Nos. 13-354 & 13-356

IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, ET AL., *Petitioners*

v.

HOBBY LOBBY STORES, INC., ET AL., *Respondents*

CONESTOGA WOOD SPECIALTIES CORP., ET AL.
Petitioners

v.

KATHLEEN SEBELIUS, ET AL., *Respondents.*

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

BRIEF OF THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS AS *AMICUS CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA WOOD SPECIALTIES CORP., ET AL.

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE* [1]

Amicus curiae United States Conference of Catholic Bishops (the "Conference") is an assembly of the leadership of the Catholic Church in the United States. The Conference seeks to unify, coordinate, encourage, promote, and carry on Catholic activities in the United States; to organize and conduct religious, charitable, and social welfare work at home and abroad; to aid in education; to care for immigrants; and generally to further these goals through education, publication, and advocacy. To that end, the Conference provides and promotes a wide range of spiritual, educational, and charitable services throughout this country and around the world.

During the promulgation of the regulations at issue in this litigation (the "Mandate"), the Conference has steadily voiced its opposition to any rule that would require faithful Catholics and other religiously motivated business owners to choose between providing coverage for products and speech that violate their religious beliefs, and exposing their

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than Amicus and its counsel, has made a monetary contribution to the preparation or submission of this brief.

businesses to devastating penalties.[2] Despite the Conference's repeated efforts to work and dialogue toward a solution, the Government has steadfastly refused to create a satisfactory exemption, either for individuals seeking to run their businesses in accordance with their faith or for nonprofit religious organizations beyond houses of worship. As a consequence, employers are forced to facilitate the provision of coverage they find religiously objectionable, whether it be for the abortion-inducing drugs and devices at issue in this litigation, or also for the similarly mandated contraceptives, sterilization procedures, and related education and counseling at issue in related litigation.

The current impasse is disturbing for several reasons. In the first place, it reflects a departure

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[2] *See, e.g.*, Comments of U.S. Conference of Catholic Bishops (Sept. 17, 2010), *available at* http://old.usccb.org/ogc/preventive.pdf; Comments of U.S. Conference of Catholic Bishops (Aug. 31, 2011), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf; Comments of U.S. Conference of Catholic Bishops (May 15, 2012), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf; Comments of U.S. Conference of Catholic Bishops (Mar. 20, 2013), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf.

from the Government's longstanding practice of safeguarding the rights of organizations and individuals to act in accordance with their religious beliefs. The Conference has consistently supported those rights, particularly in the area of protecting the dignity of all human life. The fact that this dispute has played out in the context of the Affordable Care Act is all the more frustrating because the Catholic Church has long been a leading provider of, and advocate for, accessible, life-affirming health care, and has supported a positive role for government in helping to ensure such care.

Moreover, the Conference is deeply troubled by the manner in which the Government has invited courts to improperly and erroneously delve into matters of religious doctrine during the course of litigation surrounding the Mandate. Indeed, the test repeatedly championed by the Government would transform the Religious Freedom Restoration Act's substantial burden analysis into an exercise in amateur moral theology. The Constitution, however, does not permit federal courts or government officials to be the ultimate arbiters of matters of faith. As the authorities ultimately responsible for the accurate proclamation of Catholic doctrine within their respective dioceses, the bishops who constitute the membership of the Conference thus have a unique interest in ensuring the proper application of the substantial burden test. It is that test that is the primary focus of this amicus brief.

Indeed, the Conference is particularly concerned about the proper application of the substantial burden test, because the manner in which this Court

articulates that test will have implications for Catholic nonprofit organizations—including those that have filed lawsuits across the country against the Mandate's so-called "accommodation" for nonprofit entities.[3] Rather than exempting objecting

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[3] To date, courts have enjoined application of the Mandate against nonprofit entities in eighteen out of the nineteen cases to decide the question. *See Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-709, 2014 WL 31652 (E.D. Tex. Jan. 2, 2014) (enjoining Mandate); *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-314 (N.D. Tex. Dec. 31, 2013) (Doc. 99) (same); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12 cv-92, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013) (same); *Diocese of Fort Wayne-S. Bend v. Sebelius*, No. 1:12-cv-159, 2013 WL 6843012 (N.D. Ind. Dec. 27, 2013) (same); *Grace Schs. v. Sebelius*, No. 3:12-cv-459, 2013 WL 6842772 (N.D. Ind. Dec. 27, 2013) (same); *E. Tex. Baptist Univ. v. Sebelius*, No. H-12-3009, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013) (same); *S. Nazarene Univ. v. Sebelius*, No. 13-1015, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013) (same); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 6835094 (W.D. Pa. Dec. 23, 2013) (same); *Reaching Souls Int'l, Inc. v Sebelius*, No. 13-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013) (same); *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013) (same); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013) (same); *Zubik*

nonprofit entities completely from the scope of the Mandate, under the "accommodation," the Government has instead required those entities to

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v. Sebelius, No. 2:13-cv-01459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013) (same); *Ave Maria Found. v. Sebelius*, No. 2:13-cv-15198 (E.D. Mich. Dec. 31, 2013) (granting temporary restraining order) (Doc. 12); *Little Sisters of the Poor v. Sebelius*, No. 13-cv-2611, 2013 WL 6839900 (D. Colo. Dec. 27, 2013), *injunction pending appeal granted*, No. 13A691 (U.S. Jan. 24, 2014); *Mich. Catholic Conf. v. Sebelius*, No. 1:13-cv-1247, 2013 WL 6838707 (W.D. Mich. Dec. 27, 2013), *injunction pending appeal granted*, No. 13-2723 (6th Cir. Dec. 31, 2013); *Catholic Diocese of Nashville v. Sebelius*, No. 3:13-1303, 2013 WL 6834375 (M.D. Tenn. Dec. 26, 2013), *injunction pending appeal granted*, No. 13-6640 (6th Cir. Dec. 31, 2013); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013), *injunction pending appeal granted*, No. 13-5371 (D.C. Cir. Dec. 31, 2013); *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441, 2013 WL 6729515 (D.D.C. Dec. 20, 2013), *injunction pending appeal granted*, No. 13-5371 (D.C. Cir. Dec. 31, 2013). *But see Univ. of Notre Dame v. Sebelius*, No. 3:13-cv-1276, 2013 WL 6804773 (N.D. Ind. Dec. 20, 2013), *injunction pending appeal denied*, No. 13-3853 (7th Cir. Dec. 30, 2013).

