Consolidated Case Nos. 14-1430 & 14-1431

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DIOCESE OF FORT WAYNE-SOUTH BEND, INC.; CATHOLIC CHARITIES OF THE DIOCESE OF FORT WAYNE-SOUTH BEND, INC.; SAINT ANNE HOME & RETIREMENT COMMUNITY OF THE DIOCESE OF FORT WAYNE-SOUTH BEND, INC.; FRANCISCAN ALLIANCE, INC.; SPECIALTY PHYSICIANS OF ILLINOIS, LLC; UNIVERSITY OF SAINT FRANCIS; and OUR SUNDAY VISITOR, INC.,
Plaintiffs-Appellees,

&

GRACE SCHOOLS and BIOLA UNIVERSITY, INC.,
Plaintiffs-Appellees,

v.

SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the U.S. Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF THE TREASURY,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Indiana
District Court Case Nos. 1:12-CV-159 & 3:12-CV-459
The Honorable Jon E. DeGuilio

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In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court held that the Religious Freedom Restoration Act (RFRA) prohibited the Government from enforcing contraceptive-coverage regulations against for-profit companies who asserted that complying with those regulations would violate their sincere religious beliefs. The Court gave a concise explanation for why the regulations imposed a substantial burden on the plaintiffs' exercise of religion: "If the [plaintiffs] comply with the [regulations], they believe they will be facilitating abortions [in violation of their religious beliefs], and if they do not comply, they will pay a very heavy price—as much as $1.3 million per day …. If these consequences do not amount to a substantial burden, it is hard to see what would." *Id.* at 2759.

The same is true here. Under the so-called accommodation, Appellees must (a) sign and submit a self-certification form and (b) hire and/or maintain a contractual relationship with an insurance company or third-party administrator (TPA) authorized to provide contraceptive coverage to the beneficiaries enrolled in their health plans. Just as in *Hobby Lobby*, Appellees believe that if they "comply with [the regulations]," "they will be facilitating" immoral conduct in violation of their religious beliefs. *Id.* And just as in *Hobby Lobby*, "if they do not comply, they will pay a very heavy price"—potentially millions of dollars in fines. *Id.* "[T]he mandate," therefore, "clearly imposes a substantial burden" on Appellees' religious exercise. *Id.* at 2779.

Hobby Lobby confirms that the Government substantially burdens the exercise of religion by "demand[ing] that [plaintiffs] engage in conduct that

seriously violates their religious beliefs" on pain of ruinous penalties. *Id.* at 2775. First, *Hobby Lobby* makes clear that this Court may not second-guess Appellees' undisputed testimony that taking the actions necessary to comply with the "accommodation" would be a grave violation of their religious beliefs. Appellees "sincerely believe" that those actions would make them complicit in immoral conduct, and "it is not for [courts] to say that their religious beliefs are mistaken or insubstantial." *Id.* at 2779. Instead, this Court's "only task" is to ask whether the Government has threatened to impose substantial penalties on Appellees if they refuse to comply. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir. 2013) (en banc), *aff'd*, 134 S. Ct. 2751 (2014); *Korte v. Sebelius*, 735 F.3d 654, 683-85 (7th Cir. 2013). Here that is beyond dispute.

Second, *Hobby Lobby* demonstrates that this Court's decision in *University of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014), was based on a misunderstanding of RFRA. While *Notre Dame* focused on the *actions* Appellees were compelled to take, 743 F.3d at 554, *Hobby Lobby* shows that RFRA requires courts to assess the "sever[ity]" of the threatened *penalty*—i.e., the "consequences"—of noncompliance, 134 S. Ct. at 2775-76. Likewise, while the *Notre Dame* panel believed the accommodation allowed the University to "wash[] its hands of any involvement in contraceptive coverage," 743 F.3d at 557, *Hobby Lobby* held that it is left to plaintiffs to determine whether an act "is connected" to illicit conduct "in a way that is sufficient to make it immoral," 134 S. Ct. at 2778.

