IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ETERNAL WORD TELEVISION NETWORK, INC., Plaintiff-Appellant, v. SECRETARY OF THE U.S. DEPARMENT OF HEALTH & HUMAN SERVICES, et al., Defendants-Appellees.	No. 14-12696
THE ROMAN CATHOLIC ARCHDIOCESE OF ATLANTA, et al., Plaintiffs-Appellees, v. SECRETARY, U.S. DEPARMENT OF HEALTH & HUMAN SERVICES, et al., Defendants-Appellants.	Nos. 14-12890 & 14-13239

AMENDED CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, the undersigned counsel certifies that, to the best of our knowledge, the following persons and entities may have an interest in the outcome of these cases. Persons and entities listed below who were not identified in a CIP previously filed by at least one of the parties are indicated in bold.

ACLU of Alabama Foundation, Inc.

Alabama Physicians For Life

Alliance Community for Retirement Living, Inc.

Alliance Home of Carlisle, Pennsylvania

American Association of Pro-Life Obstetricians & Gynecologists

American Bible Society

American Civil Liberties Union

American Civil Liberties Union of Alabama

American Civil Liberties Union of Georgia

American Federation of State, County and Municipal Employees

Americans United for Life

Americans United for Separation of Church and State

Amiri, Brigitte

Association of American Physicians & Surgeons, Inc.

Association of Christian Schools International

Association of Gospel Rescue Missions

Ave Maria University

Barbero, Megan

Bennett, Michelle R.

The Becket Fund for Religious Liberty

Blomberg, Daniel Howard

Bondi, Pam

Branda, Joyce R.

Brasher, Andrew L.

Brennan & Wasden, LLP

Brinkmann, Beth C.

Brown, Kenyen R.

Burnette, Jason

Burwell, Sylvia M.

Carmelite Sisters of the Most Sacred Heart of Los Angeles

Cassady, William E. (Magistrate Judge)

Catholic Charities of the Archdiocese of Atlanta, Inc.

Catholic Education of North Georgia, Inc.

Catholic Medical Association

Center for Law & Religious Freedom

Christ the King Catholic School

Christian Legal Society

Christian Medical Association

Christian and Missionary Alliance Foundation, Inc.

Colby, Kimberlee Wood

Crown College

Davidow, Charles E.

Delery, Stuart F.

Dewart, Deborah J.

Dominican Sisters of Mary

Duffey Jr., William S.

Duncan, Stuart Kyle

Dys, Jeremiah Grant

Eternal Word Television Network, Inc.

Ethics & Religious Liberty Commission of the Southern Baptist Convention

First Liberty Institute

Florida Association of Planned Parenthood Affiliates, Inc.

Forte, Stephen M.

Gibson Dunn & Crutcher LLP

Granade, Callie V.S.

Humphreys, Bradley Philip

Hungar, Thomas G.

Institutional Religious Freedom Alliance

Jed, Adam C.

Jones Day

Judicial Education Project

Katskee, Richard B.

Keim, Jonathan S.

Khan, Ayesha N.

Kirkpatrick, Megan A.

Klein, Alisa B.

Lea, Brian

Lee, Jennifer

Legal Momentum

Lew, Jacob

Lieber, Sheila

Liberty, Life, and Law Foundation

The Lutheran Church—Missouri Synod

Mach, Daniel

Marshall, Randall C.

Metcalf, Janine Cone

Mizer, Benjamin C.

Monde, David Moss

Mother of the Eucharist

NARAL Pro-Choice America

National Association of Catholic Nurses

National Association of Evangelicals

National Association of Pro Life Nurses

The National Catholic Bioethics Center

National Family Planning and Reproductive Health Association

National Latina Institute for Reproductive Health

National Women's Health Network

National Women's Law Center

Nemeroff, Patrick G.

Olens, Sam

Parker, Jr., William G.

Paul Weiss Rifkind Wharton & Garrison LLP

Perez, Thomas

Planned Parenthood Southeast, Inc.

Population Connection

Prison Fellowship Ministries

Rassbach, Eric

Religious Sisters of Mercy of Alma, Michigan

Ricketts, Jennifer

Rienzi, Mark

Salzman, Joshua M.

Scalia, Eugene

Schaerr | Duncan LLP

Service Employees International Union

Simpson University

Sisters of Life

Smith, Gambrell & Russell, LLP

Smith, E. Kendrick

Smith, Mailee R.

Strange, Luther

State of Alabama

State of Florida

State of Georgia

Stern, Mark B.

The Most Reverend John Hartmayer

The Most Reverend Wilton D. Gregory

The Roman Catholic Archdiocese of Atlanta

The Roman Catholic Diocese of Savannah

Thomas, J. Curt

Town and Country Manor of the Christian and Missionary Alliance

United States Department of Health and Human Services

United States Department of Labor

United States Department of the Treasury

Verm, Diana

Williams, James

Windham, Lori

Yates, Sally

/s/ Joshua M. Salzman
Joshua M. Salzman
Counsel for the Appellees

MOTION FOR *ZUBIK* ORDER

The defendants respectfully move this Court to enter an order in the above captioned cases that is materially identical to the remand orders that the Supreme Court issued in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam), and several other cases presenting the same issue. Specifically, we ask this Court to modify its existing injunction so as to provide plaintiffs in these cases with precisely the same interim relief that the Supreme Court provided to other plaintiffs that are similarly situated in all relevant respects. Plaintiffs oppose this motion.

1. As the Court is aware, these appeals present the same issues as were before the Court in *Zubik* and several other related cases. After consideration of supplemental briefing in *Zubik*, the Supreme Court remanded to the courts of appeals an array of cases raising RFRA challenges to the accommodation regulations at issue here. *See Zubik*, 136 S. Ct. at 1560-61; *see also*, *e.g.*, *Burwell v. Dordt Coll.*, 136 S. Ct. 2006 (2016); *University of Notre Dame v. Burwell*, 136 S. Ct. 2007 (2016); *Catholic Health Care Sys. v. Burwell*, __ S. Ct. __, 2016 WL 816249 (May 23, 2016). The Court emphasized in *Zubik* that it "expresse[d] no view on the merits of the cases" and, in particular, that it did not "decide whether [plaintiffs'] religious exercise has been substantially burdened, whether the Government has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest." 136 S. Ct. at 1560. But the Court stated that in light of what it viewed as "the substantial clarification and refinement in the positions of the parties" in their supplemental briefs, the parties

"should be afforded an opportunity to arrive at an approach going forward that accommodates [plaintiffs'] religious exercise while at the same time ensuring that women covered by [plaintiffs'] health plans 'receive full and equal health coverage, including contraceptive coverage.'" *Id.* (citation omitted). The Court accordingly vacated all of the decisions below, including decisions arising from the one court of appeals where plaintiffs had prevailed. *See, e.g.*, *U.S. Dep't of Health & Human Servs. v. CNS Int'l Ministries*, __ S. Ct. __, 2016 WL 2842448 (U.S. May 16, 2016) (vacating and remanding *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927 (8th Cir. 2015), which had upheld a RFRA challenge to the accommodation regulations).