take numerous steps to authorize third parties to provide the objectionable coverage to their employees. As the Conference informed the Government well before the accommodation was finalized, *supra* note 2, this does not resolve the religious objection to compliance with the Mandate, because even under the accommodation, objecting entities are still required to violate their religious beliefs by playing an integral role in the delivery of the mandated coverage to their employees. The Government, nonetheless, has attempted to argue that the refusal to comply with the accommodation imposes only a "de minimis" burden on religious exercise and that any burden is too "attenuated" to be substantial. For reasons articulated more fully below, that standard fundamentally misunderstands the substantial burden inquiry and would require an unconstitutional inquiry into a plaintiff's religious beliefs.

Thus, to ensure that numerous Catholic and other religious nonprofit organizations are not forced to act in violation of their religious beliefs, it is of vital importance that this Court reaffirm that in assessing whether a law imposes a substantial burden on religious exercise, courts should steer well clear of deciding religious questions. Once a plaintiff represents that taking a particular action—whatever that may be—violates his or her religious beliefs, a court's only task is to confirm the sincerity and religiosity of that representation, and then to determine if the Government has placed substantial pressure on the plaintiff to violate his or her beliefs.

SUMMARY OF ARGUMENT

At bottom, the question pending before this Court is straightforward: absent interests of the highest order, can the Government force entities or individuals to take actions that violate their sincerely held religious beliefs? Under the Religious Freedom Restoration Act ("RFRA"), the answer is clearly no. The Government attempts to argue otherwise, contending both that for-profit companies cannot exercise religion, and that in any event, the Mandate does not substantially burden the exercise of religion. Both of these arguments are without merit.

1. The notion that for-profit entities cannot exercise religion rests on an unduly narrow view of religious liberty. Such an approach would jeopardize the religious exercise of millions of Catholics who sincerely believe they are called to live out their faith in all aspects of their lives, including in the workplace. Religion is not something that can or should be divorced from the commercial sphere. Indeed, it is religion that often serves to direct that sphere toward the common good.

2. The Government's claim that the Mandate does not substantially burden the religious exercise of objecting individuals or the businesses they own rests on a fundamentally flawed understanding of the substantial burden test. That test requires courts to (1) identify the sincere religious exercise at issue, and (2) determine whether the government has placed "substantial pressure on an adherent to modify his behavior and to violate his beliefs."

Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981); *see also Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 428 (2006) (noting that a "prima facie case under RFRA" exists when a law "(1) substantially burden[s] (2) a sincere (3) religious exercise"). In identifying the relevant exercise of religion, a court must accept how plaintiffs "dr[a]w the line" as to the nature and scope of their religious beliefs. *Thomas*, 450 U.S. at 715. After plaintiffs' beliefs have been identified, the court must then determine whether the challenged regulation substantially pressures plaintiffs to violate those beliefs. *Id.* at 717; *see also Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

Here, the Government would have this Court disregard the "line" drawn by Hobby Lobby and Conestoga[4] and instead conclude that any injury is too "attenuated" to be cognizable. According to the Government, Hobby Lobby and Conestoga would subsidize their employees' use of abortion-inducing drugs and devices only after a series of independent decisions by third parties, and only after funds have flowed through a variety of accounts. Pet. Br. at 32–34 (No. 13-354). This, however, is a moral judgment masquerading as legal analysis. Rather than asking the *legal* question of whether the Mandate

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[4] Unless context indicates otherwise, references to "Hobby Lobby and Conestoga" refer to all Respondents in 13-354 and all Petitioners in No. 13-356.

substantially pressures Hobby Lobby and Conestoga to act contrary to their beliefs, the Government makes the *religious* judgment that providing the mandated coverage does not really violate Hobby Lobby's and Conestoga's beliefs. The Government, in effect, would have this Court conclude—"despite protestations to the contrary from the religious objectors who brought th[is] lawsuit"—that the "step[s]" between the provision of the mandated coverage and the use of that coverage shield Hobby Lobby and Conestoga from any moral responsibility for their actions. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457 (1988); Pet Br. at 34 (No. 13-354). Ultimately, the Government's position amounts to nothing more than the assertion that Hobby Lobby and Conestoga—who sincerely believe they cannot in good conscience provide the mandated coverage—"misunderstand their own religious beliefs." *Lyng*, 485 U.S. at 458.

Whatever the merits of the Government's moral analysis, this quintessentially religious inquiry lies well beyond executive or judicial competence. The Government's subtle, yet radical, transformation of the substantial burden analysis from a measure of the government's coercive mechanism into a judicial exploration of moral theology "cast[s] the Judiciary in a role that [it was] never intended to play." *Id.* It "cannot be squared with the Constitution or with [this Court's] precedents," *id.*, which clearly establish that "[i]t is not within the judicial function" to determine whether a plaintiff "has the proper interpretation of [his] faith," *United States v. Lee*, 455 U.S. 252, 257 (1982). Far from inviting courts to

wade into matters of religious doctrine, the substantial burden test is limited to an inquiry into the degree of pressure the Government places on an individual to violate his beliefs.

