No. 14-6026

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SOUTHERN NAZARENE UNIVERSITY; OKLAHOMA WESLEYAN UNIVERSITY; OKLAHOMA BAPTIST UNIVERSITY; AND MID-AMERICA CHRISTIAN UNIVERSITY,

Plaintiffs-Appellees

vs.

KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *ET AL.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Oklahoma
Case No. 5:13-cv-01015-F
(Honorable Stephen P. Friot)

BRIEF OF THE APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Appellees states the following:

Appellee Southern Nazarene University is an Oklahoma not-for-profit corporation. No publicly-held corporation owns 10% or more of stock in Southern Nazarene University.

Appellee Oklahoma Wesleyan University is an Oklahoma not-for-profit corporation. No publicly-held corporation owns 10% or more of stock in Oklahoma Wesleyan University.

Appellee Mid-America Christian University is an Oklahoma not-for-profit corporation. No publicly-held corporation owns 10% or more of stock in Mid-America Christian University.

Appellee Oklahoma Baptist University is an Oklahoma not-for-profit corporation. No publicly-held corporation owns 10% or more of stock in Oklahoma Baptist University.

s/ Gregory S. Baylor
Attorney for Appellees

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GLOSSARY

ACA	Affordable Care Act of 2010
HRSA	Health Resources and Services Administration
IUD	Intrauterine Device
MACU	Mid-America Christian University

OBU	Oklahoma Baptist University
OKWU	Oklahoma Wesleyan University
RFRA	Religious Freedom Restoration Act
RLUIPA	Religious Land Use and Institutionalized Persons Act
SNU	Southern Nazarene University
TPA	Third-Party Administrator

STATEMENT OF RELATED CASES

This case presents the question whether the Government may, consistent with the Religious Freedom Restoration Act, force not-for-profit religious organizations to facilitate access to abortion-inducing drugs and devices in violation of their religious beliefs. Similar issues are currently pending before this Court in *Little Sisters of the Poor Home for Aged v. Sebelius*, No. 13-1540, and *Reaching Souls Int'l v. Sebelius*, No. 14-6028, and before other Courts of Appeals in:

> *Roman Catholic Archbishop of Wash. v. Sebelius*, Nos. 13-5371 & 14-5021 (D.C. Cir.), and *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5368 (D.C. Cir.) (consol.)
>
> *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 14-427 (2d Cir.)
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s/ Gregory S. Baylor
Attorney for Appellees

STATEMENT OF THE ISSUE

Whether the federal Government may, consistent with the Religious Freedom Restoration Act, force not-for-profit religious universities to facilitate access to abortion-inducing drugs and devices in violation of their religious beliefs.

STATEMENT OF THE CASE

A. Factual Background

Plaintiffs Southern Nazarene University (SNU), Oklahoma Wesleyan University (OKWU), Oklahoma Baptist University (OBU), and Mid-America Christian University (MACU) (collectively, "the Universities") are Christ-centered institutions of higher learning. A254. Christian conviction, including respect for the dignity and worth of human life from the moment of conception, is a qualification for entry into and participation in the Universities' communities. A263. The Universities' missions include promoting the spiritual maturity of members of their respective communities by fostering obedience to and love for what they understand to be God's laws, including His restrictions on the unjustified taking of innocent human life. A263.

The Universities hold, as a matter of sincere religious conviction, that it would be sinful and immoral for them to participate in, pay for, facilitate, enable, or otherwise support access to abortion, abortion-inducing drugs and devices, and

relating counseling. A255. They hold that one of the prohibitions of the Ten Commandments ("thou shalt not murder") precludes them from facilitating, assisting in, or enabling the use of drugs or devices that can and do destroy very young human beings in the womb. *Id.* The Universities believe that sinful behavior adversely affects their relationships with God. A263.

The Universities' religious objection to the laws and regulations at issue in this case is limited to Plan B, ella, IUDs, and related counseling. A255-56. They object to complying with the HHS contraceptive Mandate (described below), either by directly including abortifacients in their employee and student plans, or via the alternative compliance mechanism sometimes referred to as the "accommodation." A255, A263.

The Universities believe that their religious duties include promoting the physical well-being and health of their employees by providing them health insurance coverage. *Id.* OBU and SNU believe that their religious duties include promoting the physical well-being and health of their students and employees by offering them health insurance coverage. *Id.* Consistent with the Universities' religious beliefs, all the employee and student plans currently in effect exclude morally objectionable abortifacients. A256-58. SNU and MACU have self-insured employee plans. A256, A258. OKWU and OBU have insured plans. A256-57. The OBU and SNU student plans are insured plans. *Id.*

The Universities must choose among four options: (a) directly include the objectionable coverage within the four corners of their insurance plans; (b) violate the Mandate and incur penalties of $100 per day for each affected individual; (c) discontinue all health plan coverage for employees and/or students; or (d) self-certify that they qualify for the accommodation and provide that self-certification to their third party administrators or issuers. A262.

The annual penalty for providing a non-compliant employee plan (*i.e.*, one that excludes objectionable abortifacients) would be $11,497,000 for Southern Nazarene; $4,088,000 for Oklahoma Wesleyan; $9,818,500 for Oklahoma Baptist; and $5,073,500 for Mid-America Christian. *See* 26 U.S.C. § 4980D(b). The annual penalty for dropping employee health insurance would be $570,000 for Southern Nazarene; $164,000 for Oklahoma Wesleyan; $478,000 for Oklahoma Baptist; and $218,000 for Mid-America Christian). *See* 26 U.S.C. §§ 4980H(a), (c)(1).

Without injunctive relief, the statutory and regulatory provisions challenged in this case become applicable to the SNU employee plan on July 1, 2014; to the SNU student plan on August 21, 2014; and to the OKWU employee plan on July 1, 2014. A255-58. But for the preliminary injunction, the challenged provisions

would have begun applying to the OBU student plan and the OBU and MACU employee plans on January 1, 2014.[1]

B. Statutory and Regulatory Background

In March 2010, Congress passed, and President Obama signed, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (March 23, 2010), and the Health Care and Education Reconciliation Act, Pub. L. No. 11-152 (March 30, 2010), together known as the "Affordable Care Act" (ACA).

One ACA provision requires that any "group health plan" or "health insurance issuer offering group or individual health insurance coverage" provide coverage for certain preventive care services. 42 U.S.C. § 300gg-13(a). These services include "preventive care and screenings" specific to women that are subsequently "provided for in comprehensive guidelines supported by the Health Resources and Services Administration," an HHS sub-agency (HRSA). 42 U.S.C. § 300gg-13(a)(4).

On August 1, 2011, HRSA determined that the phrase "preventive care and screenings" would include "[a]ll Food and Drug Administration approved contraceptive methods [and] sterilization procedures" and related "patient education and counseling for women with reproductive capacity." A259. Plan B,

[1] More detailed recitations of the relevant facts are available in the verified complaint, A12 *et seq*., and in the Joint Stipulation of Facts, A254 *et seq*.

ella, and IUDs fall within the category of "FDA-approved contraceptive methods." *Id*.

