies, pelvic pain, menstrual disorders, and certain cancers).

124. *Id*. at 58.

125. Brief for *ETBU* Petitioners, *supra* note 76, at 72.

126. *Hobby Lobby*, 134 S. Ct. at 2780.

127. Brief for *ETBU* Petitioners, *supra* note 76, at 72; Brief for *Zubik* Petitioners, *supra* note 20, at 77.

128. *See* Brief for *ETBU* Petitioners, *supra* note 76, at 72 (reasoning Catholic Groups could be exempt from providing contraception without burdening the government because adequate mechanisms already exist).

129. Brief for *Zubik* Petitioners, *supra* note 20, at 76.

130. Brief for *ETBU* Petitioners, *supra* note 76, at 73.

these additional steps would make coverage less accessible to certain women, but "the government may not 'assume a plausible, less restrictive alternative would be ineffective' just because it 'requires a consumer to take action.'"[131] The Catholic Groups concede that some employees would not qualify for the exchanges as they are *currently* structured.[132] However, the employees of exempt organizations are in the same situation, and RFRA "may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs."[133]

Moreover, Catholic Groups proffer non-exchange based less restrictive alternatives: The Government could use Title X funds to pay for contraceptive coverage.[134] Or the Government could provide the employees coverage through Medicaid, Medicare, or a refundable tax credit.[135]

Similar to their argument that there is no compelling government interest, the Catholic Groups argue that the Government cannot claim that the contraceptive mandate is the least restrictive means of achieving its interests when it applies less religiously burdensome regulations to exempt organizations.[136] In other words, the Government has not explained why rules that work for exempt organizations cannot apply to the currently accommodated organizations.

2. Government's Argument

The Government argues that the contraceptive mandate will not be as effective if there are costs or burdens placed on women.[137] There is a benefit to "seamless" health care coverage, which is not possible if women have to take additional steps to receive contraceptive coverage, because even a minor hindrance to access leads to adverse consequences like unintended and risky pregnancies.[138] And any additional steps women would have to take to receive health care coverage would place them at a disadvantage compared to men.[139]

According to the Government, the Catholic Groups' proffered less restrictive alternatives are not valid alternatives under RFRA because they

131. *Id*. at 72 (quoting United States v. Playboy Entm't Grp., 529 U.S. 803, 815 (2000)).
132. Brief for *ETBU* Petitioners, *supra* note 76, at 73–74.
133. *Id*. at 73–74 (quoting Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751, 2781 (2014)).
134. Brief for *ETBU* Petitioners, *supra* note 76, at 75 (noting that Title X is a program devoted to providing family planning services and it is available to any public entity).
135. Brief for *Zubik* Petitioners, *supra* note 20, at 81–82.
136. Brief for *ETBU* Petitioners, *supra* note 76, at 77.
137. Brief for the Respondents, *supra* note 20, at 74–75.
138. *Id*. at 74–76.
139. *Id*. at 75.

raise costs and increase burdens on women.[140] Moreover, many of the purported alternatives would require new laws or regulations.[141] These plans "operate outside any 'existing, recognized, workable, and already-implemented framework to provide coverage.'"[142] This is unlike in *Hobby Lobby* where the accommodation was an "already-existing mechanism" for providing contraceptive coverage.[143]

Moreover, the Catholic Groups put forth a limitless interpretation of RFRA because objecting employers could receive exemptions from such things as minimum wage laws and immunization requirements.[144] According to the Government, there is no way Congress intended such absurd results when enacting RFRA.[145]

Finally, the Government claims the Catholic Groups' alternatives are unfeasible because insurance companies do not provide contraception-only coverage; the Government could only provide such coverage by implementing new laws or regulations.[146] Nor is it feasible for the Government to assume the cost of subsidizing all health care coverage for female employees if the Government adopted the Catholic Groups' other exchange plan. According to the Government, the key analysis is whether there is a less restrictive alternative "available."[147] None of these options are available.

V. ANALYSIS

Under RFRA, a plaintiff must first prove that it has a sincere religious belief that is substantially burdened by the regulation. If it does so, the Government must prove that the regulation furthers a compelling governmental interest and is the least restrictive means of furthering that interest.