Thus, the question for this Court is not whether compliance with the Mandate is a *substantial violation* of an objecting employer's beliefs; instead, the question is whether the Mandate *substantially pressures* objecting employers to violate their beliefs as they, the employers, understand them. While courts can question whether the pressure placed on individuals to violate their beliefs is "substantial," under no circumstances may they assess whether a particular action transgresses those beliefs. That "line" is for the church and the individual, not the state, to draw, "and it is not for [courts]" to question. *Thomas*, 450 U.S. at 715.

Here, once the moral "line" is properly identified, it becomes readily apparent that the Mandate places substantial pressure on Hobby Lobby and Conestoga to cross that line. In accordance with their religious beliefs, Hobby Lobby and Conestoga cannot provide coverage for abortion-inducing drugs and devices. As the Mandate forces them to do precisely what their religion forbids, it is beyond question that it imposes a substantial burden on Hobby Lobby's and Conestoga's religious exercise. This burden, moreover, cannot possibly be justified by a compelling interest, nor is the Mandate the least restrictive means to achieve the Government's stated ends.

ARGUMENT

I. RELIGIOUS EXERCISE CANNOT, AND SHOULD NOT, BE EXCLUDED FROM THE MARKETPLACE

Before deciding whether Hobby Lobby's and Conestoga's exercise of religion is substantially burdened, this Court must answer the predicate question of whether RFRA protects the free exercise rights of for-profit entities or their owners. For many of the reasons ably articulated in Conestoga's brief, the Conference firmly believes the answer to that question must be yes. Pet. Br. 16–32 (No. 13-356).

Moreover, the notion that religious believers or the companies they own cannot or do not exercise religion rests on an unduly cramped definition of religious liberty and runs contrary to the manner in which Christians have understood their faith for centuries. Religion is not confined to the four walls of a church or to the private life of a believer. Rather, Christians in particular believe that they are commanded by Scripture to "do everything for the glory of God." 1 Cor. 10:31 (NABRE). "Only when their faith permeates every aspect of their lives do Christians become truly open to the transforming power of the Gospel."[5] Thus, "[a]ny

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[5] Pope Benedict XVI, Address to the Bishops of the United States (April 16, 2008), *available at* http://www.vatican.va/holy_father/benedict_xvi/speec

tendency to treat religion as a private matter must be resisted."[6] Or as Pope Francis has recently observed, "religion [cannot] be relegated to the inner sanctum of personal life, without influence on societal and national life." Pope Francis, *Evangelii Gaudium* ¶ 183.

Accordingly, a Catholic cannot in good conscience "profess . . . beliefs in church on Sunday, and then during the week . . . promote business practices or medical procedures contrary to those beliefs."[7] He cannot claim to respect the teachings of the Church, and then operate his business in a way that "ignore[s] or exploit[s] the poor and the marginalized, . . . promote[s] sexual behavior contrary to Catholic moral teaching, or . . . adopt[s] positions that contradict the right to life of every human being from conception to natural death."[8] In other words, for Catholics—as well as for many other believers—faith is not something to be checked at

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hes/2008/april/documents/hf_ben-xvi_spe_20080416_bishops-usa_en.html.

[6] *Id.*

[7] Pope Benedict XVI, Address to the Bishops of the United States (April 16, 2008), *available at* http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080416_bishops-usa_en.html.

[8] *Id.*

the door of their businesses or ignored when determining how to conduct their corporation's affairs. To the contrary, their faith plays an indispensable role in all aspects of their lives.

The Government, however, maintains that the believer loses the right to live out his faith the instant he enters the marketplace or incorporates a business. The implications of this argument are staggering. In short, the Government purports to have the power to tell believers to "stop being Catholic" or to lay aside their Christian faith upon entering the commercial sphere. This far-too-narrow view of religious freedom would have believers compartmentalize their faith in violation of basic Christian teachings, and creates an artificial divide based on the Government's perception of the sacred and the secular.

Such a divide is not only unwarranted; it is also undesirable. In fact, the "split between the faith which many profess and their daily lives deserves to be counted among the more serious errors of our age." *Gaudium et Spes* ¶ 43. As the Pontifical Council for Justice and Peace has observed,

> [d]ividing the demands of one's faith from one's work in business is a fundamental error which contributes to much of the damage done by businesses in our world today, including overwork to the detriment of family or spiritual life, an unhealthy attachment to power to the detriment of one's own good, and the abuse of economic power in order to

make even greater economic gains.[9]

After all, it is religion that reminds many businesses and their owners that "[p]rofit is a regulator of the life of a business, but it is not the only one; other human and moral factors must also be considered which, in the long term, are at least equally important for the life of a business." Pope John Paul II, *Centesimus annus* ¶ 35. It is religion that instructs companies to ensure that the "pursuit of profit [is] in harmony with the irrenounceable protection of the dignity of the people who work at different levels in the same company."[10] And it is religion that "recognizes the positive value of the market and of enterprise, but which at the same time points out that these need to be oriented towards the common good." Pope John Paul II, *Centesimus annus* ¶ 43.

Ultimately, for many people of faith, religion is not something that can or should be divorced from the manner in which they operate their businesses. By suggesting otherwise, the Government is

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[9] Pontifical Council for Justice and Peace, *Vocation of the Business Leader* ¶ 10 (November 2012), *available at* http://www.stthomas.edu/cathstudies/cst/conferences/Logic%20of%20Gift%20Semina/Logicofgiftdoc/FinalsoftproofVocati.pdf.

[10] Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* ¶ 340.

substituting its view of religion for that of the believer, and adopting an "extraordinary" standard whereby "[r]eligious exercise is protected in the home and the house of worship but not beyond." *Korte v. Sebelius*, 735 F.3d 654, 681 (7th Cir. 2013). "[F]ree-exercise rights are not so circumscribed," however, and this Court should not accept the Government's invitation to "leave religious exercise wholly unprotected in the commercial sphere." *Id.*

II. THE MANDATE SUBSTANTIALLY BURDENS HOBBY LOBBY'S AND CONESTOGA'S RELIGIOUS EXERCISE

Congress enacted RFRA to enlarge the scope of legal protection for religious freedom. In *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that neutral and generally applicable laws burdening religious practices did not trigger heightened scrutiny under the Free Exercise Clause. Responding to that decision, Congress enacted RFRA "to restore the compelling interest test" set forth in *Sherbert*, 374 U.S. 398, and *Yoder*, 406 U.S. 205. 42 U.S.C. § 2000bb(b)(1). Accordingly, RFRA prohibits the Government from "substantially burden[ing] a person's exercise of religion" unless the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(a)–(b).