Finally, nothing in *Hobby Lobby* undermines the Government's concession that the "accommodation" cannot survive strict scrutiny in the present case. To be sure, the Supreme Court pointed to the accommodation as one possible *less*-restrictive means of providing free contraception (in a case involving parties who, unlike Appellees, did not articulate a religious objection to the accommodation). But the Court by no means held that the accommodation is the *least* restrictive means available. Instead, the Court expressly reserved that question, and a mere three days later, entered an injunction pending appeal in favor of a religious nonprofit that objected to the accommodation. *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014). Consequently, this Court's decision in *Korte* remains good law, and, as the Government has conceded, that case forecloses its strict scrutiny argument here. Appellees' Br. at 3 n.4.

ARGUMENT

I. THE REGULATIONS IMPOSE A "SUBSTANTIAL BURDEN" ON APPELLEES' RELIGIOUS EXERCISE

Appellees exercise their religion by (a) refusing to sign and submit the self-certification and (b) refusing to hire and/or maintain a contractual relationship with an insurance company or TPA authorized to provide contraceptive coverage to their plan beneficiaries. Because the accommodation forces Appellees to take those actions or incur substantial penalties, in the wake of *Hobby Lobby*, this Court should "have little trouble concluding that" it "substantially burden[s]" Appellees' exercise of religion. 134 S. Ct. at 2775 (quotation omitted).

A. *Hobby Lobby* Makes Clear That RFRA Protects "Any" Exercise of Religion

Hobby Lobby confirms that the "exercise of religion" protected under RFRA "involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" 134 S. Ct. at 2770 (citation omitted). In the present case, Appellees exercise their religion by "abst[aining] from" the specific "acts" required under the accommodation. Appellees' Br. at 28-32. The two most obvious acts are detailed below.

First, Appellees object to submitting the self-certification because they believe that doing so would make them complicit in the provision of contraceptives in violation of their religious beliefs.[1] If Appellees do not submit the self-certification, then the Government has no authority under existing law to require Appellees' TPA or insurance company to provide contraceptive coverage to beneficiaries enrolled in Appellees' health plans. Most obviously, the Government cannot require the coverage to be provided directly as part of Appellees' health plans, because that would run afoul of *Hobby Lobby*.[2] And

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[1] The Schools' objection is limited to abortion-inducing products and related counseling.

[2] To be sure, the Government separately requires insurance companies (but not TPAs) to include contraceptive coverage in group policies. 45 C.F.R. § 147.130(a)(1). But in that scenario, if insured objectors refuse to submit the self-certification for religious reasons, they would be "providing contraceptive services to [their] employees as part of [their] plan of benefits, *and paying for such services*"—the very arrangement struck down in *Hobby Lobby*. *Priests for Life v. HHS*, No. 13-1261, 2013 WL 6672400, at *3 n.2 (D.D.C. Dec. 19, 2013) (emphasis added). Insured objectors can thus violate their religious beliefs by

the Government has conceded that the self-certification is a prerequisite to the coverage obligation under the "accommodation." Appellees' Br. at 44. Indeed, that is the only reason the Government continues to litigate this case; otherwise it would have no need to force Appellees to submit the form. *See Wheaton*, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting) (noting that the TPA "bears the legal obligation to provide contraceptive coverage only upon receipt of a valid self-certification.") (citing 26 C.F.R. § 54.9815-2713A(b)(2); 29 C.F.R. § 2510.3-16(b); *see also* 26 C.F.R. § 54.9815-2713A(c)(2) (self-certification a prerequisite to coverage); *Hobby Lobby,* 134 S. Ct. at 2763 (stating that "[w]hen a group health-insurance issuer receives notice that one of its clients has invoked this provision, the issuer *must then"* "provide separate payments for contraceptive services") (emphasis added).