Defendants exempted certain religious employers from the Mandate. A259. That exemption is limited to churches, their integrated auxiliaries, and religious orders. 45 C.F.R. § 147.131(a). The Universities are not eligible for this exemption. Defendants state that the exemption "does not undermine the governmental interests furthered by the contraceptive coverage requirements." 78 Fed. Reg. at 39,874. They explain that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." *Id*. The same rationale applies to the Universities, as they employ people of the same faith who share the same objection.[2]

By regulation, Defendants created an "accommodation" for non-exempt religious employers that object to including some or all "FDA-approved contraceptive methods" and related counseling in their employee and/or student health insurance plans. A260. In comments on the Advance Notice of Proposed

[2] A263. *See also* Verified Complaint ¶¶ 6, 28-29, 51-52, 68-70, 86-88.

Rulemaking[3] and on the Notice of Proposed Rulemaking, [4] multiple major faith-based organizations, including associations and individual Christian colleges and universities, informed Defendants that the proposed rules did not adequately address their moral concerns. Many of the religious arguments in those comments are substantially identical to the ethical objections asserted by the Universities in the instant litigation.[5]

An organization is eligible for the accommodation if it satisfies the following requirements: (a) it opposes providing coverage of some or all of any contraceptive services required to be covered under the applicable regulations on account of religious objections; (b) it is organized and operates as a nonprofit entity; (c) it holds itself out as a religious organization; and (d) it self-certifies, in a

[3] "Certain Preventive Services Under the Affordable Care Act," 77 Fed. Reg. 16501 (Proposed Mar. 21, 2012), CMS-9968-ANPRM.

[4] "Coverage of Certain Preventive Services Under the Affordable Care Act," 78 Fed. Reg. 8456 (Proposed Feb. 6, 2013), CMS-9968-P.

[5] Comments of Council for Christian Colleges & Universities on *Coverage of Certain Preventative Services Under the Affordable Car Act*, 78 Fed. Reg. 8456 (Feb. 6, 2013), CMS-9968-P (submitted April 8, 2013), 7-8; Comments of United States Conference of Catholic Bishops on *Coverage of Certain Preventative Services Under the Affordable Car Act*, 78 Fed. Reg. 8456 (Feb. 6, 2013), CMS-9968-P (submitted Mar. 20, 2013), 16-23; Comments of National Association of Evangelicals on *Certain Preventive Service Under the Affordable Care Act*, 78 Fed. Reg. 16501 (Mar. 21, 2012), CMS-9968-ANPRM (submitted June 19, 2012), 1-2; Comments of Church Alliance on *Coverage of Certain Preventative Services Under the Affordable Car Act*, 78 Fed. Reg. 8456 (Feb. 6, 2013), CMS-9968-P (submitted April 8, 2013), 9-18; Comments of Catholic Medical Association on *Coverage of Certain Preventative Services Under the Affordable Car Act*, 78 Fed. Reg. 8456 (Feb. 6, 2013), CMS-9968-P (submitted April 8, 2013), 4-5.

form and manner specified by the Secretaries of Health and Human Services and Labor, that it satisfies the three preceding criteria and makes such self-certification available for examination upon request. A260. *See also* 45 C.F.R. § 147.131(b); 29 C.F.R. § 2590.715.2713A(a); 26 C.F.R. § 54.9815-2713A(a).

Under these regulations, a group health plan established or maintained by an organization eligible for the "accommodation" that provides benefits on a self-insured basis complies with the requirement to provide contraceptive coverage if (a) the organization or its plan contracts with one or more third party administrators; (b) the organization provides each third party administrator that will process claims for any contraceptive services that must be covered with a copy of a "self-certification"; and (c) the organization does not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for some or all contraceptive services for participants or beneficiaries, and does not, directly or indirectly, seek to influence the third party administrator's decision to make such arrangements. A260-61.

If a third party administrator receives a copy of the self-certification, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for the drugs, devices and services to which the organization objects. A261.

A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies with the requirement to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification to each issuer that would otherwise provide such coverage in connection with the group health plan. A261. A group health insurance issuer that receives a copy of the self-certification must (a) expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; (b) provide separate payments for any required contraceptive services for plan participants and beneficiaries for so long as they remain enrolled in the plan. *Id*.

C. Proceedings Below

The Universities filed their verified complaint on September 20, 2013. A12. They moved for a preliminary injunction on November 27, 2013. A7. The parties filed a joint stipulation of facts for purposes of the adjudication of the preliminary injunction motion. A9. On December 23, 2013, the district court granted the Universities' motion. A266. The Government filed its notice of appeal in the district court on February 11, 2014. A288.

SUMMARY OF ARGUMENT

In *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), *cert. granted*, 134 S. Ct. 678 (U.S. Nov. 26, 2013) (No. 13-354), this Court held that government action imposes a "substantial burden" on religious exercise under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, when it substantially pressures the claimant to engage in conduct contrary to a sincerely held religious belief. 723 F.3d at 1138. In the instant case, the Government is substantially pressuring the Universities to violate their sincerely held religious convictions in the dignity and value of human life by facilitating access to abortion-inducing drugs and devices.

The Government is imposing the same pressure on the Universities that it imposed upon the *Hobby Lobby* plaintiffs—pressure this Court deemed substantial. More specifically, the Government is forcing the Universities to choose among the following options: (1) comply with the Mandate, with or without the so-called "accommodation" mechanism set forth in 45 C.F.R. § 147.131 and the corollary Department of Labor and Department of the Treasury rules; (2) offer plans that include abortifacients, thereby violating their religious beliefs; (3) offer plans that exclude abortifacients, thereby suffering $100 per employee per day fines; or (4) drop employee health insurance entirely, which would *both* violate their religious beliefs *and* subject them to serious financial penalties ($2,000 per year per

employee, after the first 30). The Government is imposing a similarly unpalatable choice upon the two Universities that offer student health insurance plans.

Significantly, this Court held in *Hobby Lobby* that neither the Government nor the courts may second-guess a claimant's sincere religious conclusions about the moral permissibility of the conduct the Government is pressuring it to do. This Court rejected the Government's invitation to assess whether the plaintiffs' connection to the potential use of objectionable abortifacients was "too attenuated" or "indirect" to be a "substantial burden" under RFRA. 743 F.3d at 1137-40. The Court held that its "only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." *Id*. at 1137.

Remarkably, the Government in this case essentially urges this Court to eschew this approach to the "substantial burden" inquiry. It invites the Court to second-guess the Universities' moral analysis, couching its recycled and repudiated argument not in the language of "attenuation" and "indirectness," but by (a) attacking the Universities' use of the word "facilitate" to describe their role in the alternative compliance scheme; (b) pouring dispositive meaning into whether the Universities can be said to "provide" abortifacients or abortifacient coverage; and (c) implausibly re-branding the alternative compliance mechanism as an "opt-out." The bottom line, however, is that the Government, just as in

Hobby Lobby, is substantially pressuring the plaintiffs to take action in violation of their religious convictions. Given that, the outcome is clear: the Government's application of the Mandate to the Universities substantially burdens its religious exercise.

The Government's new arguments (so new that they were raised neither in Hobby Lobby nor the district court in this case) are similarly unavailing. It has no plausible support for the contention that the Court should consider the potential burden on third parties of a RFRA exemption *in the context of assessing the substantiality of the burden on the claimant* (in addition to the context of the "compelling governmental interest" inquiry). The Government's unsupported speculation that the Universities might save money if they dropped employee health insurance is simply irrelevant. And, contrary to the Government's apparent contention, the financial penalties for non-compliance are legally cognizable burdens on religious exercise. Finally, the Government's attempt to reframe the "compelling governmental interest" inquiry—by misrepresenting what the Universities are challenging—cannot succeed.