Here, the Catholic Groups have proven that the accommodation substantially burdens their free exercise: it mandates that they facilitate access to contraception that they are religiously opposed to providing. The Government may be able to prove that the accommodation furthers a compelling interest in women's health and equality, but it has not shown

140. *Id*. at 76.
141. *Id*. at 76–77.
142. *Id*. at 79 (quoting Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751, 2787 (2014)).
143. Brief for the Respondents, *supra* note 20, at 54.
144. *Id*. at 79–80.
145. *Id*.
146. *Id*. at 82–83.
147. *Id*. at 84 (quoting Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983)).

that the accommodation is the least-restrictive means of furthering this compelling interest—the Government could provide contraception using ACA exchanges without conscripting the Catholic Groups.

A. The Catholic Groups Are Substantially Burdened By The Contraceptive Mandate

The Court should hold that the contraceptive mandate substantially burdens the Catholic Groups. The Catholic Groups accurately characterize some of the Government's arguments as attacks on the sincerity of their beliefs, which all parties have acknowledged is impermissible. To be sure, there is a certain appeal to the Government's position. All it requires is that the Catholic Groups file a one-page notice. And the Government is correct that interpreting RFRA as broadly as the Catholic Groups seek may impede the Government's ability to enact its policy goals.[148] However, RFRA requires that the Government take the Catholic Groups claims on their face as sincere.

Thus, the Court must accept that filing the objection and maintaining a contractual relationship with a party that provides an organization's employees contraception and abortifacients is a burden on religious exercise. As the Government notes, this does not necessarily mean that as a legal matter the Catholic Groups are substantially burdened, but the Government must give these groups' religious beliefs deference.

If, instead of filing a Form 700 or HHS Notice, the Government mandated that organizations flip a light switch on a Saturday in order to object to providing contraceptive coverage, it seems unlikely anyone would question an Orthodox Jewish organization's opposition to this practice.[149] The Court would apply strict scrutiny to that regulation. The Government treats these situations differently only because it is unwilling to allow religious organizations to claim that an administrative notice burdens them. But RFRA is clear. Arguments in favor of administrative convenience are irrelevant to whether the burden on religion is substantial. In effect, the Government is collapsing RFRA's least-restrictive inquiry with its substantial burden inquiry.

To be sure, if the Catholic Groups were truly able to opt out of the mandate, as the Government contends, the Catholic Groups would not be

148. *See* Brief for the Respondents, *supra* note 20, at 48–49 (discussing different parades of horribles).

149. *See* Brief for *Zubik* Petitioners, *supra* note 20, at 42–43 (discussing how de minimis actions under Supreme Court precedent are substantial burdens).

substantially burdened. Likewise, the Government is correct that the Catholic Groups may not object to internal government policies or third-party independent conduct. However, the accommodation does not truly opt out the Catholic Groups; they are directly burdened. And the Catholic Groups' opposition to the contraceptive mandate does not derive from opposition to internal government policies or third-party conduct.

The Government contends that filing the Form 700 or HHS Notice "gives rise to the *occasion* for the government to act," but that the "issuer's or TPA's legal obligation" does not "*derive from*" the filing.[150] But the rules are quite clear. To be an eligible organization and thus accommodated, a religious non-profit, such as the Catholic Groups, must file a Form 700 or HHS Notice.[151] And "[w]hen [the notice] is provided to an issuer, the issuer has *sole* responsibility for providing" the contraception coverage.[152] Likewise, if a TPA receives a copy of the Form 700 or DOL Notice, and agrees to remain in a contractual relationship with the eligible organization, then the TPA "shall provide or arrange payments for contraceptive services."[153] Thus, the Catholic Groups must file a notice for any third party obligation to arise.

The Government's argument is further undermined by regulations that state that the Form 700 or HHS Notice will cause an eligible organization to comply with the Mandate.[154] The Government argues that this is a petty semantics because if the word "exempts" had replaced "complies" in the regulation, the effect would be the same, and the Catholic Groups would not be burdened.[155] But this is unsound for two reasons.