Second, regardless of the legal effect of the self-certification, Appellees object separately to maintaining a contractual relationship with a third party authorized to provide contraceptive coverage to enrolled beneficiaries. According to their religious judgment, Appellees believe that maintaining such a relationship makes them complicit in the provision of contraceptive coverage, because they would be morally responsible for the connection between the coverage providers and the recipients, and they would be sustaining the

(continued…)

filing the self-certification, in which case their insurer would provide coverage under the accommodation, or they can violate their religious beliefs by paying directly for the coverage.

infrastructure (whether paying for it or not) by which the coverage is delivered. In this sense, Appellees are akin to Muslims or Mormons who refuse to hire a caterer that will serve complimentary alcohol to their guests at a social function. It makes no difference whether Appellees pay the cost; what matters is that they exercise their religion by hiring a company that will not provide the offending products.

After *Hobby Lobby*, there can be no dispute that these actions fall well within the scope of religious exercise protected by RFRA. The required actions are "'physical acts'" from which Appellees believe they must "'abst[ain]'" "'for religious reasons.'" 134 S. Ct. at 2770 (citation omitted); *id.* at 2762 (RFRA protects "'any exercise of religion,'" and "mandat[es] that this concept 'be construed in favor of broad protection of religious exercise'") (citation omitted). Just as the plaintiffs in *Hobby Lobby* "believe[d] that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage," Appellees believe that the actions "demanded by the HHS regulations [are] connected to" illicit conduct "in a way that is sufficient to make it immoral for them to" take those actions. *Id.* at 2778. In other words, Appellees have "dr[a]w[n]" a "line" "between [actions they] found to be consistent with [their] religious beliefs" and actions they "found morally objectionable." *Id.* It is not for this Court to "say that the line [they] drew was an unreasonable one." *Id.* (citation omitted).

B. *Hobby Lobby* Confirms That a "Substantial Burden" Arises When the Government Forces a Plaintiff to Act Contrary to a Sincere Religious Belief on Pain of Substantial Penalty

In *Hobby Lobby*, the Supreme Court held that the challenged regulation substantially burdened the plaintiffs' exercise of religion because "the economic consequences [would] be severe" if the plaintiffs "[did] not yield" to the Government's "demand that they engage in conduct that seriously violates their religious beliefs." 134 S. Ct. at 2775. Notably, the Court did not consider whether complying with the regulations would be a "substantial" violation of the plaintiffs' religious beliefs, or whether it would require "substantial" physical exertion. Instead, the Court simply noted that the plaintiffs "object[ed] on religious grounds" to complying with the regulation, and proceeded to ask whether the plaintiffs would incur a substantial *penalty* if they did not comply. *Id.* at 2775-79. The Court answered that question in the affirmative: if the plaintiffs refused to comply with the regulation, they would pay millions of dollars in fines. Because "[t]hese sums are surely substantial," *id.*, the Court found a "substantial burden" on the plaintiffs' exercise of religion.

Hobby Lobby specifically held that courts may not inquire "whether the religious belief asserted in a RFRA case is reasonable," but instead must ask only whether plaintiffs face a substantial penalty for acting "in accordance with *their religious beliefs*." *Id.* at 2778. The Court emphasized that it is the prerogative of individuals to decide for themselves which actions are "consistent with [their] religious beliefs," and in particular which actions wrongfully "facilitat[e] the commission of an immoral act by another." *Id.* Thus,

if plaintiffs "sincerely believe" that taking an action "lies on the forbidden side of the line," "it is not for [a court] to say that their religious beliefs are mistaken or insubstantial." *Id.* at 2779. Instead, the court's "'narrow function'" is "'to determine' whether the line drawn reflects 'an honest conviction.'" *Id.* (citation omitted). If a plaintiff has an "honest conviction" that a certain action is religiously forbidden, and if he is forced to take that action on pain of substantial penalty, then there is a "substantial burden" on his exercise of religion. *Id.*