The district court did not abuse its discretion in granting the Universities' motion for preliminary injunction. The Government does not even argue that the Universities will not suffer irreparable harm in the absence of an injunction; that the balance of hardship is in its favor; or that the injunction does not serve the

public interest. Given that the Universities have more than proven a likelihood of success on the merits of their RFRA claim, this Court should affirm the lower court's preliminary injunction.

ARGUMENT

I. THE ABORTIFACIENT MANDATE'S BURDEN ON THE SCHOOLS' RELIGIOUS EXERCISE IS "SUBSTANTIAL" UNDER RFRA.

Faithfully applying the analysis dictated by this Court in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), the district court held that the Mandate "substantially burdens" the Universities' religious exercise. A278-282. It correctly held that the Government substantially pressured the Universities to violate their sincere religious beliefs. *Id*. Under *Hobby Lobby*, reasoned the district court, such pressure constitutes a substantial burden under RFRA. *Id*.

In the district court, the Government argued that the Universities' eligibility for the accommodation rendered *Hobby Lobby* inapplicable and warranted a contrary result. More specifically, it claimed that the burden was not substantial for two (alleged) reasons: (1) that the physical act of executing and delivering the self-certification was not particularly time-consuming or onerous;[6] and (2) that the

[6] In the district court, the Government sometimes used the phrase "de minimis" to communicate the same idea. *See, e.g.*, Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, ECF No. 25, at 21, 25, 27

burden was "indirect" because the insurers and TPAs (rather than the Universities) pay for the objectionable abortifacients.[7]

The district court made short work of these contentions. Regarding the first, the district court stated:

> The government's argument rests on the premise that the simple act of signing a piece of paper, even with knowledge of the consequences that will flow from that signing, cannot be morally (and, in this case, religiously) repugnant – an argument belied by too many tragic historical episodes to be canvassed here. The burden, under RFRA, is not to be measured by the onerousness of a single physical act. RFRA undeniably focuses on violations of conscience, not on physical acts.

A281-282.

As to the Government's argument that the burden was "indirect," the district court understood that the Government was essentially asking it to second-guess (and reject) the Universities' *moral* conclusion. Declining to accept the Government's invitation, the district court stated: "the question 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." A282 (citing *Hobby Lobby*, at 1142). The lower court held that the Government's desired analysis – under which a court would second-guess the claimant's moral assessment of its complicity in religiously unacceptable acts – "could not be

[7] In the district court, the Government sometimes used the phrase "too attenuated" to convey the same idea. *See, e.g.*, Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, ECF No. 25, at 27.

squared with the Supreme Court's decisions in *Thomas*[8] and *Lee*[9] or with the Tenth's Circuit's decision in *Hobby Lobby*." A281 n.4.

Summing up its assessment of the substantiality of the burden, the district court concluded:

> The government has put these institutions to a choice of either acquiescing in a government-enforced betrayal of sincerely held religious beliefs, or incurring potentially ruinous financial penalties, or electing other equally ruinous courses of action. That is a burden, and it is substantial.

A282.[10]

On appeal, the Government abandons the argument that the burden is not substantial because the physical act of completing and delivering the self-certification is not time-consuming or inherently onerous. It also appears to all but abandon another of the central contentions of its district court brief: that the Mandate does not substantially burden the Universities' religious exercise because

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[8] *Thomas v. Review Bd.*, 450 U.S. 701 (1981).

[9] *United States v. Lee*, 455 U.S. 252 (1982).

[10] The Government's contention (Gov. Br. at 10, 12, 22-23) that the district court simply "deferred" to the Universities' legal argument that the Mandate substantially burdened their religious exercise under RFRA is false. The district court, as required by this Court in *Hobby Lobby*, credited the Universities' factual assertion that complying with the Mandate via the accommodation would contradict the Universities' religious beliefs. Indeed, the Government stipulated to this, electing not to challenge the sincerity of the Universities' belief. A263. The district court then examined whether the Government was imposing "substantial pressure" upon the Universities to violate their beliefs. A280-82. The district court's failure to second-guess the Universities' *moral* analysis hardly constitutes an inappropriate deferral to the Universities' *legal* arguments.

it (allegedly) does not require the schools to "modify their behavior in any meaningful way."[11]

Instead, it argues once again (albeit in slightly different language) that the Universities' *moral* assessment is wrong, urging the Court to second-guess (and disagree with) the schools' religiously-based ethical analysis and hold that the burden is thus not substantial under RFRA. Rather than use words like "indirect" or "attenuated," the Government now (1) attacks the Universities' use of the word "facilitation" to describe their role in the provision of abortifacient coverage to their plan beneficiaries;[12] and (2) tries to pour dispositive significance into whether the Universities can be said to "provide" abortifacients or abortifacient coverage.[13] It also describes the "division of labor" between the Universities and their insurers/TPAs under the accommodation, apparently implying that the assignment

[11] *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, ECF No. 25, at 20-22. This argument rested on language plucked out of a case from the Fifth Circuit called *Garner v. Kennedy*, 713 F.3d 237, 241-42 (5th Cir. 2013), in which the court said that a RFRA claimant must show that the challenged regulation caused him to "modify his behavior." The government claimed that the accommodation did not cause the Universities to modify their behavior, because both before and after the Mandate, the Universities would inform their insurers or TPAs that they objected to abortifacients. The fact that the conveyance of the self-certification would cause coverage of abortifacients – the precise opposite of the pre-Mandate communications – was deemed irrelevant by the Government. But for a single stray comment echoing this rather odd contention, Gov. Br. at 14, the Government has abandoned this argument.

[12] *See, e.g.*, Gov. Br. at 11 (declaring that, under the accommodation, organizations "do *not* 'facilitate' the provision of contraceptive coverage by third parties") (emphasis added).

[13] *See, e.g.*, Gov. Br. at 1, 11, 14.

of certain duties to the insurers/TPAs in the scheme somehow renders incorrect the Universities' moral assessment of their own role. *See* Gov. Br. at 15-17.

The Government also half-heartedly makes, in a footnote, what appear to be two new arguments for the proposition that the Mandate does not substantially burden the Universities' religious exercise. Gov. Br. at 17 n. 5. First, it suggests that the burden is not substantial because the Universities might be better off financially if they dropped employee health insurance and paid the resulting fines. *Id*. Second, it contends that the enormous financial penalties essentially do not "count" for purposes of the substantial burden analysis, inappropriately invoking the principle that government actions that make religious exercise more expensive do not necessarily impose substantial burdens on that exercise. *Id*.

As discussed below, the district court correctly understood and applied the "substantial burden" test this Court set forth in *Hobby Lobby*. The lower court appropriately rejected the Government's invitation to second-guess (and disagree with) the Universities' evaluation of the morality of complying with the Mandate through the accommodation mechanism. In addition, the Government's new contentions – if they are even truly meant to constitute substantive arguments – are unpersuasive and must be rejected.

A. The Mandate Burdens the Universities' Religious Exercise.

In assessing whether the Mandate substantially burdens the Universities' religious exercise, it is essential to: (1) identify the religious exercise in question; and (2) identify exactly what the government is doing with respect to that exercise. *See Hobby Lobby*, 723 F.3d at 1140.