Under RFRA, therefore, courts must first assess whether the challenged law imposes a "substantial[] burden" on the plaintiff's "exercise of religion." *Id.* As every appellate court to consider the question in the context of the Mandate has concluded, where

sincerity is not in dispute, this initial inquiry requires courts to (1) identify the religious exercise at issue, and (2) determine whether the government has placed "substantial pressure"—i.e., a substantial burden—on the plaintiff to abstain from that religious exercise. *Korte*, 735 F.3d at 682–85; *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1216–18 (D.C. Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137–41 (10th Cir. 2013) (en banc); *see also O Centro*, 546 U.S. at 428; *Thomas*, 450 U.S. at 718.

Here, instead of first identifying the religious beliefs at issue, and then assessing whether the Mandate pressures objectors to violate those beliefs, the Government would have this Court assess whether the Mandate requires Hobby Lobby and Conestoga to violate their religious beliefs at all—or at least, whether it requires them to "substantially" violate those beliefs. Such determinations, however, lie well beyond this Court's competence. As Hobby Lobby and Conestoga explained below, they sincerely believe that they cannot operate their businesses in the manner required by the Mandate without violating their religious beliefs. Failure to accept Hobby Lobby's and Conestoga's representations regarding their beliefs and, even more egregiously, making an inherently religious judgment about the extent to which the Mandate violates those beliefs, would run roughshod over well-established precedent that has repeatedly warned courts not to delve into religious matters. Once it is acknowledged that sponsoring the mandated coverage violates Hobby Lobby's and Conestoga's

sincerely held religious beliefs, it becomes readily apparent that the Mandate imposes a substantial burden on their religious exercise.

A. The Refusal to Provide the Mandated Coverage Is a Protected Exercise of Religion

RFRA defines "exercise of religion" to include "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (emphasis added). "This definition is undeniably very broad, so the term 'exercise of religion' should be understood in a generous sense." *Korte*, 735 F.3d at 674. As this Court has recognized, religious exercise includes "not only belief and profession but the performance of (or abstention from) physical acts." *Smith*, 494 U.S. at 877.

Whether a belief or practice is entitled to protection is "not to turn upon a judicial perception of the particular belief or practice in question." *Thomas*, 450 U.S. at 714. Instead, courts must accept plaintiffs' description of their beliefs, regardless of whether the court, or the Government, finds them "acceptable, logical, consistent, or comprehensible." *Id.* at 714–15 (refusing to question the moral line drawn by plaintiff); *see also Lee*, 455 U.S. at 257 (same).[11] In other words, it is left to the

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[11] *See also, e.g.*, *United States v. Ali*, 682 F.3d 705, 710–11 (8th Cir. 2012) (finding error where the district court questioned claimant's "interpretation

plaintiff to "dr[a]w a line" regarding the actions his religion deems permissible, and once that line is drawn, "it is not for [a court] to say [it is] unreasonable." *Thomas*, 450 U.S. at 715.

The reason for this approach is obvious: "[c]ourts are not arbiters of scriptural interpretation." *Id.* at 716. It is not "within the judicial function and judicial competence" to determine whether a belief or practice is in accord with a particular faith. *Id.*; *see also Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial

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of Islamic doctrine"); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1314 (10th Cir. 2010) (explaining that "the issue is not whether the lack of a halal diet that includes meats substantially burdens the religious exercise of any Muslim practitioner, but whether it substantially burdens Mr. Abdulhaseeb's own exercise of his sincerely held religious beliefs"); *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008) (stating that plaintiff's representations brought his "dietary request squarely within the definition of religious exercise"); *Wyhe v. Reisch*, 581 F.3d 639, 656 (8th Cir. 2009) (rejecting government attempts to question claimant's representation that a particular item was necessary to celebrate a religious festival); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (rejecting government efforts to dispute plaintiff's representation that a medical test would violate his religion).

ken to question . . . the validity of particular litigants' interpretations of [the] creeds [of their faith]."). Accordingly, this Court has "[r]epeatedly and in many different contexts" "warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887. Indeed, since *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), it has been clear that secular authorities may not decide the meaning of religious doctrine or beliefs. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 115–16 (1952). As this Court recently and unanimously reiterated, each religion is entitled to "shape its own faith," free of judicial interference. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

Thus, given the inability of Article III courts to make judgments regarding religious matters, when identifying the relevant religious exercise for purposes of RFRA, judicial competence extends only to determining "whether the beliefs professed by a [claimant] are sincerely held and whether they are, in his own scheme of things, religious." *United States v. Seeger*, 380 U.S. 163, 185 (1965). Put a different way, it suffices that a plaintiff has an "honest conviction that [the actions required of him are] forbidden by his religion." *Thomas*, 450 U.S. at 716.