By focusing solely on the magnitude of the threatened penalty, *Hobby Lobby* followed well-established Supreme Court precedent. As this Court recognized in *Korte*, a substantial burden on religious exercise arises whenever the Government imposes "'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" 735 F.3d at 682 (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981)). Under that simple test, a court's sole task is to "evaluate[] the coercive effect of the governmental pressure," and to determine whether the adherent is being substantially pressured to take *any* action in violation of his sincere religious beliefs. *Korte*, 735 F.3d at 683. That limitation is essential, because determining whether an action constitutes a "substantial" violation of an adherent's religion lies well beyond "the judicial function." *Thomas*, 450 U.S. at 716.

Here, a straightforward application of *Hobby Lobby* establishes that the accommodation substantially burdens Appellees' religious exercise. It is

undisputed that Appellees have an "honest conviction" that their religion forbids them from (a) submitting the self-certification or (b) hiring and/or maintaining a contractual relationship with a third party authorized to provide contraceptive coverage to their plan beneficiaries. It is also undisputed that the "accommodation" requires Appellees to take exactly those actions or incur the ruinous penalties at issue in *Hobby Lobby*. Thus, while the Government insists on referring to its regulations as an "accommodation," this alternative compliance mechanism does not actually accommodate Appellees, but rather forces them to "engage in conduct that seriously violates their religious beliefs." 134 S. Ct. at 2775. "That qualifies as a substantial burden on religious exercise, properly understood." *Korte*, 735 F.3d at 685.

C. ***Hobby Lobby*** **Forecloses the Government's Arguments**

None of the Government's arguments hold water after *Hobby Lobby*. The Government's first argument is that the "accommodation" allows Appellees to "opt out" of the requirement to provide contraceptive coverage directly. Gov't Br. at 13-15. But as Appellees have explained, that phony "opt out" does nothing to alleviate the burden, because the only way they can "opt out" of the direct-coverage requirement is by taking *other* actions that violate their religious beliefs. Appellees' Br. at 40-44; *supra* Part I.A. The regulations thus

leave no way for Appellees to act in accordance with their sincere religious beliefs unless they pay substantial penalties.[3]

The Government's next argument is that Appellees do not really object to the actions *they* must take, but instead object only to the actions of *third parties*. Gov't Br. at 16-21. That is simply false. It is undisputed that Appellees have a sincere religious objection to (a) submitting the self-certification form, and (b) maintaining the required contractual relationship. Appellees believe taking those actions would make them complicit in wrongdoing, and *Hobby Lobby* rejected the Government's argument that such complicity-based objections are "too attenuated" to be cognizable. 134 S. Ct. at 2777. As the Supreme Court recognized, any question of complicity must be left to the religious believer, because it "implicates a difficult and important question of religion and moral philosophy, namely, 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." *Id.* at 2778.

The Government's third argument is that granting a RFRA exemption for Appellees would impermissibly burden the "rights" of third parties. But *Hobby Lobby* flatly rejected that argument as well: "Nothing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose

[3] *Hobby Lobby* also rejected the argument that the option of "dropping insurance coverage eliminates the substantial burden that the HHS mandate imposes." 134 S. Ct. at 2777.

burdens on religious exercise so long as those burdens confer a benefit on other individuals." *Id.* at 2781 n.37. Indeed, on the Government's theory, it could apparently force a Mormon congregation to host a party with a third-party bartender serving whisky, and there would no substantial burden as long as the congregation didn't have to pay for the whisky. There is no difference between that scenario and the case at hand: Appellees are forced to offer health plans through third parties that will provide an objectionable service to their plan beneficiaries.