Three "exercises of religion" are at stake in this case. Two are affirmative pursuits of religious objectives; the third is avoidance of conduct contrary to the Universities' beliefs. First, the Universities affirmatively live out their religious beliefs in the dignity of human life by making available to members of their communities health insurance coverage that reflects the University communities' shared pro-life beliefs. A255. Second, they create and foster academic communities that encourage their members (faculty, staff, and students) to grow in spiritual maturity through obedience to God's commands, including His commands about the value of human life. A263. Third, the Universities seek to avoid facilitating sinful behavior, thereby engaging in immoral conduct themselves. A255, A263.

Through the Mandate, the Government interferes with each of these three "exercises of religion." First, it has made it untenable, to put it mildly, for the Universities to provide employee and student health insurance that correlates with their pro-life beliefs. Left free to exercise their religion in the health insurance

context, their plans would ensure access to everything the Affordable Care Act and the Mandate require (including non-abortifacient contraceptives) other than abortifacients like ella, Plan B, and IUDs. A256, A257, A258. Participation in their plans would not trigger the "free" availability of embryo-destroying drugs and devices to members of their communities. *Id.*

Because of the Mandate, however, insurance issuers will sell the Universities (that do not self-insure) plans that either (a) *expressly* include abortifacients; or (b) *functionally* include abortifacients by guaranteeing separate payments for them upon the school's execution and conveyance of the self-certification to the issuer.

In the case of a self-insured entity like Southern Nazarene or Mid-America Christian, it may comply with the Mandate by either (a) setting up a self-insured plan that includes abortifacients; or (b) setting up a self-insured plan that functionally includes abortifacients by guaranteeing separate payments for them by the TPA upon the entity's execution of the self-certification. If it fails to do either of these, and instead creates a self-insurance plan that does *not* facilitate the availability of abortifacients, it will face fines of $100 per beneficiary per day. A262.

The Government has also made it impossible, as a practical matter, to avoid facilitating the use of abortifacients by dropping employee health insurance

altogether (something that would transgress the Universities' religious convictions in its own right). The financial penalty for such a move is $2,000 per employee per year after the first 30 employees. A263.

Because the Government has left the Universities without the option of fulfilling their religious convictions by providing health insurance that does not facilitate access to abortifacients (or of dropping employee health insurance altogether), they are forced to provide health insurance that *does* facilitate that access. This significantly interferes with the Universities' other two "exercises of religion." First, it directly and significantly interferes with their ability to make and enforce religiously-rooted rules of conduct applicable to their employees and students, all of whom voluntarily joined their respective communities. It directly and significantly interferes with their ability effectively to communicate their pro-life message to their students, faculty, staff, and the broader community. It directly and significantly interferes with their pursuit of their mission to grow the spiritual maturity of the members of their communities by fostering obedience to and love for God's laws.

Second, it forces them to engage in behavior that violates their religious convictions. A255, A263. Either complying with the Mandate as originally written or complying with it by executing a self-certification that ensures the same result (*i.e.*, free access for members of their communities to abortifacients as a

consequence of their employment with them) is, in the eyes of each University, sinful and immoral. *Id*. The Universities believe that sin adversely affects their relationship with God. A263. Although the shape and magnitude of this adverse effect cannot be predicted or calculated, the Universities nonetheless believe it is quite real, and to be avoided.

The Mandate burdens the Universities' religious exercise by coercing them to take action they believe to be sinful and immoral, and by interfering with their freedom to foster voluntary communities that encourage spiritual maturity through compliance with shared ethical commitments rooted in religious conviction.

As to the first of these ways the Government burdens the Universities' religious exercise, the Universities will transgress their understanding of God's laws by providing health insurance to their employees and students that gives them guaranteed payments for drugs and devices that take human life. A255, A263. In short, by complying they will sin. And non-compliance, either through dropping employee and/or student coverage, or by continuing their current coverages (which exclude abortifacients), is not possible, either financially, ethically, or both. A255, 263.

As discussed above, the Universities not only want to avoid committing sin, but also want to foster the spiritual maturity of members of their communities, faculty, staff, and students alike. Christian conviction—including respect for the

dignity and worth of human life from the moment of conception—is a qualification for entry into and participation in their communities. A263. And, it bears noting, faculty, staff, and students all voluntarily join these communities. Foisting unwanted access to free abortifacients upon the Universities' employees, their families, and students tangibly interferes with this key component of the Universities' missions. Facilitating free access to abortifacients while simultaneously trying to foster a pro-life ethic lacks integrity; and doing the former undermines the latter. The "fig leaf" of the accommodation is just that; a cosmetic, but ultimately unsuccessful, effort to cover over the underlying ethical problem.

B. The Mandate's Burden on the Universities' Religious Exercise is "Substantial" Under RFRA.

Of course, the critical legal question is whether this adverse impact on the Universities' religious exercise constitutes a "substantial burden" under the Religious Freedom Restoration Act. Under this Court's test set forth in *Hobby Lobby*, it is. The Government's efforts to re-write the test must be rejected.

1. *The Mandate's burden on the Universities' religious exercise is substantial under* Hobby Lobby.

a. The test: substantial pressure to violate beliefs.

In *Hobby Lobby*, this Court held that government action imposes a substantial burden if it (i) requires participation in an activity prohibited by a sincerely held religious belief, (ii) prevents participation in conduct motivated by a

sincerely held religious belief, or (iii) places substantial pressure on an adherent to engage in conduct contrary to a sincerely held religious belief. 723 F.3d at 1138. It focused its analysis of the plaintiffs' RFRA claims on the third of these. *Id*.

The Court correctly observed that "[t]he substantial pressure prong rests firmly on Supreme Court precedent," particularly *Thomas v. Review Board*, 450 U.S. 701, and *United States v. Lee*, 455 U.S. 252. 723 F.3d at 1138. In each case, the government was pressuring the claimants to take actions that contradicted their religious convictions, triggering a judicial assessment of the government's justification for doing so. *Id*. at 1138-39.

The *Hobby Lobby* court also observed that the Tenth Circuit had previously embraced the "substantial pressure" test for "substantial burden." *Id.* at 1140. In *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010), this Court found a substantial burden under the Religious Land Use and Institutionalized Persons Act[14] because the government "'place[d] substantial pressure on [the claimant] by presenting him with a Hobson's choice—either he eats a non-halal diet in violation of his sincerely held beliefs, or he does not eat.'" *Id*. (quoting *Abdulhaseeb* at 1317).

[14] "Congress intended the substantial burden tests in RFRA and RLUIPA to be interpreted uniformly." 723 F.3d at 1138 n.13 (citing *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 661 (10th Cir. 2006)).

This Court declared, "[o]ur only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." *Id.* at 1137.

b. The test applied to the facts of this case.

Applying that test to the facts of this case, there can be no other conclusion: the Mandate substantially burdens the Universities' religious exercise. Through the Mandate, the Government is imposing substantial pressure upon the schools to engage in conduct contrary to a sincerely held religious belief.

With respect to their employee plans, the Government has given the Universities the following choices: (1) comply with the Mandate, with or without the accommodation mechanism; (2) offer plans that include abortifacients, thereby violating their religious beliefs; (3) offer plans that exclude abortifacients, thereby suffering $100 per employee per day fines; or (4) drop employee health insurance entirely, which would *both* violate their religious beliefs *and* subject them to serious financial penalties. A262, A255.