The above-captioned cases were not among those that reached the Supreme Court. In February 2016, this Court issued an opinion rejecting plaintiffs' RFRA and other challenges. *See* 818 F.3d 1122 (11th Cir. 2016). But on May 31, 2016, in light of *Zubik*, this Court issued an order vacating that decision. That Order provided a schedule for supplemental briefing and stated:

> We continue to enjoin the Secretary of Health and Human Services from enforcing against EWTN, Catholic Charities, and CENGI the substantive requirements set forth in 42 U.S.C. § 300gg-13(a)(4) and from assessing fines or taking other enforcement action against EWTN, Catholic Charities, or CENGI for non-compliance. This stay shall remain in effect until further order of the Court.

May 31 Order at 5.

On July 21, 2016, the Departments issued a Request for Information (RFI) to determine whether further modifications to the existing accommodation could resolve the RFRA objections asserted by various organizations while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage. *See* 81 Fed. Reg. 47,741 (published July 22, 2016). In light of the RFI, on July 29, 2016, the parties filed a joint motion asking this Court to vacate the supplemental briefing schedule and to stay further proceedings. That motion was granted on August 10, 2016.

2. *Zubik* specifically addresses the nature and extent of the interim relief to which identically situated plaintiffs are entitled while litigation of this type remains pending. Before the Supreme Court's decision, most of the plaintiffs in *Zubik* and the other pending cases raising similar RFRA challenges to the accommodation had secured interim relief against the enforcement of the contraceptive-coverage requirement. The Supreme Court's decision provides continued interim relief, specifying that during the pendency of these cases "the Government may not impose taxes or penalties on [plaintiffs] for failure to provide the . . . notice" required by the existing accommodation regulations. *Zubik*, 136 S. Ct. at 1561. But the Court also expressly provided that neither its decision nor any prior interim order prevents the Departments from notifying plaintiffs' issuers and third-party administrators (TPAs) of their obligation to make separate payments for contraceptives under the accommodation, thereby ensuring that the affected women receive the coverage to

which they are entitled by law while the litigation remains pending. The opinion provides:

> Nothing in this opinion, or in the opinions or orders of the courts below, is to affect the ability of the Government to ensure that women covered by [plaintiffs'] health plans "obtain, without cost, the full range of FDA approved contraceptives." *Wheaton College v. Burwell*, 573 U.S. —, —, 134 S. Ct. 2806, 2807, 189 L. Ed. 2d 856 (2014). Through this litigation, [plaintiffs] have made the Government aware of their view that they meet "the requirements for exemption from the contraceptive coverage requirement on religious grounds." *Id.*, at —, 134 S. Ct., at 2807. Nothing in this opinion, or in the opinions or orders of the courts below, "precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage" going forward. *Ibid.* Because the Government may rely on this notice, the Government may not impose taxes or penalties on petitioners for failure to provide the relevant notice.

Zubik, 136 S. Ct. at 1560-61. The Court issued materially identical orders in the cases in which petitions for writs of certiorari were held pending the *Zubik* decision. *See*, *e.g.*, *Burwell v. Dordt Coll.*, 136 S. Ct. 2006 (2016); *University of Notre Dame v. Burwell*, 136 S. Ct. 2007 (2016); *Catholic Health Care Sys. v. Burwell*, __ S. Ct. __, 2016 WL 816249 (May 23, 2016).

The Supreme Court's orders respond to a concern raised by the government in its supplemental brief in *Zubik*, which advised the Supreme Court that the parties to the consolidated cases before the Court provided or arranged health coverage for thousands of employees and students, but that "[b]ecause of injunctions and other interim relief entered by the lower courts, none of the affected women are presently receiving the full and equal health coverage to which they are statutorily entitled."

Supplemental Brief for the Respondents 20, *Zubik v. Burwell*, No. 14-1418 & consol. cases. The government noted that, in light of the interim orders entered by the lower courts, further litigation over the accommodation would result in the "continued denial of statutory rights" to the affected women—as well as "to tens of thousands of additional women" who receive health coverage from the parties to other pending challenges to the accommodation (including these cases). *Id.* *Zubik* responded to this concern by expressly superseding the preliminary injunctions and other "opinions or orders of the courts below," *Zubik*, 136 S. Ct. at 1560, to the extent those interim orders had prevented the government from notifying the relevant issuers and TPAs of their obligation to provide separate coverage.

The Supreme Court's interim orders differ from the lower court injunctions they superseded by providing that the Departments may rely on information provided by plaintiffs through litigation to ensure that women covered by plaintiffs' health plans obtain, without cost, the full range of FDA approved contraceptives. As the Supreme Court was aware, its orders thus allow the Departments to use information already in the Departments' possession to direct plaintiffs' insurers and TPAs to provide or arrange separate coverage of contraceptives for the plaintiffs' employees and students. The government had informed the Court during an earlier stage of the proceedings in *Zubik* that the Departments did exactly that after the Supreme Court issued an analogous interim order in *Wheaton College*. *See Zubik*, Mem. for Resps. in Opp. 28-29, No. 14A1065 (U.S.) (Ex. A) ("Consistent with the Court's interim order,

the Departments have sent notifications to the insurers and TPAs for Wheaton's non-grandfathered employee health plans describing their obligation to provide separate coverage under the applicable regulations."); *id.* at 31 (explaining that the *Wheaton* approach would be workable in *Zubik* because "applicants have provided the identities of their TPAs during the course of the litigation").