First, words have meanings. The Government, through its rule making, states that the eligible organizations' filing of the accommodation is as an act of compliance with a requirement that the Government knows the groups are religiously opposed to facilitating. It would not have characterized the accommodation this way in light of its knowledge about religious organizations' objections to the contraceptive mandate unless filing a notice truly caused these religious groups to comply with the rule. In other words, the Government used "complies" instead of "exempt" because the Government recognizes a functional difference. Second, the Government's argument fails because IRS "religious employers" are

150. Brief for the Respondents, *supra* note 20, at 38.
151. 45 C.F.R. § 147.131(b)(4) (2015).
152. 45 C.F.R. § 147.131(c)(1)(i).
153. 26 C.F.R. § 54.9815-2713A (2015).
154. 45 C.F.R. § 147.131(c).
155. Brief for the Respondents, *supra* note 20, at 40.

exempt from the mandate entirely. Giving a church an exemption because of its religious objections is strong evidence that there is an objectionable act performed when an organization complies with the accommodation.

Additionally, the Government's own characterization of the mandate defeats its argument that Third Parties have an independent obligation to provide the Catholic Groups' employees contraceptive coverage. There would be no need to force the Catholic Groups to file the accommodation if Third Parties already have an independent obligation to provide the female employees coverage regardless of the Catholic Groups' actions.[156]

Also, the Government's reliance on *Burwell v. Hobby Lobby*'s characterization of the mandate is misplaced. To be sure, in dicta the Court wrote that the accommodation opted out and "effectively exempt[ed]" objecting religious employers from the mandate.[157] But the Court was only reasoning that the accommodation was a less burdensome alternative than forcing the claimants to pay for contraceptive services; it did not hold that the accommodation was permissible per se, and it did not analyze whether the accommodation could also be a substantial burden.[158]

Moreover, cases like *Lyng v. Northwest Indian Cemetery* and *Bowen v. Roy* do not support the Government's argument that the Catholic Groups are attempting to impermissibly interfere with internal government policy.[159] Here, unlike in those cases, the Petitioners are complaining about regulations that burden them directly. The Government argues that the litigants in *Roy* made the same argument as the Catholic Groups—i.e., if and only if the *Roy* parents filed a public benefit form would the Government use the daughter's social security number in violation of the parents' religious beliefs.[160]

But *Roy* does not support the Government's argument. The *Roy* parents did not argue that filing a benefits form without a social security number would violate their religious belief per se, as the Catholic Groups do here with a notice.[161] Instead, the parents argued that it was a violation of their religious beliefs for the Government to use their daughter's social security.[162] Their only objection to filing the benefits form was that they

156. *See* Brief for *Zubik* Petitioners, *supra* note 20, at 51–52 (reasoning that the Government would not require notices if they were meaningless).
157. Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751, 2763, n.9 (2014).
158. *See id*. (discussing the accommodation as a possible less restrictive alternative).
159. Brief for *ETBU* Petitioners, *supra* note 76, at 54.
160. Brief for the Respondents, *supra* note 20, at 36.
161. Bowen v. Roy, 476 U.S. 693, 697 (1986).
162. *Id*.

had to include their daughter's number on the form.[163] This case actually supports the Catholic Groups' argument because a majority of the Justices determined that the Government was religiously burdening the family by forcing the parents to include the daughter's social security number on the form. If including a social security number on a form is a religious burden, a form which enables and triggers abortifacient use is also a religious burden.

Finally, an analogy illustrates how the accommodation substantially burdens religious exercise. According to the Government, under the Catholic Groups' interpretation of RFRA, "[a] conscientious objector to the draft could claim that the act of identifying himself as such on his Selective Service card constitutes a substantial burden because that identification would then trigger the draft of a fellow selective service registrant in his place."[164] Clearly this would be an awful result. The Catholic Groups proffer a different analogy: "a conscientious objector who (quite reasonably) objects to a government policy that allows him to avoid military service only by providing a form that both identifies and obligates a family member or friend to serve in his stead" is obviously burdened.[165]

The Catholic Groups' analogy more accurately describes the accommodation because filing the objection identifies a specific Third Party and obligates that Third Party to provide contraceptive services. Just as the Catholic Groups could not object to anyone getting drafted, they are not objecting to any party providing their employees contraception. For example, the Government could pay for the employees' coverage. But the Catholic Groups' religious beliefs are burdened when their action "identifies and obligates" a party with which they have a pre-existing relationship to provide services they object to providing.