The first, second, and fourth options all violate the Universities' sincere religious beliefs. A267, 274. The third option is morally permissible but financially impossible. The annual penalty would be $11,497,000 for Southern Nazarene; $4,088,000 for Oklahoma Wesleyan; $9,818,500 for Oklahoma Baptist; and $5,073,500 for Mid-America Christian. *See* 26 U.S.C. § 4980D(b).

Accordingly, they face enormous pressure to select one of the three religiously unacceptable options. And one of those options—dropping employee coverage—would itself be expensive ($570,000 annually for Southern Nazarene; $164,000 for Oklahoma Wesleyan; $478,000 for Oklahoma Baptist; and $218,000 for Mid-America Christian). *See* 26 U.S.C. §§ 4980H(a), (c)(1).

Under *Hobby Lobby*, there is no doubt these potential fines impose "substantial pressure" upon the Universities to comply with the Mandate. In that case, this Court stated that "it is difficult to characterize the pressure as anything but substantial." 723 F.3d at 1140. The Court observed that the Government "did not question the significance of the financial burden" in the district court. *Id*. at 1141. Accordingly, "the district court record leaves only one possible scenario: Hobby Lobby and Mardel incurred a substantial burden on their ability to exercise their religion." *Id*. This Court concluded that "[t]his is precisely the sort of Hobson's choice described in *Abdulhaseeb*, and Hobby Lobby and Mardel have established a substantial burden as a matter of law." *Id*. The district court in this case was correct to observe that the Universities face a similar Hobson's choice and thus that the Mandate substantially burdens their religious exercise. A280.

Although a straightforward application of this Court's approach in *Hobby Lobby* is sufficient to dictate this conclusion, it bears noting that numerous courts have held that application of the Mandate to accommodated entities' employee

plans substantially burdens their religious exercise. *See Catholic Archdiocese of N.Y. v. Sebelius*, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013) (granting summary judgment); *Catholic Diocese of Beaumont v. Sebelius*, 2014 WL 31652 (E.D. Tex. Jan. 2, 2014) (granting permanent injunction); *Persico v. Sebelius*, 2013 WL 6922024 (W.D. Pa. Dec. 20, 2013) (same); *Zubik v. Sebelius*, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013) (granting preliminary injunction); *Roman Catholic Diocese of Ft. Worth v. Sebelius*, No. 12-314 (N.D. Tex. Dec. 31, 2013) (same); *Ave Maria Found. v. Sebelius*, 2014 WL 117425 (E.D. Mich. Jan. 13, 2014) (same); *Diocese of Ft. Wayne v. Sebelius*, 2013 WL 6843012 (N.D. Ind. Dec. 27, 2013)(same); *Geneva Coll. v. Sebelius*, 2013 WL 6835094 (W.D. Pa. Dec. 23, 2013) (same); *Legatus v. Sebelius*, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013) (same); *East Tex. Baptist Univ. v. Sebelius*, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013); *Grace Schs. v. Sebelius*, 2013 WL 6842772 (N.D. Ind. Dec. 27, 2013) (same); *Sharpe Holdings, Inc. v. Sebelius*, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013) (same); *Roman Catholic Archbishop of Wash. v. Sebelius*, 2013 WL 6729515 (D.D.C. Dec. 20, 2013) (same); *Roman Catholic Archdiocese of Atlanta v. Sebelius*, 2014 WL 1256373, at *18 (N.D. Ga. Mar. 26, 2014). *See also Little Sisters of the Poor Home for the Aged v. Sebelius*, 2014 WL 272207 (U.S. Jan. 24, 2014) (enjoining application of Mandate pending appeal); *Catholic Diocese of Nashville v. Sebelius*, No. 13-6640, Doc. No. 006111923518 (6th Cir. Dec. 31,

2013) (same); *Michigan Catholic Conf. v. Sebelius*, No. 13-2723, Doc. No. 006111923522 (6th Cir. Dec. 31, 2013) (same); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5368, Doc. No. 1473216 (D.C. Cir. Dec. 31, 2013) (same). *But see University of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014).

The reasoning of the district court in *Zubik* is particularly compelling:

> [A]lthough the "accommodation" legally enables Plaintiffs to avoid directly paying for the portion of the health plan that provides [abortifacient] products, services, and counseling, the "accommodation" requires them to shift the responsibility of purchasing insurance and providing [abortifacient] products, services, and counseling, on a secular source. The Court concludes that Plaintiffs have a sincerely-held belief that "shifting responsibility" does not absolve or exonerate them from the moral turpitude created by the "accommodation"; to the contrary, it still substantially burdens their sincerely-held religious beliefs.

2013 WL 6118696, at *25.

With respect to their student plans, the Government has given Southern Nazarene and Oklahoma Baptist (schools with student plans) two options: (1) facilitate plans that include abortifacients, thereby violating their religious beliefs; or (2) stop facilitating student health insurance entirely, which also would violate their religious beliefs. To be sure, *Hobby Lobby* did not address whether the application of the Mandate to a student health plan violates RFRA. Nonetheless, the reasoning of *Hobby Lobby* points ineluctably to the conclusion that it does.

The Mandate gives the two schools a Hobson's choice, under which both available options are, in the eyes of the schools, morally unacceptable. *See Geneva Coll. v. Sebelius*, 960 F. Supp. 2d 588 (W.D. Pa. 2013) (preliminarily enjoining, under RFRA, application of Mandate to religious college's student insurance plan); *Grace Schs.*, 2013 WL 6842772, at *19 (same).

In sum, the Mandate substantially burdens the Universities' religious exercise under a straightforward application of the test recognized by this Court in *Hobby Lobby*.

2. *The Government's efforts to circumvent or alter the proper "substantial burden" inquiry must fail.*

The Government attempts to circumvent or alter the proper substantial burden inquiry in four ways. First, repackaging an argument it unsuccessfully made in the district court (and in this Court in *Hobby Lobby*), it encourages this Court to second-guess the Universities' religious judgment about the morality of complying with the Mandate via the accommodation. Gov. Br. at 2, 11-12, 16-20. Second, it contends that the alleged potential impact of a RFRA-driven exemption from the Mandate somehow affects the substantial burden inquiry (in a manner, of course, that is favorable to the Government). Gov. Br. at 20-22. Third, it floats the possibility that dropping insurance and suffering the consequences may be financially better for the Universities. Gov. Br. at 17 n.5. Fourth, it fleetingly

claims that the imposition of significant penalties is not a legally cognizable burden. Gov. Br. at 18 n. 5.[15]

All these efforts are unsuccessful. The Mandate's burden on the Universities' religious exercise is substantial under RFRA.

a. Neither the government nor this Court may second-guess the Universities' religious judgment.

The parties do not disagree about the mechanics of the accommodation and what it accomplishes. They agree, for example, that the accommodation ensures that beneficiaries of the Universities' plans receive abortifacient coverage, and that "separate payments" are available from the insurers or TPAs if – and only if – the Universities execute the self-certification and deliver it to their insurers or TPAs.

The parties *do* disagree about the *labels* that ought to be used to describe the Universities' role in this scheme. The Universities state that, under the accommodation, they "facilitate" access to the coverage. The Government explicitly denies this, declaring that accommodated entities "do *not* 'facilitate' the provision of contraceptive coverage." Gov. Br. at 2 (emphasis added). It instead re-brands the accommodation as an "opt-out"[16] and contends that the Universities

[15] It bears noting that the latter two of these arguments are raised only in a footnote and that the latter three of these are made for the first time in this Court.