For precisely that reason, the *Zubik* petitioners strenuously opposed analogous interim relief when their petition for a writ of certiorari was pending. *See Zubik*, Reply in Support of Emergency Application 14, No. 14A1065 (U.S.) (Ex. B). The *Zubik* petitioners recognized that "the Government has now made clear that it is treating a notification under the *Wheaton* order as identical to the notification under the accommodation to which [the petitioners] vigorously object"—that is, that the government would rely on such a notification to require or encourage the employer's insurer or TPA to provide contraceptive coverage. *Id.* Notwithstanding that objection, however, the Supreme Court issued an injunction pending final disposition of the petition for certiorari in *Zubik* that was analogous to the *Wheaton* order. *See Zubik v. Burwell*, 135 S. Ct. 2924 (2015). And in entering the most recent remand orders in *Zubik* and the other parallel cases, the Court once again quoted and incorporated the terms of the order that had allowed the government to require Wheaton College's insurers and TPAs to provide contraceptive coverage to its employees and students. *See Zubik*, 136 S. Ct. at 1560-61. Accordingly, in the cases remanded by the Supreme Court, the Departments have notified the issuers and TPAs

that were identified in the litigation of their obligation to make or arrange separate payments for contraceptives, without cost to or involvement by the plaintiffs.

3. The Supreme Court's direction in the *Zubik* opinion and the related orders reflected the Court's considered judgment about the appropriate treatment of the parties during the pendency of the litigation. The Departments respectfully submit that the Supreme Court's judgment about appropriate interim relief applies equally to this case, and that the parties to all of the pending RFRA challenges to the accommodation should be treated in the same manner while the cases remain pending.

For all of these reasons, we respectfully request that this Court issue an order that is materially identical to the remand orders issued by the Supreme Court, *Zubik*, 136 S. Ct. at 1560-61, which would provide:

> Nothing in this Court's prior opinions or orders, or in the opinions or orders of the court below, is to affect the ability of the Government to ensure that women covered by plaintiffs' health plans "obtain, without cost, the full range of FDA approved contraceptives." *Wheaton College v. Burwell*, 573 U.S. —, —, 134 S. Ct. 2806, 2807, 189 L. Ed. 2d 856 (2014). Through this litigation, plaintiffs have made the Government aware of their view that they meet "the requirements for exemption from the contraceptive coverage requirement on religious grounds." *Id.*, at —, 134 S. Ct., at 2807. Nothing in this Court's prior opinions or orders, or in the opinions or orders of the courts below, "precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage" going forward. *Ibid.* Because the Government may rely on this notice, the Government may not impose taxes or penalties on plaintiffs for failure to provide the relevant notice.

If this Court enters such an order, to the extent that plaintiffs have identified their insurance issuers and/or TPAs during the course of this litigation, the Departments can issue notifications to the issuers and/or TPAs pursuant to the regulations.[1]

Respectfully submitted,

MARK B. STERN
ALISA B. KLEIN
/s/ Joshua M. Salzman
JOSHUA M. SALZMAN
202-532-4747
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., NW, Rm. 7258
Washington, DC 20530

AUGUST 2016

[1] *See generally* 29 C.F.R. § 2590.715-2713A(b); 45 C.F.R. § 147.131(c). For the plaintiffs that have identified their plan as a self-insured church plan, the Departments will notify the TPA of the incentive available under the regulations to make or arrange separate payments for contraceptives. *See* 80 Fed. Reg. 41,318, 41,323 n.22 (July 14, 2015).

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2016, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Joshua M. Salzman
JOSHUA M. SALZMAN

IN THE SUPREME COURT OF THE UNITED STATES

No. 14A1065

MOST REVEREND DAVID A. ZUBIK, ET AL., APPLICANTS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON EMERGENCY APPLICATION TO RECALL AND STAY THE MANDATE OR ISSUE AN INJUNCTION PENDING THE RESOLUTION OF A PETITION FOR A WRIT OF CERTIORARI

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

The Solicitor General, on behalf of respondents, respectfully files this memorandum in opposition to the emergency application to recall and stay the mandate of the United States Court of Appeals for the Third Circuit or to issue an injunction pending the filing and disposition of a petition for a writ of certiorari.

STATEMENT

Under federal law, health coverage provided by employers and insurers generally must cover certain preventive health services, including contraceptive services prescribed for women

by their doctors. Applicants object to that requirement on religious grounds. As religious nonprofit organizations, applicants are either automatically exempt from the contraceptive-coverage requirement or eligible for regulatory accommodations that would allow them to opt out by providing notice of their objection. Applicants contend, however, that the accommodations themselves violate the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb et seq., because the government will require or encourage non-objecting third parties to provide separate contraceptive coverage to the affected women after applicants opt out. The court of appeals rejected applicants' RFRA challenge and denied a motion to stay its mandate pending the filing and disposition of a petition for a writ of certiorari.

1. The Patient Protection and Affordable Care Act (Affordable Care Act or Act), Pub. L. No. 111-148, 124 Stat. 119,[1] generally requires health insurance issuers and employers offering group health plans to cover certain preventive services without cost-sharing -- that is, without requiring copayments, deductibles, or coinsurance payments. 42 U.S.C. 300gg-13. The required services include "preventive care and screenings" for

[1] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

women "as provided for in comprehensive guidelines supported by" the Health Resources and Services Administration (HRSA), a component of the Department of Health and Human Services (HHS). 42 U.S.C. 300gg-13(a)(4); see Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Hobby Lobby). Congress included a specific provision for women's preventive health services "to remedy the problem that women were paying significantly more out of pocket for preventive care and thus often failed to seek preventive services." Priests for Life v. HHS, 772 F.3d 229, 235 (D.C. Cir. 2014), petition for reh'g en banc pending (filed Dec. 26, 2014); see Hobby Lobby, 134 S. Ct. at 2785-2786 (Kennedy, J., concurring).

In developing the required guidelines, HRSA relied on a list of services recommended by experts at the Institute of Medicine (IOM). See Hobby Lobby, 134 S. Ct. at 2762. IOM's recommendations included the "full range" of contraceptive methods approved by the Food and Drug Administration (FDA), which IOM found can greatly decrease the risk of unwanted pregnancies, adverse pregnancy outcomes, and other negative health consequences, and reduce medical expenses for women. IOM, Clinical Preventive Services for Women: Closing the Gaps 10, 102-110 (2011).