Here, there can be no doubt that Hobby Lobby and Conestoga possess just such an "honest conviction." Indeed, there is no dispute that Hobby Lobby and Conestoga sincerely believe they may not take the specific actions necessary to comply with

the Mandate. This analysis remains the same regardless of whether the exercise at issue is that of the corporate or individual claimants. Because RFRA protects "any exercise of religion," 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A), the precise nature of the religious exercise at issue is irrelevant to the substantial burden analysis. The Court's only task at this stage is to determine whether the asserted exercise—whatever that may be—is sincere and religious. Thus, it is immaterial that the individual claimants exercise their religion by refusing to "order[] their companies to provide insurance coverage for drugs or devices whose use is inconsistent with their faith," *Hobby Lobby*, 723 F.3d at 1152 (Gorsuch, J., concurring), while the corporate claimants object to directly purchasing and providing the coverage, *id.* at 1140 (majority op.). What matters is that under either scenario, the claimants have an "honest conviction" that the actions they must take are "forbidden by [their] religion." *Thomas*, 450 U.S. at 716. [12]

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[12] Of course, a religious exercise need not be "compelled by" a claimant's faith to be protected under RFRA. 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). Thus, RFRA would apply even to actions merely motivated by religious belief. In any event, RFRA plainly protects religious exercise where, as here, the claimant believes he is compelled by his religion to refrain from taking the actions at issue.

B. The Mandate Imposes a Substantial Burden on Hobby Lobby's and Conestoga's Religious Exercise

Once Hobby Lobby's and Conestoga's refusal to comply with the Mandate is identified as a protected religious exercise, the "substantial burden" analysis is straightforward. As this Court has held, the Government "substantially burdens" the exercise of religion if it coerces an individual "to perform acts undeniably at odds with fundamental tenets of [his] religious beliefs," *Yoder*, 406 U.S. at 218, or otherwise "put[s] substantial pressure on [him] to modify his behavior and to violate his beliefs," *Thomas*, 450 U.S. at 717–18. In *Yoder*, for example, this Court found that a $5 penalty imposed a substantial burden on Amish plaintiffs who refused to follow a compulsory secondary-education law. 406 U.S. at 208, 218. Likewise, in *Thomas*, the denial of unemployment compensation substantially burdened the pacifist convictions of a Jehovah's Witness who refused to work at a factory manufacturing tank turrets. 450 U.S. at 713–18.

Here, the Mandate plainly imposes a "substantial burden" on Hobby Lobby's and Conestoga's religious exercise. Failure to take the actions required by the Mandate will subject Hobby Lobby and Conestoga to potentially fatal fines of $100 a day per affected beneficiary. 26 U.S.C. § 4980D(b). If they drop health coverage altogether, they will be subject to annual fines of $2,000 per full-time employee after the first thirty employees, *id.* § 4980H(a), (c)(1), and/or face ruinous practical consequences due to their inability to offer

employees the crucial benefit of health coverage. These penalties, which could involve millions of dollars in fines, clearly impose the type of pressure that qualifies as a substantial burden.

In short, Hobby Lobby and Conestoga are faced with a stark choice: violate their religious beliefs or pay potentially crippling fines. This Court has repeatedly held that coercing a plaintiff to act in violation of his religious beliefs is the very definition of a substantial burden. *Thomas*, 450 U.S. at 717 (stating that the inquiry "begin[s]" with an assessment of whether a law "*compel*[*s*] a violation of conscience"); *Sherbert*, 374 U.S. at 404 (same); *see also Yoder*, 406 U.S. at 218. Indeed, when presented with this exact choice and these exact penalties, every appellate court to reach the question has concluded that "there can be little doubt that the contraception mandate imposes a substantial burden on . . . religious exercise." *Korte*, 735 F.3d at 683; *see also Gilardi*, 733 F.3d at 1218 ("If that is not 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,' we fail to see how the standard could be met." (quoting *Thomas*, 450 U.S. at 718)); *Hobby Lobby*, 723 F.3d at 1141 (holding that the Mandate imposed a substantial burden on religious exercise by "demand[ing]," on pain of onerous penalties, "that [plaintiffs] enable access to contraceptives that [they] deem morally problematic"). As the Seventh Circuit explained: "[t]he contraception mandate forces [Hobby Lobby and Conestoga] to do what their religion tells them they must not do. That qualifies as a substantial

burden on religious exercise, properly understood." *Korte*, 735 F.3d at 685.

C. The Government Fundamentally Misunderstands the Nature of the Substantial Burden Inquiry

The Government, however, ignores the straightforward analysis laid out above. Instead, it invites this Court to engage in moral theology disguised as legal inquiry. Conceding that Hobby Lobby's and Conestoga's "sincere religious beliefs are, of course, entitled to respect," Pet. Br. at 32 (No. 13-354), the Government nonetheless proceeds to provide a laundry list of facts in an effort to show that Hobby Lobby and Conestoga are many "step[s] removed" from the actual use of abortion-inducing drugs or devices, *id.* at 34. Among other things, the Government notes that the monies used to finance the objectionable coverage will be "placed into an undifferentiated fund," and that decisions about "whether to claim such benefits" will be "made by independent third parties." *Id.* at 33. Indeed, for reasons of confidentiality, Hobby Lobby and Conestoga will never "even know whether any employee was using the contraceptives to which [they] object." *Id.* According to the Government, this means that "the relationship between [Hobby Lobby's and Conestoga's] claimed injury and the challenged governmental action is too attenuated" to merit relief. *Id.* at 32; *see also id.* at 34 ("RFRA does not protect against the burden on religious exercise that 'arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ

from one's own.'" (quoting *O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012))).[13]

While these facts may lead some religious adherents to conclude, upon their own moral analysis, that compliance with the Mandate does not violate their own beliefs, that is not true of the claimants here. In any event, those facts are completely irrelevant to the legal question of whether the Mandate substantially burdens Hobby Lobby's and Conestoga's religious exercise. As explained by the Seventh Circuit, any contention that the burden is too attenuated "focuses on the

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[13] In the process, the Government asserts that the "substantial-burden question is a legal one for a court." Pet. Br. at 32 (No. 13-354). This is most certainly true. But that legal question is whether the law at issue places substantial pressure on Hobby Lobby and Conestoga "to modify [their] behavior and to violate [their] beliefs." *Thomas*, 450 U.S. at 717–18. In other words, because RFRA protects "any exercise of religion" and because the Constitution bars the judiciary from weighing in on matters of theology, this Court must defer to Hobby Lobby and Conestoga's description of their religious exercise at step one of RFRA's substantial burden analysis. *Supra* Part II.A. But the Court must still proceed to step two, where it answers the legal question of whether the Government has placed substantial pressure on Hobby Lobby and Conestoga to violate their religious beliefs. *Supra* II.B.