[16] Under a genuine "opt-out," eligible entities would enjoy the same protection as the exceedingly small category of organizations to which the Government extended the religious exemption. 45 C.F.R. § 147.131(a).

do not "provide" abortifacient coverage.[17] The Government's tacit assumption apparently is that if it can persuade the Court that the word "facilitate" is unsuitable, that the Universities do not "provide" abortifacient coverage, or that the accommodation is an "opt-out," then there is no "substantial burden."

The relevant legal question, however, is decidedly *not* about the best word or phrase to describe the Universities' role. The real issue, instead, is whether the Universities sincerely believe that performing their function in the scheme would violate their religious convictions, *i.e.*, would be morally impermissible. *That* is the question *Hobby Lobby* requires this Court to consider. As discussed in the preceding section, there is no serious debate about that question. Given the substantial pressure the Government is imposing on the Universities to perform their role in the scheme, the Government is substantially burdening their religious exercise.

[17] It bears noting that the relevant regulations do not describe the accommodation as an "opt-out." Indeed, they do not even call it an "accommodation." Instead, they characterize it as an alternative method of *compliance* with the requirement to provide contraceptive coverage. *See, e.g.*, 45 C.F.R. § 147.131(c)(1) ("an eligible organization . . . *complies* with any requirement . . . to *provide* contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification" to its insurance issuer) (emphasis added). This reflects the statutory language, which declares that non-grandfathered plans "*shall* . . . *provide coverage for* . . . preventive care and screenings" identified by HRSA. 42 U.S.C. § 300gg-13(a)(4) (emphasis added). The "accommodation" is a mechanism by which an employer satisfies this requirement; the government is *not* arguing that it is giving "eligible organizations" a way to *avoid* compliance with this statutory requirement. An alternative method of compliance is hardly an "opt-out."

The Universities' statement that they "facilitate" access to abortifacients under the accommodation is just a shorthand way of saying that they have concluded that their complicity in the provision of abortifacients is morally unacceptable. It is "material cooperation with evil" that, in their judgment, falls on the wrong side of the moral line. When the Government *denies* that the Universities "facilitate" abortifacient coverage, *see, e.g.*, Gov. Br. at 2, it is really saying that it simply disagrees with their moral assessment. It is, for all intents and purposes, arguing that the connection between (a) the Universities' role in the scheme; and (b) the provision of abortifacient coverage, is not sufficiently "close" in its judgment to "count."

The Government's word-play is just a repackaging of the "attenuation" argument made below, and rejected in *Hobby Lobby*. In that case, the Government argued that there was no substantial burden because "'[a]n employee's decision to use her health coverage to pay for a particular item or service *cannot properly be attributed to* her employer.'" 723 F.3d at 1137 (emphasis added) (quoting government's brief). The Court noted that the government and its supporting amici all argued that "one does not have a RFRA claim if the act of alleged government coercion somehow depends on the independent actions of third parties." *Id.*

This Court stated that "[t]his position is fundamentally flawed because it advances an understanding of 'substantial burden' that presumes 'substantial'

requires an inquiry into the theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs." *Id*. (emphasis in original).

The *Hobby Lobby* Court held that the relevant precedents (*Thomas v. Review Board, United States v. Lee*, and *Abdulhaseeb v. Calbone*) explicitly repudiated the notion that courts, in assessing the substantiality of a burden, should second-guess a claimant's religiously-based moral reasoning. *Id*. at 1138-39.

In *Thomas*, the claimant drew a moral line between (a) participating in the production of sheet metal later used to manufacture tank turrets [which he deemed permissible]; and (b) participating in the manufacture of the tank turrets themselves [which he deemed impermissible]. Not only was this moral line not self-evident, the claimant "could not clearly articulate the basis for the difference." *Id*. at 1138. Nonetheless, as this Court stated, the Supreme Court declined to second-guess his religiously-based ethical conclusion. *Id*. at 1138-39 (discussing *Thomas*).

This Court declared that "*United States v. Lee* similarly demonstrates that the burden analysis does not turn on whether the government mandate operates directly or indirectly, but on the coercion the claimant feels to violate his beliefs." *Id*. at 1139. Indeed, as the Court observed, "the belief at issue in *Lee* turned in part on a concern of *facilitating* others' wrongdoing." *Id*. (emphasis added). The government in that case tried to characterize the burden as "indirect" and thus

insufficient to trigger scrutiny under the Free Exercise Clause. *Id*. The Supreme Court rejected the government's tactic. *Id*. (citing *Lee*, 455 U.S. at 257).

Again, when the Government argues that the Mandate does *not* require the Universities to "facilitate" or "provide" access to abortifacients or abortifacient coverage, it is in reality urging this Court to second-guess (and reject) their conclusion about the moral impermissibility of complying with the Mandate via the accommodation. *Hobby Lobby*, and the precedents upon which it rests, foreclose this argument – whether it is couched in terms of "indirectness," "attenuation," or otherwise.

b. The potential impact on third parties does not change the "substantial burden" analysis.

RFRA, of course, sets forth a straightforward test for assessing religious liberty claims. If the claimant proves that the challenged government action substantially burdens his religious exercise, the government must prove that the burden is the least restrictive means of advancing a compelling governmental interest. 42 U.S.C. § 2000bb-1. Virtually every interest asserted by a government defendant can be characterized as serving the interests of "third parties"; courts necessarily and appropriately will consider the impact of a RFRA exemption on third parties in assessing the "compellingness" of a stated interest.

Oddly, the Government contends that courts should somehow consider the potential burden on third parties of a RFRA exemption in the context of assessing

the substantiality of the burden on the claimant. Gov. Br. at 20-22. It asserts that the district court "erroneously assume[d]" to the contrary. Gov. Br. at 20.

It bears noting at the outset that the Government did not even make this argument in the district court. *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, ECF No. 25, at 20-28. Second, as discussed in detail above, this Court in *Hobby Lobby* set forth the applicable "substantial burden" test, and that test does not include consideration of the potential impact on others of the requested exemption.

Third, the Government's contention is inconsistent with the text and structure of RFRA itself. The phrase "substantial burden" is self-evidently concerned with the magnitude of the burden *on the claimant*; if the burden is sufficiently weighty to be "substantial," the court will then turn to whether the government's interest is compelling. In that part of the analysis, the court can (and usually will) consider the potential impact on others of the requested free exercise exemption. It is simply incoherent to suggest that the potential impact on third parties counts twice, both in the "compelling governmental interest" and the "substantial burden" contexts.[18]

[18] Of course, in the context of a preliminary injunction motion, a court must consider whether the requested relief is in the public interest.

Fourth, *Sherbert v. Verner*,[19] *Wisconsin v. Yoder*,[20] and *United States v. Lee*, contrary to the Government's suggestion, Gov. Br. at 20-21, simply do not stand for the proposition that the potential impact on third parties must be considered at the "substantial burden" stage of the overall analysis. In each of these cases, the Court's consideration of the potential impact of a Free Exercise Clause exemption upon third parties is plainly part of its inquiry into what, under RFRA, would be called the "compelling governmental interest" component of the analysis.