The Government's final argument is that Appellees fail to acknowledge that "substantiality" is a legal question for courts to decide. This argument simply misunderstands how RFRA works. While "substantiality" is indeed a legal question, *Hobby Lobby* makes clear that a court's inquiry is limited to the substantiality *of the penalty* imposed if the plaintiff refuses to violate his beliefs. Appellees' Br. at 52-53. There is no requirement that the required action involve a substantial violation of religious doctrine, much less that it involve substantial physical exertion. Courts have no competence to determine how "substantial" a religious violation might be. Just like flipping a light switch on the Sabbath (objectionable to some Orthodox Jews), signing and submitting a piece of paper might seem like no big deal to a nonbeliever. Nevertheless, courts must accept a plaintiff's "honest conviction" that what the government is pressuring him to do conflicts with his religion. 134 S. Ct. at 2779.

II. *HOBBY LOBBY* MAKES CLEAR THAT *NOTRE DAME* DOES NOT CONTROL

After *Hobby Lobby*, this Court's decision in *Notre Dame* is no longer good law. *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 915 (7th Cir. 2009) ("We have overruled our prior decisions …. when the Supreme Court issues a decision on an analogous issue that compels us to reconsider our position."). The panel's analysis in *Notre Dame* turned on its conclusion that forcing religious groups to submit the self-certification cannot be a "substantial" burden on religious exercise because "[t]he form is two pages long," and submitting the form "could have taken no more than five minutes." 743 F.3d at 554. Such reasoning was squarely rejected by *Hobby Lobby*, which held that the substantial-burden analysis focuses on the magnitude of the *penalty* the Government threatens to force believers to act contrary to their religious beliefs. *Supra* Part I. The *Notre Dame* court also wrongly arrogated unto itself the authority to decide that compliance with the "accommodation" would not "mak[e] Notre Dame complicit in sin." 743 F.3d at 557; *id.* at 554-58 (disputing Notre Dame's belief that the accommodation would make it "an accomplice in the provision of contraception, in violation of Catholic doctrine"). That analysis is irreconcilable with *Hobby Lobby*, which held that religious believers, not courts, determine whether a particular action amounts to impermissible facilitation of wrongful conduct. 134 S. Ct. at 2778-79. While the *Notre Dame* panel believed the accommodation allowed the University to "wash[] its hands of any involvement in contraceptive coverage," 743 F.3d at 557, *Hobby Lobby* makes clear that *plaintiffs* must be allowed to determine whether an action "is

connected" to illicit conduct "in a way that is sufficient to make it immoral for them to" take that action, 134 S. Ct. at 2778.[4]

III. THE "ACCOMMODATION" CANNOT SATISFY STRICT SCRUTINY

Although "the government" must "shoulder the burden" of satisfying the least-restrictive-means test, here "the government has not even tried" to satisfy that test. *Korte*, 735 F.3d at 685-86. Instead the Government has *conceded* that the accommodation fails that test in light of *Korte*. Appellees' Br. at 3 n.4. Because *Hobby Lobby* left *Korte* intact, the Government's concession remains binding: *Korte* squarely forecloses the Government's strict scrutiny argument.

Even if the Government could take back its concession, its argument would be futile because *Hobby Lobby* sets the bar even higher than *Korte* did. Indeed, the Supreme Court confirmed that the least-restrictive means test under RFRA is "exceptionally demanding," 134 S. Ct. at 2780, because RFRA did not "merely restore the balancing test used in the *Sherbert* line of cases," but instead "provided even broader protection for religious liberty." *Id.* at 2761 n.3.

Moreover, the Government has made no effort to satisfy its evidentiary burden. As the Solicitor General recently explained, the Government cannot meet this burden through "unsubstantiated statement[s]." Br. for the U.S. as Amicus Curiae at 17, *Holt v. Hobbs*, No. 13-6827 (U.S. May 2014). Rather, it

[4] At the least, *Hobby Lobby* makes clear that *Notre Dame* should be limited to its facts. As Appellees have explained, this case is distinguishable in several crucial respects. Appellees' Br. at 36-39.

must "offer evidence—usually in the form of affidavits from [government] officials—explaining how the imposition of an identified substantial burden furthers a compelling government interest and why it is the least restrictive means of doing so, with reference to the circumstances presented by the individual case." *Id.*; *id.* at 18 (noting that where a plaintiff "identifies [acceptable] less restrictive alternatives," the Government must "demonstrate that they have 'considered and rejected the efficacy of' those alternatives") (citation omitted). No such evidence has been submitted here.