wrong thing—the employee's use of contraception—and addresses the wrong question—how many steps separate the employer's act of paying for contraceptive coverage and an employee's decision to use it." *Korte*, 735 F.3d at 684. To argue that "any complicity problem is insignificant or nonexistent" because "several independent decisions separate the employer's act of providing the mandated coverage from an employee's eventual use of contraception" is to "purport[] to resolve the religious question underlying [this] case[]." *Id.* at 685. But for the reasons discussed above, "[n]o civil authority can decide that question." *Id.*; *Gilardi*, 733 F.3d at 1217 (rejecting the attenuation argument); *Hobby Lobby*, 723 F.3d at 1137 (same); *supra* Part II.A. If Hobby Lobby and Conestoga interpret the "creeds" of their faith to prohibit provision of the mandated coverage, "[i]t is not within the judicial ken to question" "the validity of [their] interpretation[]." *Hernandez*, 490 U.S. at 699. Simply put, courts have no competence to determine the point at which degrees of attenuation render conduct morally permissible, or the point at which promoting and facilitating morally objectionable activity is immoral in itself regardless of whether that offer is taken up by others. Indeed, this Court has squarely rejected such analysis.

For example, in *Thomas*, the Court held that the denial of unemployment compensation to a man who refused to work at a factory that manufactured tank turrets substantially burdened his pacifist convictions as a Jehovah's Witness. 450 U.S. at 713–18. Rather than questioning whether working in a

factory—as opposed to being handed a gun and sent off to war—was too attenuated a breach of those beliefs, this Court recognized "that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Id.* at 715. Likewise, in *Lee*, the Court rejected the Government's contention that payment of social security taxes into the general treasury was too indirect a violation to "threaten the integrity of" the Amish belief that it was "sinful not to provide for their own elderly and needy." 455 U.S. at 255, 257. Instead, it readily accepted the representation of the Amish plaintiff that "the payment of the taxes" "violate[d] [his] religious beliefs." *Id.* at 257.

As in *Thomas* and *Lee*, this Court should accept at face value Hobby Lobby's and Conestoga's earnest belief that they cannot in good conscience comply with the Mandate. But instead of accepting that representation, the Government would have this Court conduct its own analysis of whether compliance with the Mandate should be taken to violate those convictions. In other words, rather than analyzing whether the Mandate puts substantial pressure on Hobby Lobby and Conestoga to abandon their religious opposition to providing the mandated coverage, the Government would have this Court evaluate whether compliance with the Mandate amounts to a substantial violation of their religious beliefs.

This distinction is not without a difference: the former analysis involves an exercise of legal judgment, while the latter analysis involves an inherently religious inquiry. While a court may rule

on the legal question of whether the Mandate places substantial pressure on claimants to abandon their opposition to the mandated coverage, whether providing that coverage makes an employer "complicit in a grave moral wrong" is "a question of religious conscience for [Hobby Lobby and Conestoga] to decide." *Korte*, 735 F.3d at 683, 685; *supra* Part II.A. Here, Hobby Lobby's and Conestoga's answer to the latter question must be respected, regardless of whether a court finds it to be "logical, consistent, or comprehensible." *Thomas*, 450 U.S. at 714.[14]

For similar reasons, the claim made by some courts that providing coverage for abortion-inducing drugs and devices is no different from the payment of wages—which can ultimately be used to purchase those drugs and devices—must also be rejected. *See, e.g.*, *O'Brien*, 894 F. Supp. 2d at 1160 (stating that "the contribution to a health care plan has no more than a de minimus [sic] impact on the plaintiff's religious beliefs than paying salaries and other

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[14] The Government attempts to buttress its argument by analogy to this Court's Establishment Clause jurisprudence. Pet. Br. at 33 (No. 13-354) (citing *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)). But the question of whether or not individual choice vitiates government endorsement of religion for purposes of the Constitution says nothing about whether the degrees of separation at issue here vitiate moral responsibility for purposes of claimants' faith.

benefits to employees," which they may then use to purchase contraceptives). That "argument requires impermissible line drawing, and [should be] reject[ed] out of hand." *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1296 n.9 (D. Colo. 2012), *aff'd*, No. 12–1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013). The question of whether one action (paying wages that may then be used to purchase abortion-inducing drugs and devices) is morally indistinguishable from another (providing coverage for abortion-inducing drugs and devices) is one for religious authorities and individuals, not the courts. *Hobby Lobby*, 723 F.3d at 1142 ("[T]he question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity."). Whether a competing moral analysis stems from a coreligionist or the Government, it is not the business of the judiciary to determine whether claimants "correctly perceive[] the commands of their [own] faith." *Thomas*, 450 U.S. at 716. Indeed, even were the line between salary and health coverage "unreasonable," it would not be for a court to second guess an employer that had drawn that line. *Id.* at 715–16 (refusing to question a line between manufacturing raw material for use in the production of tanks and using that material to fabricate tanks).

But in any case, the line here is eminently reasonable. Employees may use their paycheck to procure an abortion, aspirin, apple pie, or anything else. An employee's salary simply belongs to the employee, and the employer has no input into its

use. But when an employer purchases coverage for abortion-inducing drugs and devices, it effectively hands its employees a free ticket that can only be redeemed for those drugs or devices. The employer is thus made complicit in the purchase of products to which it objects.[15] In that respect, mandating that employers purchase objectionable coverage for their employees is qualitatively different from leaving it to the employees to use their paychecks as they see fit.