B. The Government Has A Compelling Interest In Providing Contraceptive Services To Women

The Court should hold—or at least assume without deciding—that there is a compelling interest here. There is no question that contraception provides women numerous health benefits. The Catholic Groups skirt away from addressing these benefits seemingly because it is obvious.[166] Nevertheless, the Catholic Groups contend that typically the Government

163. *Id*.
164. Brief for the Respondents, *supra* note 20, at 48.
165. Brief for *ETBU* Petitioners, *supra* note 76, at 45.
166. Brief for the Respondents, *supra* note 20, at 55.

in a strict scrutiny context cannot claim that an interest is compelling but then enact numerous exemptions to the regulation designed to accomplish the interest.[167]

Insofar as exemptions to regulations defeat the Government's compelling interest arguments in other contexts, in light of *Hobby Lobby* there is a compelling interest here. Five Justices thought so in *Hobby Lobby*, and their rationales apply just as strongly to this case. Although the Catholic Groups' argument about numerous exemptions do not defeat the Government's claim for a compelling interest, these arguments are key to resolving the least-restrictive-alternative inquiry.

C. The Catholic Groups Proffer Alternatives That Are Less Restrictive Than The Accommodation

It is too difficult for the Government to prove that the accommodation is the least-restrictive means of providing women preventive care equivalent to the preventative care that men receive. The Catholic Groups' most plausible proffered alternative is that the Government could allow their employees to buy contraception-only coverage through the existing ACA exchanges. Recipients of these plans would have two healthcare cards: one from their employer covering everything but contraception and one from an exchange plan only covering contraception.

The Government mischaracterizes the Catholic Groups' plan as an impermissible new program. The ACA dramatically changed the United States health care industry. When examining the effect of the Catholic Groups' proffered alternatives to the mandate, one must look at the ACA as a whole. This dispute is just another case in a line of cases defining the constitutionality and statutory permissibility of the new ACA program. Given the total amount of ACA subsidies already provided by the Government, the Catholic Groups' proffered alternative would cost very little additional money and would only require minor tweaks to the ACA's regulatory scheme. Certainly the Government can offer contraception-only coverage through exchanges. The ACA exchanges could have initially been designed this way. Instead, the Government decided to use an accommodation that burdens religious exercise. It is a weak argument for the Government to now claim that this alternative, one that would have easily been implemented when the exchanges were designed, is an impermissible alternative to the accommodation.

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167. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 433 (2006).

Moreover, the Government asserts that it should not have to assume the cost of providing contraceptive coverage to women via the exchanges. But under the accommodation the Government—not the Catholic Groups—pays Third Parties a premium to provide contraception. There is no reason to expect that paying for this contraceptive coverage through an exchange program will cost significantly more than paying Third Parties.

The Government's strongest argument is that women, if they have to take additional steps to receive preventive care via an exchange, will not receive coverage equal to what men receive. By definition, if women have to take an extra step than men, they are not on an equal footing. To be sure, under the Catholic Groups' exchange-based plans, female employees will have to take some additional steps to receive coverage. But the effort required of female employees under the Catholic Groups' plan is de minimis—a few clicks on the website. Thus, there is a permissible less restrictive alternative.[168]

CONCLUSION

The accommodation's notice is only a piece of paper to most people, but the Catholic Groups' sincere religious objections to the accommodation have to be credited. RFRA applies here because the Catholic Groups are substantially burden. And the Government fails to defend the accommodation under the exceptionally demanding strict scrutiny test because there are less restrictive alternatives available to the Government to accomplish its goals that do not burden the Catholic Groups. The Court should strike down the accommodation. Doing so will not give the Catholic Groups a key to the kingdom, but it is better for them than going to hell in a HHS notice.

168. *See* United States v. Playboy Entm't Grp., 529 U.S. 803, 815 (2000) (reasoning an alternative was less restrictive even though it required consumers to take more action than the existing regulatory scheme).