Moreover, any suggestion that *Hobby Lobby* approved of the "accommodation" as a viable least-restrictive means in all cases is badly mistaken. In fact, the Court expressly did "not decide" that question. 134 S. Ct. at 2782 & n.40; *id.* at 2763 n.9. Instead, the Court simply found the accommodation less restrictive than the full-blown Mandate in the context of plaintiffs who *did not object* to complying with the accommodation.[5] Here, in the context of plaintiffs who *do* object, the accommodation is obviously not the least-restrictive means, because the "most straightforward way" to provide such coverage "would be for the Government to …. provid[e] the [] contraceptives at issue" directly, without forcing plaintiffs to act in violation of

[5] *Hobby Lobby*'s discussion of the accommodation in the context of plaintiffs who did *not* object to complying with it does not suggest that the accommodation does not substantially burden the religious exercise of *Appellees*, who *do* object. 134 S. Ct. at 2782 n.40; *id.* at 2786 (Kennedy, J., concurring) ("[T]he plaintiffs have not criticized [the accommodation]….").

their beliefs. *Id.* at 2780.[6] The Government's position appears to be "that RFRA can never require the Government" to "expend additional funds" to avoid burdening religious objectors. *Id.* at 2781. That view, however, "reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted [RFRA]." *Id.*

In addition, just as in *Korte*, "there are many [other] ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors." 735 F.3d at 686. *Korte* specifically approved several options: "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 and sterilization services. No doubt there are other options." 735 F.3d at 686. All of these options are "less restrictive" than the "accommodation" because they would deliver free contraception without forcing Appellees to violate their beliefs. But the Government has not even attempted to show why these alternative are not feasible. *Cf. Hobby Lobby,* 134 S. Ct. at 2780-81 (citing the failure to submit evidence).

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[6] The Government cannot now claim that the cost of such a program would be prohibitive. After all, it is already paying TPAs 115% of their costs to procure the coverage under the accommodation, 79 Fed. Reg. 13,744, 13,809 (Mar. 11, 2014); 45 C.F.R. § 156.50, and though it bears the burden of proof, has adduced no evidence demonstrating that the cost would be significant, much less prohibitive.

If there was ever any suggestion that *Hobby Lobby* somehow blessed the accommodation, the Court fully dispelled that notion by entering an injunction pending appeal for the non-profit plaintiff in *Wheaton*, 134 S. Ct. 2806. Far from foreclosing a challenge to the accommodation, the dissenters in *Wheaton* believed that the order "entitle[s] hundreds or thousands of other [nonprofits]" to relief. *Id.* at 2814 n.6 (Sotomayor, J., dissenting).

CONCLUSION

Just like the plaintiffs in *Hobby Lobby*, Appellees sincerely believe that they may "not in good conscience" take the actions required of them by the Government. 134 S. Ct. at 2783. "HHS's apparent belief" that, absent interests of the highest order, it can compel Appellees to take precisely those actions "would lead to intolerable consequences." *Id.* After all, if the Government can force Appellees to sign the self-certification and contract with a third party that will provide contraceptive coverage to their employees, there is no reason it could not force them to sign a similar form and contract with entities that would provide coverage for "third-trimester abortions or assisted suicide." *Id.* Such coercion to act in violation of conscience is obviously a substantial burden on religious exercise.

Respectfully submitted, this the 7th day of August, 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitations set out in this Court's order of July 3, 2014. The brief, including headings, footnotes, and quotations, contains 3,996 words, as calculated by the Microsoft Word word count function.

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I hereby certify that, on August 7, 2014, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

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