The Government's reliance on this Court's decision in *Bowen v. Roy*, 476 U.S. 693 (1986), is similarly misplaced. That case stands for nothing more than the proposition that an individual cannot challenge an "'activit[y] of [a third party], in which [he] play[ed] *no role*.'" *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (emphasis added). In *Bowen*, for example, this Court held only that an individual's religious beliefs could not be used "to dictate the conduct of the Government's internal procedures." 476 U.S. at 700. Specifically, the Appellee's religious exercise was not substantially burdened because his objection was to the conduct of a third party; namely, to the government's use of a

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[15] *See* Comments of U.S. Conference of Catholic Bishops at 12 (May 15, 2012) (explaining that the purchase of health benefits is "different" from paying wages because the former is "earmarked" and the latter is not), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf.

social security number to administer his daughter's public welfare benefits. *Id.*

Here, in contrast, the provision of the mandated coverage is not an activity of a third party in which Hobby Lobby and Conestoga play no role. After all, Hobby Lobby's and Conestoga's stated objection is to the requirement that *they themselves* provide coverage for abortion-inducing drugs and devices. *Supra* Part II.A. In other words, Hobby Lobby and Conestoga are being compelled to act in violation of their religious beliefs. This is the epitome of a substantial burden. *Thomas*, 450 U.S. at 717 (stating that the inquiry "begin[s]" with an assessment of whether a law "*compel*[*s*] a violation of conscience"); *Sherbert*, 374 U.S. at 404 (same); *Yoder*, 406 U.S. at 218 (same). True, they are not "prevented from keeping the Sabbath" or "participating in a religious ritual," *O'Brien*, 894 F. Supp. 2d at 1159, but for purposes of this Court's inquiry, it is *equally improper* to require them to provide the mandated coverage. Again, by its very terms, RFRA protects "*any* exercise of religion." 42 U.S.C. § 2000cc-5(7)(A) (emphasis added).[16]

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[16] If anything, *Bowen* supports Hobby Lobby and Conestoga's position. The Appellee in that case objected not only to the government's use of his daughter's social security number, but also to the *separate* requirement that *he provide* the government with that number in order for her to receive benefits. 476 U.S. at 701–12 (opinion of Burger, C.J.). Though it did not decide the question

It is likewise error to assert that exempting employers from covering religiously-objectionable services would be tantamount to imposing the employers' beliefs on their employees. Pet. Br. at 39 (No. 13-354). The refusal to pay for services that violate one's religion hardly forces one's religious practices upon others. Indeed, this suggestion gets things exactly backwards. Hobby Lobby's and Conestoga's employees remain free to use whatever drugs and devices they want, whether Hobby Lobby and Conestoga pay for them or not. But the Mandate forces Hobby Lobby and Conestoga to pay for the choices of their employees, even though doing so conflicts with their sincerely held religious beliefs.

In fact, RFRA's legislative history confirms that it was enacted precisely to prevent the Government from compelling persons and organizations to provide religiously-objectionable products and services to others—the exact religious exercise at issue in this litigation. For example, Nadine Strossen, then president of the ACLU, testified in support of RFRA, noting that the statute

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(continued…)

due to a dispute over mootness, a majority of the Court would have held that this requirement—which required action on the part of the Appellee—imposed a substantial burden on Appellee's religious exercise. *See id.* at 715–16 (Blackmun, J., concurring in part); *id.* at 724–33 (O'Connor, J., concurring in part, dissenting in part); *id.* at 733 (White, J., dissenting).

safeguarded "such familiar practices" as "permitting religiously sponsored hospitals to decline to provide abortion or contraception services" to others. *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102d Cong. 192 (1992) (statement of Nadine Strossen). Members of Congress made similar statements during debate on the floor. 139 Cong. Rec. 9685 (1993) (statement of Rep. Hoyer) (noting that a "Catholic teaching hospital lost its accreditation for refusing to provide abortion services" to others and that RFRA provides "an opportunity to correct [this] injustice[]"); *id.* at 4660 (statement of Rep. Green) (same). Ultimately, there can be little doubt that RFRA was intended precisely to protect individuals and entities from being forced to facilitate the use of religiously-objectionable products and services by others.

III. THE MANDATE CANNOT SURVIVE STRICT SCRUTINY

As the Mandate substantially burdens Hobby Lobby's and Conestoga's exercise of religion, the "burden is placed squarely on the Government" to demonstrate that the regulation satisfies strict scrutiny. *O Centro*, 546 U.S. at 429–31; 42 U.S.C. § 2000bb-1. And as every court to consider the question in the context of the Mandate has

concluded, the Government cannot meet this demanding standard.[17]

A. The Mandate Does Not Further a Compelling Government Interest

Under RFRA, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430–31. "[B]roadly formulated" or "sweeping" interests are inadequate. *Id.* at 431; *Yoder*, 406 U.S. at 221. Rather, the Government must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption." *Yoder*, 406 U.S. at 236; *see also O Centro*, 546 U.S. at 431. The Government, therefore, must demonstrate a specific compelling interest in dragooning "the particular claimant[s]

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[17] *E.g.*, *Korte*, 735 F.3d at 685–87; *Gilardi*, 733 F.3d at 1219–24; *Hobby Lobby*, 723 F.3d at 1143–45; *Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648, 2013 WL 3297498, at *16–18 (M.D. Fla. June 25, 2013); *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 433–35 (W.D. Pa. 2013); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 806–07 (E.D. Mich. 2013); *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 12-6756 (N.D. Ill. Jan. 3, 2013) (Doc. No. 50); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 125–29 (D.D.C. 2012); *Newland*, 881 F. Supp. 2d at 1297–98.

whose sincere exercise of religion is being substantially burdened" into serving as the instruments by which its purported goals are advanced. *Id.* at 430–31. This, it has not begun to do.