Consistent with IOM's recommendations, the HRSA guidelines include all FDA-approved contraceptive methods, as prescribed by

a health care provider. 77 Fed. Reg. 8725 (Feb. 15, 2012); see Hobby Lobby, 134 S. Ct. at 2762. Accordingly, the regulations adopted by the three Departments responsible for implementing the relevant provisions of the Affordable Care Act (HHS, Labor, and the Treasury) include those contraceptive methods among the preventive services that insurers and employers must cover without cost-sharing. 45 C.F.R. 147.130(a)(1)(iv) (HHS); 29 C.F.R. 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. 54.9815-2713(a)(1)(iv) (Treasury).[2]

2. The regulations requiring coverage of contraceptives include an automatic exemption for certain "religious employers." 45 C.F.R. 147.131(a). Incorporating a longstanding definition from the Internal Revenue Code, that exemption applies to "'churches, their integrated auxiliaries, and conventions or associations of churches,' as well as 'the exclusively religious activities of any religious order.'" Hobby Lobby, 134 S. Ct. at 2763 (quoting 26 U.S.C.

[2] Under the Affordable Care Act's grandfathering provision, health plans that have not made specified changes since the Act's enactment are exempt from many of the Act's reforms, including the requirement to cover preventive services. Hobby Lobby, 134 S. Ct. at 2763-2764; see 42 U.S.C. 18011. That exemption is a transitional measure, and the percentage of employees in grandfathered plans is steadily declining, having dropped from 56% in 2011, to 48% in 2012, to 36% in 2013, to 26% in 2014. Kaiser Family Found. & Health Research & Educ. Trust, Employer Health Benefits 2014 Annual Survey 7, 210 (2014).

6033(a)(3)(A)). In addition, the Departments have implemented regulatory accommodations "that seek[] to respect the religious liberty of [other] religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives" as employees of other organizations. Id. at 2759. Those accommodations are available to any nonprofit organization that "holds itself out as a religious organization" and that opposes covering some or all of the required contraceptive services "on account of religious objections." 45 C.F.R. 147.131(b); accord 26 C.F.R. 54.9815-2713A(a); 29 C.F.R. 2590.715-2713A(a). Eligible organizations can invoke the accommodations using either of two procedures: One set forth in regulations promulgated in July 2013, and another set forth in regulations promulgated in August 2014.

a. To opt out of the contraceptive-coverage requirement under the original accommodations, an organization need only "self-certify" its eligibility using a form provided by the Department of Labor and transmit that certification to a third party. Hobby Lobby, 134 S. Ct. at 2782; 78 Fed. Reg. 39,870 (July 2, 2013).

If the eligible organization purchases coverage for its employees from a health insurance issuer, it opts out by transmitting its self-certification to the issuer. An issuer

that receives such a certification is required to "provide separate payments for contraceptive services" for employees who want those services, "without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries." Hobby Lobby, 134 S. Ct. at 2763; see 45 C.F.R. 147.131(c)(2).

Rather than purchasing coverage from an insurance issuer, some employers "self-insure" by bearing the financial risk of employee health claims themselves. Those employers typically hire an insurance company or other outside entity to serve as a third-party administrator (TPA) responsible for processing claims and performing other administrative tasks. 78 Fed. Reg. at 39,879-39,880 & n.40. An eligible organization with a self-insured health plan opts out under the original accommodations by transmitting its self-certification to its TPA. The TPA ordinarily "must 'provide or arrange payments for contraceptive services' for the organization's employees without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries." Hobby Lobby, 134 S. Ct. at 2763 n.8 (quoting 78 Fed. Reg. at 39,893); see 29 C.F.R. 2590.715-2713A(b)(2). The TPA may obtain compensation for providing the required coverage from the federal government through a reduction in the fees insurers pay to participate on

federally-facilitated Exchanges created by the Affordable Care Act. Hobby Lobby, 134 S. Ct. at 2763 n.8.

The self-insured accommodation operates differently if the eligible organization's self-insured plan is a "church plan" defined in 29 U.S.C. 1002(33). Unless they elect to be covered, church plans are exempt from regulation under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 et seq. See 29 U.S.C. 1003(b)(2). The government's authority to require a TPA to provide contraceptive coverage under the accommodations derives from ERISA. 79 Fed. Reg. 51,095 n.8 (Aug. 27, 2014). Accordingly, if an eligible organization with a self-insured church plan invokes the accommodation by submitting a self-certification, its TPA is not legally required to provide contraceptive coverage to the organization's employees (though the TPA may seek reimbursement from the government if it chooses to provide such coverage voluntarily). Ibid.

In all cases, an organization that opts out under the accommodations has no obligation "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874. An eligible organization also need not inform plan participants or enrollees of the separate coverage provided by third parties. Instead, issuers and TPAs must provide such notice and must do so "separate from"

materials distributed in connection with the eligible organization's group health coverage. 29 C.F.R. 2590.715-2713A(d); 45 C.F.R. 147.131(d). The accommodations thus "effectively exempt[]" objecting organizations from the contraceptive-coverage requirement, while still ensuring that the organizations' employees receive the full scope of preventive health coverage to which they are entitled under federal law. Hobby Lobby, 134 S. Ct. at 2763.

b. In August 2014, the Departments augmented the original accommodations in light of this Court's interim order in Wheaton College v. Burwell, 134 S. Ct. 2806 (2014) (Wheaton). In that case, the Court granted an injunction pending appeal to Wheaton College, a nonprofit religious college that had challenged the original accommodations under RFRA. As a condition for injunctive relief, the Court required Wheaton to inform HHS in writing that it satisfied the eligibility requirements for the accommodations. Id. at 2807. The Court provided that Wheaton "need not use the form prescribed by the Government" and "need not send copies to health insurance issuers or [TPAs]." Ibid. But the Court also specified that "[n]othing in [its] order precludes the Government from relying on" the written notice provided by Wheaton "to facilitate the provision of full contraceptive coverage under the Act." Ibid. Accordingly, the Court emphasized that "[n]othing in [its] interim order affects

the ability of [Wheaton's] employees and students to obtain, without cost, the full range of FDA approved contraceptives." Ibid.