Fifth, exempting the Universities from the abortifacient component of the Mandate would *not* adversely affect the beneficiaries of their plans. The Universities' communities are made up of individuals who share the schools' religious convictions, including about the use of abortifacients. A275. "Depriving" them of coverage they do not want can hardly be said to impair their interests. The Government concedes as much in its rationale for the religious exemption, which applies equally to the Universities. It states that the exemption "does not undermine the governmental interests furthered by the contraceptive coverage requirements." 78 Fed. Reg. at 39,874. It explains that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely

[19] 374 U.S. 398 (1963).
[20] 406 U.S. 205 (1972).

than other people to use contraceptive services even if such services were covered under their plan." *Id*.

In short, the potential impact on third parties of a RFRA exemption does not alter the "substantial burden" inquiry.

c. The unsupported speculation that dropping insurance might save money is irrelevant.

In a footnote, the Government observes that instead of complying with the Mandate via the accommodation, the Universities "also could choose to discontinue offering health coverage." Gov. Br. at 17 n. 5. It continues: "In that scenario, with respect to their employees, plaintiffs would save the cost of providing health coverage and instead may be subject to a tax of $2,000 per full-time employee." *Id*. (citing 26 U.S.C. § 4980H(a) and (c)(1)). Although it is not entirely clear, the Government seems to be suggesting (a) that dropping employee health coverage and paying the tax might be less expensive than offering health insurance, and thus (b) that the option of dropping employee health coverage renders "insubstantial" the burden that flows from compliance with the Mandate. This apparent contention is unpersuasive for a number of reasons.

First, the Government failed to make this argument either in the district court or in the Tenth Circuit in the *Hobby Lobby* litigation. 723 F.3d at 1141. Second, this apparent argument erroneously presupposes that financial factors inevitably determine the outcome of moral questions. Suppose, hypothetically, that a law

requires employers to pay for employee abortions but pays the employer three times the actual out-of-pocket cost. The employer would obviously come out ahead financially; yet, this hardly means that this hypothetical requirement does not substantially burden the employer's religious exercise.

Third, the Universities offer insurance (both employee and student) out of religious conviction. A255. Given this, the Government is (or appears to be) suggesting that the Universities could avoid one transgression of their religious convictions by engaging in another. Again, this sort of Hobson's choice constitutes a substantial burden on religious exercise.

Fourth, the argument that the Universities would "come out ahead" financially is dubious on the merits. If the Universities dropped employee health insurance, they almost certainly would need to increase wages and salaries to maintain comparable levels of compensation. The increased salaries would be taxable, unlike health insurance benefits, thus pressuring the Universities to increase wages by an even greater amount. Dropping insurance would almost certainly complicate the Universities' relationships with current employees and job applicants.

In sum, it is far too glib to assert, as the Government apparently does, that dropping insurance is a suitable option for the Universities, rendering the burden of complying with the Mandate insubstantial.

d. The financial penalties for non-compliance are legally cognizable burdens on religious exercise.

In the same footnote, the Government appears to be arguing that the Universities would suffer no legally cognizable burden if they circumvented the Mandate by dropping insurance and paying the $2,000 per employee tax. Gov. Br. at 18 n. 5. The Government suggests that the burden would not be legally cognizable under the Supreme Court's statement in *Braunfeld v. Braun*, 366 U.S. 599, 605 (1961), that a government regulation is not susceptible to a Free Exercise Clause challenge when it merely "operates so as to make the practice of . . . religious beliefs more expensive." *Id*. To the extent the Government is making this argument, its logic would extend to the enormous fines the Universities would pay if they offered non-compliant plans (*i.e.*, the plans they currently have—ones without abortifacients).

This is a truly remarkable argument; perhaps that is why it appears fleetingly in a footnote and is undeveloped. First, the array of choices the Government presents the Universities does not resemble the options the Sabbath-observant merchants faced in *Braunfeld*. In that case, the plaintiffs' religious beliefs prevented them from opening their retail stores between Friday and Saturday evenings. *Id*. at 601. State law prevented them from opening on Sunday. *Id*. at 600-601. They thus suffered a competitive disadvantage in relation to other merchants not precluded by their faith from opening their stores on Saturday. *Id*.

at 602. In the instant case, by contrast, the costs in question are imposed directly by the Government in the form of a tax. The two scenarios are simply not comparable.

Second, under the Government's reasoning, it could pass a law imposing a $100 tax for attendance at a worship service with impunity. After all, such a tax would simply "operate so as to make the practice of . . . religious beliefs more expensive." This cannot be—and is not—the law.

In conclusion, the district court correctly held that the Mandate substantially burdens the Universities' religious exercise. The option of complying with the Mandate via the accommodation is morally unacceptable to the Universities, and neither the Government nor a court may second-guess their ethical judgment. The magnitude of the pressure on the Universities to comply with the Mandate in violation of their religious beliefs is substantial, and none of the Government's efforts to modify this Court's *Hobby Lobby* "substantial burden" inquiry succeed. Accordingly, this Court must affirm the district court's preliminary injunction.

II. THE GOVERNMENT'S STATED INTERESTS ARE NOT COMPELLING.

The Government concedes, as it must, that this Court has already held that the Mandate is not the least restrictive means of advancing a compelling governmental interest. Gov. Br. at 25-26 (citing *Hobby Lobby*, at 1143-45).

This Court's conclusion in that regard is even more undeniable as applied to the instant facts. In explaining the rationale for the religious exemption from the Mandate, the Government conceded that forcing employers whose employees are likely to share their religious convictions does not advance the Mandate's stated interests. *See* 78 Fed. Reg. 39,874. The Universities are such employers. Their employees share their religious convictions, including their convictions regarding the dignity of human life and the immorality of abortifacient use.

That the Universities' employees are unlikely to use the abortifacients to which the Universities object conclusively proves by itself that the Government has no interest in imposing the Mandate on the Universities. And RFRA requires the government to prove that the "application of the burden *to the person*" satisfies strict scrutiny. 42 U.S.C. § 2000bb-1(b) (emphasis added). *See also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006).

After conceding that *Hobby Lobby* already decided that the Mandate fails strict scrutiny, the Government appears to argue that the interests allegedly behind the Mandate (health and equality) are not even relevant here. Gov. Br. at 26-27.

Instead, it starts with the premise that in this case, the Universities are not challenging "the Mandate" at all, but are instead challenging "the accommodation." This is false both factually and conceptually.

The Universities are challenging the abortifacient component of the statutory preventive services Mandate. 42 U.S.C. § 300gg-13(a)(4). The precise content of the statutory Mandate, of course, was provided by HRSA. The penalties for non-compliance, including the penalties associated with entirely dropping employee health insurance in order to avoid one violation of conscience, are necessarily relevant to the Universities' RFRA claim. The "accommodation" is simply another means through which the Universities *comply* with the Mandate—and a means by which the Government ensures that beneficiaries of the Universities' employee and student plans have abortifacient coverage as a consequence of their participation in those plans.

Under the logic of the Government's contention, the Universities presumably would be happy with an invalidation of the accommodation, as if the accommodation in and of itself were the only problematic element to the entire statutory and regulatory scheme under which the beneficiaries of the Universities' plans get abortifacient coverage. But they would *not* be happy with such relief, and the accommodation by itself is *not* the essence of their problem. The problem with the accommodation is that it fails to accomplish its stated objective, at least

with regard to these plaintiffs—to eliminate the burden on the consciences of accommodated entities. Invalidation of the accommodation would simply put the Universities back where they were prior to its adoption, in the same position as employers like Hobby Lobby and Mardel.