When promulgating the Mandate, the Government proffered two generalized interests: (i) "public health" and (ii) "ensuring that women have equal access to health care." 78 Fed. Reg. 39,870, 39,872 (July 2, 2013). "[B]oth interests as articulated by the government are insufficient . . . because they are 'broadly formulated interests justifying the general applicability of government mandates.'" *Hobby Lobby*, 723 F.3d at 1143 (citation omitted). Such "sketchy and highly abstract" interests cannot be "compelling," as it is impossible for the Government to "demonstrate a nexus" between those interests and applying the Mandate to these particular claimants. *Gilardi*, 733 F.3d at 1220. In short, "[b]y stating the public interests so generally, the government guarantees that the mandate will flunk the test." *Korte*, 735 F.3d at 686.

Moreover, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal citation omitted); *see also O Centro*, 546 U.S. at 433. Here, the Government cannot claim an interest of the "highest order" because the Mandate exempts millions of employees—through "grandfathering" provisions, the narrow exemption for "religious employers," and

the enforcement exceptions for small employers. *Korte*, 735 F.3d at 686. Simply put, "the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 723 F.3d at 1143; *Gilardi*, 733 F.3d at 1222–23.

The Government's interest also cannot be compelling because, at best, the Mandate would only "[f]ill" a "modest gap" in contraceptive coverage. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). The Government acknowledges that contraceptives are widely available at free and reduced cost and are covered by "over 85 percent of employer-sponsored health insurance plans." 75 Fed. Reg. 41,726, 41,732 (July 19, 2010). In such circumstances, the Government cannot claim to have "identif[ied] an actual problem in need of solving." *Brown*, 131 S. Ct. at 2738 (internal quotation marks and citation omitted). As this Court has observed, the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9.

Finally, under RFRA, the Government must identify an "actual problem" in need of solving with respect to the particular claimants filing suit, not among the general population. *Supra* pp. 33–34. The Government has not begun to meet this burden, relying instead on the broad proposition that "lack of access to contraceptive services has proven in many cases to have serious negative health consequences for women and newborn children." 78 Fed. Reg. at 39,887. In the first place, according to the D.C. Circuit, "the science [behind that claim] is debatable

and may actually undermine the government's cause." *Gilardi*, 733 F.3d at 1221. And, to say that lack of access to contraception can have negative health implications does not establish a significant lack of access among Hobby Lobby's and Conestoga's employees or that the Mandate would significantly increase contraception use or decrease unintended pregnancies among those employees.[18] The Government provides no evidence on these points and thus cannot show that enforcing the Mandate against objecting organizations is "actually necessary" to achieve its aims. *Brown*, 131 S. Ct. at 2738.

B. The Mandate Is Not the Least Restrictive Means of Furthering the Government's Asserted Interests

Under RFRA, the Government must also show that the regulation "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Under that test, "if there are other, reasonable ways to achieve those [interests] with a lesser burden on constitutionally protected activity, [the Government] may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). A statute or regulation is the

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[18] In fact, recent scholarship suggests otherwise. Helen M. Alvare, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 Vill. L. Rev. 379, 396–411, 425–30 (2013).

least restrictive means if "no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights.'" *Sherbert*, 374 U.S. at 407. To meet its burden, the Government must engage in a "serious, good faith consideration of workable . . . alternatives." *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (citation omitted).

Once again, every court to have considered the question has concluded that "there are viable[, less restrictive,] alternatives . . . that would achieve the substantive goals of the mandate." *Gilardi*, 733 F.3d at 1222; *see also Korte*, 735 F.3d at 686–87; *Hobby Lobby*, 723 F.3d at 1144.[19] Indeed, "[t]here are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty" than forcing religious objectors to provide the mandated coverage in violation of their sincere beliefs. *Korte*, 735 F.3d at 686. These include the same alternatives Hobby Lobby and Conestoga proposed here: "The government can provide a 'public option' for contraception insurance; it can give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers; it can give tax incentives to consumers of contraception . . . services." *Id.*; *Gilardi*, 733 F.3d at 1222 (same). While the Conference in no way recommends these alternatives, and may oppose them as a matter of policy, the mere fact that they

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[19] *E.g.*, *Beckwith*, 2013 WL 3297498, at *18 n.16; *Monaghan*, 931 F. Supp. 2d at 808.

remain available to the Government shows that the Mandate cannot survive RFRA's narrow-tailoring requirement. In light of these alternatives, there is no justification for forcing Hobby Lobby and Conestoga to violate their religious beliefs.

CONCLUSION

At bottom, the Government's argument that the Mandate does not substantially burden the religious exercise of Hobby Lobby and Conestoga reflects a misunderstanding of the religious objection at issue. Hobby Lobby and Conestoga object not only to the use of abortion-inducing drugs and devices, but also to taking actions themselves that facilitate or promote their use. *Hobby Lobby*, 723 F.3d at 1140. This concept of responsibility for facilitating an immoral act committed by another is not unique to religious believers. Just as an individual may be held accountable for aiding and abetting a crime he did not personally commit, 18 U.S.C. § 2, so too may an individual violate the moral law if in certain circumstances he or she cooperates in or promotes the commission by others of acts contrary to their beliefs. As Judge Gorsuch explained,

> All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing

> wrongful conduct themselves bear moral culpability.

Hobby Lobby, 723 F.3d at 1152 (Gorsuch, J., concurring). Hobby Lobby and Conestoga "are among those who seek guidance from their faith on these questions," *id.*, and their faith has led them to the firm and sincere conclusion that the actions required of them by the Mandate cross the "line" between permissible and impermissible facilitation of wrongful conduct, *Thomas*, 450 U.S. at 715. For the reasons described above, that line is indisputably theirs to draw, and it is not for this Court or the Government to question. *Id.* By placing substantial pressure on Hobby Lobby and Conestoga to cross this line, primarily in the form of crushing fines, the Government has substantially burdened their exercise of religion.

Respectfully submitted,

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