Although the interim order in Wheaton cautioned that it "should not be construed as an expression of the Court's views on the merits," 134 S. Ct. at 2807, the Departments augmented the original accommodations to provide other eligible organizations with an option equivalent to the one the Court's injunctive order made available to Wheaton. Under interim final regulations promulgated in August 2014, an eligible organization may opt out of the contraceptive-coverage requirement by notifying HHS rather than by sending a self-certification to its insurer or TPA. 79 Fed. Reg. at 51,092. An organization need not use any particular form and need only indicate the basis on which it qualifies for the accommodations, as well as the type of plan it offers and contact information for the plan's insurance issuers and TPAs. Id. at 51,094-51,095; see 29 C.F.R. 2590.715-2713A(b)(1)(ii)(B) and (c)(1); 45 C.F.R. 147.131(c)(1).

If an eligible organization notifies HHS that it is opting out using this alternative method, the Departments make the necessary communications to ensure that the organization's issuers or TPAs make or arrange separate payments for contraceptive services for employees and beneficiaries who want such services. 45 C.F.R. 147.131(c)(2) (insured plans); 29

C.F.R. 2590.715-2713A(b)(2) (self-insured plans). As with the original accommodations, an eligible organization that opts out plays no role in the provision of contraceptive coverage and has no obligation to inform plan participants or enrollees of the availability of the separate payments made by third parties. 79 Fed. Reg. at 51,094-51,095.

3. Applicants are two Catholic Bishops, two Catholic Dioceses, and several nonprofit organizations affiliated with the Dioceses. Appl. App. A24. Applicants provide health coverage for their employees through self-insured plans administered by TPAs, but they object on religious grounds to covering contraceptive services. Id. at A25. The Dioceses are houses of worship under the Internal Revenue Code and are therefore automatically exempt from the contraceptive-coverage requirement under 45 C.F.R. 147.131(a). See pp. 4-5, supra.[3] The affiliated nonprofit organizations are eligible to opt out under the accommodations. Appl. App. A11.

Applicants have not indicated whether their self-insured plans are "church plans" exempt from ERISA under 29 U.S.C. 1003(b)(2). The consequences that would follow if applicants

[3] Applicants have indicated that the Diocese of Pittsburgh's plan is not subject to the contraceptive-coverage requirement for the additional reason that it is a grandfathered plan. 2:13-cv-1459 Docket entry No. 1, at 9 (Oct. 8, 2013); see 42 U.S.C. 18011.

invoked the accommodations are thus unclear: If their plans are subject to ERISA regulation, applicants' TPAs would be required to provide separate payments for contraceptive services for employees and beneficiaries who want such services. If, instead, the plans are church plans exempt from ERISA, the TPAs would be under no legal obligation to provide such coverage (though they could choose to do so voluntarily and seek reimbursement from the government). 79 Fed. Reg. at 51,095 n.8. There is no indication that applicants' TPAs object to providing separate contraceptive coverage.

4. Applicants challenged the accommodations in two suits filed in the U.S. District Court for the Western District of Pennsylvania. As relevant here, applicants contended that RFRA entitles them not only to opt out of providing contraceptive coverage themselves, but also to prevent their TPAs from providing applicants' employees with separate coverage after applicants opt out. The district court agreed, granting preliminary and then permanent injunctive relief. Appl. App. A25-A27; see id. at D1-D29.

5. The court of appeals reversed. Appl. App. A1-A49.[4] RFRA provides that the government may not "substantially burden

[4] The court of appeals consolidated applicants' cases with the government's appeal of preliminary injunctions granted to

a person's exercise of religion" unless that burden is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1(a) and (b). The court held that applicants are not entitled to relief under RFRA because the accommodations do not impose a substantial burden on their exercise of religion.

The court of appeals began by distinguishing this Court's decision in Hobby Lobby, which held that the contraceptive-coverage requirement violated RFRA as applied to closely held for-profit corporations that were not eligible for the accommodations. Appl. App. A32-A34. The court explained that, unlike the plaintiffs in Hobby Lobby, applicants can invoke the accommodations and "avoid both providing contraceptive coverage to their employees and facing penalties for noncompliance." Id. at A34. The court emphasized that under the accommodations, eligible organizations have "no role whatsoever in the provision of the objected-to contraceptive services." Id. at A35. Instead, the coverage is provided separately by third parties -- the organizations' insurers and TPAs. Id. at A35-A38.

The court of appeals explained that applicants do not object to notifying their TPAs (or the government) that they

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Geneva College, another nonprofit organization challenging the accommodations under RFRA. Appl. App. A11, A20-24.

oppose the provision of contraceptive-coverage and qualify for the accommodations. Appl. App. A29, A37. Instead, applicants' "real objection is to what happens after the [notice] is provided -- that is, to the actions of the [TPAs], required by law, once [applicants] give notice of their objection." Id. at A38. Those TPAs are not parties to these suits and apparently have not objected to providing contraceptive coverage under the accommodation regulations. The court held that "RFRA does not grant [applicants] a religious veto against plan providers' compliance with those regulations, nor the right to enlist the government to effectuate such a religious veto against the legally required conduct of third parties." Id. at A38 (quoting Priests for Life, 772 F.3d at 251).[5]

6. The court of appeals denied applicants' petition for rehearing en banc and their motion to stay the mandate pending the filing and disposition of a petition for a writ of certiorari. Appl. App. B1-B3, C1.

[5] The court of appeals also rejected applicants' contention that the accommodations impermissibly "partition[] the Catholic Church" because the Dioceses are automatically exempt from the contraceptive-coverage requirement under 45 C.F.R. 147.131(a), whereas the affiliated nonprofit organizations are instead eligible to opt out under the accommodations. Appl. App. A46-A48. Aside from a passing footnote (Appl. 5 n.2), applicants do not renew that argument in this Court.

ARGUMENT

Applicants seek a stay of the court of appeals' mandate to allow the injunctions entered by the district court to remain in effect. "To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of the stay." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." Ibid. When, as in this case, the court of appeals has denied a stay, the applicant must "rebut the presumption that the decisions below -- both on the merits and on the proper interim disposition of the case -- are correct." Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers); see Magnum Import Co. v. Coty, 262 U.S. 159, 163-164 (1923).