Moreover, the stated interests behind the accommodation are *not* limited to (allegedly) protecting the religious consciences of non-exempt religious entities (something it fails to do). The Government itself declared that the purpose of the accommodation is to do that *while ensuring that the beneficiaries of accommodated entities' plans get the objectionable coverage.* So, the Government cannot escape the unavoidable reality that "the accommodation" is (allegedly) justified by the same interests as the Mandate to which it is affixed.

Of course, it is perfectly legitimate for a litigant to argue about the potential *consequences* of an adverse ruling. That is perhaps the better way to understand the Government's argument. It is apparently saying that if the Court affirms the preliminary injunction, the Government will be less able to similarly accommodate religious conscience in other contexts.

This is unpersuasive for two reasons. First, the Government has failed to identify any other contexts in which an "accommodation" of this sort might even be a coherent response to a conflict between a government requirement and religious exercise. Customarily, such conflicts are resolved by granting an

exemption. *See, e.g.*, 42 U.S.C. § 2000e-1(a) (exempting religious employers from Title VII's ban on religious discrimination in employment).

Second, this argument proves too much. It is always true that if a court holds that a particular government rule substantially burdens religious exercise without adequate justification, future litigants may successfully apply or even extend its principles to other, different situations. Such a concern, however, cannot justify denying a claim for a RFRA exemption. If so, no RFRA claim would ever succeed—something that cannot have been Congress's intent.

In short, this Court should reject the Government's frankly odd effort to circumvent *Hobby Lobby*'s controlling conclusion that the Mandate does not advance a compelling interest. Given that the Mandate substantially burdens the Universities' religious exercise, it violates RFRA.

CONCLUSION

The Universities respectfully request that this Court affirm the district court's grant of their motion for preliminary injunction.

Respectfully submitted this the 12th day of May, 2014.

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Attorney for Appellees

CERTIFICATE OF SERVICE

I herby certify that on May 12, 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system and caused 7 hard copies to be delivered within two business days. Opposing counsel and counsel for amici supporting Appellants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/Gregory S. Baylor
Gregory S. Baylor

ADDENDUM

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45 C.F.R. § 147.131

(a) Religious employers. In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(b) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self- certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

(c) Contraceptive coverage--insured group health plans--

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (b)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) Payments for contraceptive services--

(i) A group health insurance issuer that receives a copy of the self- certification described in paragraph (b)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 147.130(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 147.130(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from

> the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 147.130(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services-- insured group health plans and student health insurance coverage. For each plan year to which the accommodation in paragraph (c) of this section is to apply, an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services, and must provide contact information for questions and complaints.The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): “Your [employer/institution of higher education] has certified that your [group health plan/student health insurance coverage] qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your [employer/institution of higher education] will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of health insurance issuer] will provide separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your [group health plan/student health

insurance coverage]. Your [employer/institution of higher education] will not administer or fund these payments. If you have any questions about this notice, contact [contact information for health insurance issuer]."

(e) Reliance--

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(f) Application to student health insurance coverage. The provisions of this section apply to student health insurance coverage arranged by an eligible organization that is an institution of higher education in a manner comparable to that in which they apply to group health insurance coverage provided in connection with a group health plan established or maintained by an eligible organization that is an employer. In applying this section in the case of student health insurance coverage, a reference to "plan participants and beneficiaries" is a reference to student enrollees and their covered dependents.

29 C.F.R. § 2590.715-2713A

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self- certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) Contraceptive coverage--self-insured group health plans--

(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides each third party

administrator that will process claims for any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section, which shall include notice that--

> (A) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and
>
> (B) Obligations of the third party administrator are set forth in § 2510.3–16 of this chapter and § 2590.715–2713A.

(iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

(2) If a third party administrator receives a copy of the self-certification described in paragraph (a)(4) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a

copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR156.50(d).

(4) A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(c) Contraceptive coverage--insured group health plans--

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (a)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) Payments for contraceptive services--

(i) A group health insurance issuer that receives a copy of the self- certification described in paragraph (a)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 2590.715–2713(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 715 of ERISA. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--self- insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any

application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) Reliance--insured group health plans--

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

26 C.F.R. § 54.9815-2713A

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretaries of Health and Human Services and Labor, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) Contraceptive coverage--self-insured group health plans. (1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) of this section are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides each third party administrator that will process claims for any contraceptive

services required to be covered under § 54.9815–2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section, which shall include notice that--

> (A) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and
>
> (B) Obligations of the third party administrator are set forth in 29 CFR 2510.3–16 and 26 CFR 54.9815–2713A.

(iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

(2) If a third party administrator receives a copy of the self-certification described in paragraph (a)(4) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a

premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(c) Contraceptive coverage--insured group health plans--(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 54.9815– 2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (a)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) Payments for contraceptive services. (i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (a)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 54.9815–2713(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 9815. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--self- insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the

eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/ health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) Reliance--insured group health plans.

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

42 U.S.C. § 2000bb-1

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

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.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 300gg-13(a)

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

> (1) evidence-based items or services that have in effect a rating of ‘‘A’’ or ‘‘B’’ in the current recommendations of the United States Preventive Services Task Force;
>
> (2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and[1]
>
> (3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration.[2]
>
> (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.[2]
>
> (5) for the purposes of this chapter, and for the purposes of any other provision of law, the current recommendations of the United States Preventive Service Task Force regarding breast cancer screening, mammography, and prevention shall be considered the most current other than those issued in or around

[1] So in original. The word ‘‘and’’ probably should not appear.
[2] So in original. The period probably should be a semicolon.

Nothing in this subsection shall be construed to prohibit a plan or issuer from providing coverage for services in addition to those recommended by United States Preventive Services Task Force or to deny coverage for services that are not recommended by such Task Force.

No. 14-6026

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SOUTHERN NAZARENE UNIVERSITY; OKLAHOMA WESLEYAN UNIVERSITY; OKLAHOMA BAPTIST UNIVERSITY; AND MID-AMERICA CHRISTIAN UNIVERSITY,

Plaintiffs-Appellees

vs.

KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *ET AL.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Oklahoma
Case No. 5:13-cv-01015-F
(Honorable Stephen P. Friot)

ERRATA ON BRIEF OF APPELLEES:
REQUEST FOR ORAL ARGUMENT

This appeal presents the question whether the federal Government may, consistent with the Religious Freedom Restoration Act ("RFRA"), force not-for-profit religious universities to facilitate access to abortion-inducing drugs and devices in violation of their religious beliefs. The same issue is pending before other circuits. Given the importance of the issue, the Universities respectfully request oral argument.

Respectfully submitted this the 13th day of May, 2014.

By:

s/ Gregory S. Baylor

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because foregoing document has been prepared in a proportionally spaced typeface using Word 2007 Times New Roman 14 point font.

2. I further certify that (1) all required privacy redactions have been made; (2) the required paper copies are exact versions of the document filed electronically; and (3) that the electronic submission was scanned for viruses and found to be virus free.

s/ Gregory S. Baylor
Attorney for Appellees

CERTIFICATE OF SERVICE

I herby certify that on May 13, 2014, I electronically filed the foregoing document with the Clerk of this Court by using the appellate CM/ECF system and caused 7 hard copies to be delivered within two business days. Opposing counsel and counsel for amici supporting Appellants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/Gregory S. Baylor
Gregory S. Baylor