Applicants cannot make the required showing. The court of appeals correctly rejected their RFRA claims, and its decision does not conflict with any decision of this Court or another court of appeals. To the contrary, identical RFRA challenges have been rejected by every court of appeals to consider them,

and the Court's decision in Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014), was premised on the availability of the accommodations as a less-restrictive alternative. There is thus no reasonable probability that this Court will grant certiorari and reverse the decision below.[6]

Unable to demonstrate that their forthcoming petitions will satisfy this Court's traditional criteria for certiorari review, applicants rely heavily on the order granting interim relief in Wheaton College v. Burwell, 134 S. Ct. 2806 (2014). But shortly after the Court issued that order, the Departments augmented the accommodations to provide all eligible organizations -- including applicants -- with an option materially equivalent to the one this Court made available to the applicant in that case. Wheaton thus confirms that the application should be denied. If, however, the Court concludes that interim relief is appropriate here, it should follow the path marked in Wheaton.

1. Applicants have not demonstrated that their claims warrant this Court's review. They do not and could not contend that the decision below conflicts with any decision by another

[6] Applicants' inability to satisfy the standards for a stay forecloses their alternative request for injunctive relief. See Respect Maine PAC v. McKee, 131 S. Ct. 445, 445 (2010) (an injunction "'demands a significantly higher justification' than a request for a stay") (quoting Ohio Citizens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312, 1313, (1986) (Scalia, J., in chambers)).

court of appeals. To the contrary, every circuit that has addressed the question -- both before and after Hobby Lobby -- has held that the accommodations are consistent with RFRA. See Appl. App. A44-A46; Priests for Life v. HHS, 772 F.3d 229, 246 (D.C. Cir. 2014), petition for reh'g en banc pending (filed Dec. 26, 2014); Michigan Catholic Conference & Catholic Family Servs. v. Burwell, 755 F.3d 372, 390 (6th Cir. 2014) (Michigan Catholic Conference), petition for cert. pending, No. 14-701 (filed Dec. 12, 2014); see also University of Notre Dame v. Sebelius, 743 F.3d 547, 559 (7th Cir. 2014), vacated, 135 S. Ct. 1528 (2015).[7]

Applicants note (Appl. 13-14 & n.5) that other courts of appeals have issued injunctions pending appeal in cases raising parallel challenges. But those interim orders neither establish circuit precedent nor predict the issuing courts' ultimate views on the merits. Motions panels of the Sixth and D.C. Circuits, for example, had granted similar interim relief before those courts ultimately rejected RFRA challenges to the

[7] In Notre Dame, this Court granted a petition for a writ of certiorari, vacated the decision below, and remanded for further consideration in light of Hobby Lobby. University of Notre Dame v. Burwell, 135 S. Ct. 1528 (2015). The Sixth Circuit's decision in Michigan Catholic Conference was also issued before Hobby Lobby, and the government has therefore acknowledged that the Court may wish to grant, vacate, and remand in that case as well. Br. in Opp. at 10, 21, Michigan Catholic Conference v. Burwell, No. 14-701 (filed Mar. 19, 2015). In this case, by contrast, the court of appeals' decision postdated and relied upon Hobby Lobby.

accommodations. See Michigan Catholic Conference, 755 F.3d at 398 ("We lift the stay temporarily issued by this court pending resolution of this appeal."); see also Priests for Life, 772 F.3d at 242. There is thus no disagreement in the lower courts warranting this Court's intervention.

2. Even if a grant of certiorari were reasonably probable, applicants fail to demonstrate the requisite likelihood that this Court would reverse the decision below. The court of appeals correctly held that the accommodations do not substantially burden applicants' exercise of religion. Applicants' RFRA claims also fail for the independent reason that the accommodations are the least restrictive means of furthering compelling governmental interests, including ensuring that women have full and equal access to preventive health services. And contrary to applicants' contentions, this Court's decision in Hobby Lobby confirms that the accommodations are consistent with RFRA.

a. The accommodations do not substantially burden applicants' exercise of religion. To opt out of the contraceptive-coverage requirement, those applicants that are not automatically exempt need only notify HHS or their TPAs that they object to providing contraceptive coverage on religious grounds. They would then be relieved of any obligation to provide, arrange, or pay for such coverage. Hobby Lobby, 134 S.

Ct. at 2763. Any obligation to provide separate contraceptive coverage would instead fall on their TPAs, who apparently have no objection to providing it.[8] The availability of the accommodations thus renders applicants "effectively exempt[]" from the contraceptive-coverage requirement. Ibid.

Applicants do not object to informing HHS or their TPAs that they have religious objections to providing contraceptive coverage. To the contrary, they conceded below that "the act of filling out or submitting [the self-certification form] itself does not impose a burden on their religious exercise." Appl. App. A29. Instead, applicants object "to what happens after the form is provided -- that is, to the actions of the [TPAs], required by law, once [applicants] give notice of their objection." Appl. App. A38. But, as the courts of appeals have recognized, "the inability to restrain the behavior of a third party that conflicts with [applicants'] religious beliefs does not impose a burden on [applicants'] exercise of religion" within the meaning of RFRA. Michigan Catholic Conference, 755 F.3d at 388 (citation and internal quotation marks omitted); accord Appl. App. A43-A44.

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[8] As explained above, if applicants' plans are church plans exempt from ERISA, their TPAs would be under no legal obligation to provide separate coverage, but could choose to do so and to seek reimbursement from the government. See pp. 10-11, supra.

Applicants assert (Appl. 21-26) that, by making this determination, the court of appeals impermissibly "substitute[d] its religious judgment for that of Applicants." That is incorrect. Citing Hobby Lobby, the court repeatedly emphasized that it was not "delving into [applicants'] beliefs" or questioning the sincerity of their religious objections to the accommodations. Appl. App. A31; see id. at A29. Instead, the court recognized that "[w]hether a burden is 'substantial' under RFRA is a question of law, not a question of fact," id. at A44, and it held that, as a legal matter, the government's imposition of "an independent obligation on a third party" cannot "impose a substantial burden on the exercise of religion," id. at A39-A40. In other words, the Third Circuit joined other courts of appeals in holding that "[r]eligious objectors do not suffer substantial burdens under RFRA where the only harm to them is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out." Priests for Life, 772 F.3d at 246; accord Michigan Catholic Conference, 755 F.3d at 388.

That holding follows directly from decisions establishing that a religious adherent "may not use a religious objection to dictate the conduct of the government or of third parties." Priests for Life, 772 F.3d at 246. This Court has made clear, for example, that the right to the free exercise of religion

"simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." Bowen v. Roy, 476 U.S. 693, 699 (1986); see Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-451 (1988).

For the same reason, "RFRA does not grant [applicants] a religious veto" against the actions of third parties, nor does it allow applicants "to control their employees' relationships with other entities willing to provide health insurance coverage to which the employees are legally entitled." Priests for Life, 772 F.3d at 251, 256. And while applicants sincerely believe that invoking the accommodations would render them complicit in objectionable conduct, RFRA does not permit them to collapse the legal distinction between requirements that apply to them and actions taken by the government and other third parties. Cf. Roy, 476 U.S. at 700 n.6 ("Roy's religious views may not accept this distinction between individual and governmental conduct. It is clear, however, that the Free Exercise Clause, and the Constitution generally, recognize such a distinction * * * ."") (citation omitted).

Applicants' description of the asserted burden imposed by the accommodations confirms that their objections are based on the conduct of third parties. Applicants object (Appl. 17-18) "to submitting the self-certification form" not because they

object to notifying their TPAs of their opposition to contraception, but rather "because of what is caused by that action" -- in other words, because the government requires or encourages non-objecting third parties to step in and provide the required coverage once applicants are excused.[9] Applicants also object (Appl. 18-20) to "maintain[ing] a contractual relationship with a third party that is obligated, authorized, and incentivized to provide contraceptive coverage." But applicants already contract with TPAs, and applicants have not suggested that their TPAs object to providing contraceptive coverage under the accommodations. The accommodations thus would not require applicants to change their conduct at all: They would continue to provide notice that they object to the provision of contraceptive coverage, and they would continue to play no role in covering it. The only difference would be that third parties would step in and provide coverage separate from

[9] Applicants are wrong to assert (Appl. 17) that "[i]t is undisputed that, by signing the self-certification form, Applicants authorize and designate their TPAs to provide the morally objectionable coverage." Eligible organizations "submit forms to communicate their decisions to opt out, not to authorize TPAs to do anything on their behalf," and "the objected-to services are made available because of the regulations, not because [the organizations] complete a self-certification." Priests for Life, 772 F.3d at 255. In any event, the augmented accommodations allow applicants to opt out without signing the self-certification form; they need only provide the requisite written notice of their objection to HHS. 79 Fed. Reg. at 51,094-51,095.

the health coverage sponsored by applicants. See Hobby Lobby, 134 S. Ct. at 2763 & n.8.[10]

Applicants' contention that the "exemption process itself imposes a substantial burden" on their exercise of religion is "paradoxical and virtually unprecedented." Priests for Life, 772 F.3d at 246 (citation omitted). Our Nation has a long history of allowing religious objectors to opt out and then requiring others to fill the objectors' shoes. The accommodations "work[] in the way such mechanisms ordinarily do: the objector completes the written equivalent of raising a hand," and the government then "arranges for other entities to step in and fill the gap as required to serve the legislatively mandated regime." Id. at 250.

Under applicants' view of RFRA, all such accommodations could be recast as substantial burdens on the objectors' exercise of religion. For example, "a religious conscientious objector to a military draft" could claim that being required to

[10] Applicants assert (Appl. 18-19) that, because their self-insured plans also include entities that are automatically exempt from the contraceptive-coverage requirement under 45 C.F.R. 147.131(a), invoking the accommodations would require them to provide their TPAs with the names of the individuals employed by the exempted organizations to ensure that those individuals do not receive separate coverage. But any need for such information is not a burden imposed by the accommodations; it is a function of the greater protection provided by the automatic exemption.

claim conscientious-objector status constitutes a substantial burden on his exercise of religion because it would "'trigger' the draft of a fellow selective service registrant in his place and thereby implicate the objector in facilitating war." Priests for Life, 772 F.3d at 246 (citation omitted). Similarly, the claimant in Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981), could have demanded not only that he not make weapons but also that he not be required to opt out of doing so, because opting out would cause someone else to take his place on the assembly line. See id. at 710-711; see also Appl. App. A38-A39 n.14. Applicants point to no authority endorsing such a sweeping understanding of RFRA.

b. In any event, even if applicants could establish a substantial burden on their exercise of religion, their RFRA claims would still fail because the accommodations are "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1(b)(2).

Applicants contend (Appl. 26-31) that the interests served by the contraceptive-coverage requirement and the accommodations are not compelling. The Court did not resolve that question in Hobby Lobby, but five Justices separately recognized that HHS had "ma[de] the case" that the contraceptive-coverage requirement "serves the Government's compelling interest in

providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee." 134 S. Ct. at 2785-2786 (Kennedy, J., concurring); accord id. at 2799-2800 & n.23 (Ginsburg, J., dissenting). Accordingly, as the D.C. Circuit explained in rejecting arguments identical to the ones applicants press here, Hobby Lobby supports the conclusion that the accommodations serve "the government's compelling interest in providing women full and equal benefits of preventive health coverage." Priests for Life, 772 F.3d at 264.

The accommodations are also the least restrictive means of furthering the interests at stake. By allowing applicants and other objecting organizations to opt out of any requirement "to contract, arrange, pay, or refer for contraceptive coverage," 78 Fed. Reg. at 39,874, "[t]he accommodation [procedure] requires as little as it can from the objectors while still serving the government's compelling interests." Priests for Life, 772 F.3d at 237.

Applicants contend (Appl. 33-34) that the government could instead provide their employees with contraceptive coverage through other programs. As an initial matter, the Departments lack the legal authority to adopt applicants' suggested

alternatives.[11] Those "alternatives" would thus deny full coverage of preventive services unless and until Congress enacted an entirely new program. "[I]n applying RFRA," however, "'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'" Hobby Lobby, 134 S. Ct. at 2781 n.37 (quoting Cutter v. Wilkinson, 544 U.S. 709, 720 (2005)). The free exercise of religion protected by RFRA cannot "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." Id. at 2787 (Kennedy, J., concurring).

Moreover, even if applicants' proposed alternatives were legally permissible, they would "substantially impair the government's interest[s]." Priests for Life, 772 F.3d at 265. At a minimum, the affected women would be required "to take steps to learn about, and to sign up for, a new government funded and administered health benefit." Hobby Lobby, 134 S.

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[11] For example, applicants assert (Appl. 34) that "nothing prevents the Government from allowing employees of religious objectors to purchase subsidized coverage (either for contraceptives alone, or full plans)" on the Affordable Care Act's health insurance Exchanges. But those Exchanges may only make available "qualified health plans" providing comprehensive coverage, and could not offer contraception-only policies. 42 U.S.C. 18031(d)(2)(B)(i); see 42 U.S.C. 18021(a)(1)(B); 78 Fed. Reg. at 39,882. And HHS could not allow applicants' employees to purchase subsidized comprehensive coverage because the Act's subsidies have income-based requirements and are generally unavailable to individuals eligible for coverage under employer-sponsored plans. 26 U.S.C. 36B(c)(2)(B), 5000A(f)(1)(B).

Ct. at 2783 (citation omitted). The resulting "financial, logistical, informational, and administrative burdens" on women seeking contraceptive coverage would defeat the central purpose of the Affordable Care Act's preventive-services requirement, which seeks to remove barriers to preventive care. Priests for Life, 772 F.3d at 265; see 78 Fed. Reg. at 39,888; cf. Reno v. American Civil Liberties Union, 521 U.S. 844, 874 (1997) (less-restrictive alternatives must be "at least as effective" as the challenged requirement). "Providing contraceptive services seamlessly together with other health services, without cost sharing or additional administrative or logistical burdens and within a system familiar to women, is necessary to serve the government's interest in effective access." Priests for Life, 772 F.3d at 265. The accommodations serve that interest while imposing the minimum possible burden on objecting organizations.

c. This Court's decision in Hobby Lobby confirms that the accommodations are consistent with RFRA. In that case, the Court held that the contraceptive-coverage requirement violated RFRA as applied to closely held for-profit corporations that were not eligible for the accommodations. 134 S. Ct. at 2785. Although the Court did not decide whether the accommodations "compl[y] with RFRA for purposes of all religious claims," id. at 2782, the availability of the accommodations formed the critical premise for the Court's decision. The Court noted that

the accommodations are a "less restrictive" alternative that "seek[] to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." Id. at 2759, 2782; see id. at 2786-2787 (Kennedy, J., concurring). And the Court repeatedly emphasized that the availability of the accommodations meant that its decision "need not result in any detrimental effect on any third party," 134 S. Ct. at 2781 n.37, because "[t]he effect of the HHS-created accommodation[s] on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero," id. at 2760; see id. at 2759, 2782-2783.[12]

This case is entirely different. If applicants' objections to the accommodations are sustained, there is no "existing, recognized, workable, and already-implemented framework to provide coverage." Hobby Lobby, 134 S. Ct. at 2786 (Kennedy, J., concurring). Instead, accepting applicants' objection would

[12] Consistent with Hobby Lobby, the Departments are currently engaged in notice-and-comment rulemaking on a proposal to extend the accommodations to "closely held for-profit entities" to ensure that employees of those companies have access to the coverage to which they are entitled under federal law. 79 Fed. Reg. at 51,121.

deny coverage to their employees -- and to the employees of all other similarly situated organizations -- absent "the imposition of a whole new program" by Congress. Ibid.

3. Applicants rely heavily (Appl. 1, 12-13) on this Court's order granting interim relief in Wheaton. In that case, the Court granted an injunction pending appeal to a plaintiff challenging the original accommodations, which required an eligible organization to make a certification directly to its insurer or TPA. 134 S. Ct. at 2807. But the Court required, as a condition for that relief, that Wheaton notify HHS in writing that it satisfied the eligibility requirements for the accommodations. Ibid. And the Court further provided that "[n]othing in [its] order preclude[d] the government from relying on this notice * * * to facilitate the provision of full contraceptive coverage under the Act." Ibid. The Court therefore emphasized that its grant of interim relief did not "affect[] the ability of [Wheaton's] employees and students to obtain, without cost, the full range of FDA approved contraceptives." Ibid. Consistent with the Court's interim order, the Departments have sent notifications to the insurers and TPAs for Wheaton's non-grandfathered employee health plans

describing their obligation to provide separate coverage under the applicable regulations.[13]

The Departments have now augmented the original accommodations to afford applicants here -- and all other eligible organizations -- an option materially equivalent to the one this Court's interim order provided for Wheaton. Like Wheaton, each applicant may now opt out by "inform[ing] [HHS] in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services." Wheaton, 134 S. Ct. at 2807. And like Wheaton, applicants "need not use [a] form prescribed by the Government" and "need not send copies to health insurance issuers or [TPAs]." Ibid.; see 29 C.F.R. 2950.715-2713A(b)(1)(ii)(B) and (c)(1); 45 C.F.R. 147.131(c)(1).

Applicants do not identify any material difference between the written notice required in Wheaton and the written notice

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[13] See 14-2396 Docket entry No. 42, at 6 (7th Cir. Jan. 12, 2015). The Departments inform us that they have sent similar notifications to the insurers and TPAs of eight other eligible organizations that have invoked the augmented accommodations since August 2014. With respect to Wheaton, the Departments were initially unable to send a notification to one of Wheaton's insurers (the issuer of its student health plan) because they lacked the necessary contact information. Id. at 6-7. The Departments later obtained the required information and intended to send the notification in February 2015. 14-2396 Docket entry No. 44, at 1 (7th Cir. Feb. 6, 2015). Due to an oversight, the notification was not sent then, but the Departments have informed us that it will be sent this week.

permitted under the augmented accommodations.[14] And because applicants already have available an option equivalent to the one this Court granted to a similarly situated party raising the same claim, Wheaton further confirms that there is no basis for staying the court of appeals' mandate and preserving the injunctions entered by the district court.[15]

If this Court nonetheless concludes that interim relief is warranted in this case, it should adhere to the approach it followed in Wheaton: The Court should grant an interim

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[14] Applicants note (Appl. 7 n.3) that the accommodations require additional administrative details, such as the names and contact information of the eligible organization's insurers and TPAs. But that information "represents the minimum information necessary" for the Departments to relieve the accommodated organizations of the requirement to provide contraceptive coverage and to notify insurers and TPAs of their obligation to provide separate coverage. 79 Fed. Reg. at 51,095. And in any event, applicants do not suggest that they have any greater religious objection to providing a notice containing those details than they would to providing the notice required by this Court's order in Wheaton.

[15] Applicants also rely (Appl. 1, 12-13) on this Court's order granting an interim injunction in Little Sisters of the Poor Home for the Aged v. Sebelius, 134 S. Ct. 1022 (2014) (Little Sisters). But that case involved unusual circumstances not present here: The applicants in Little Sisters provided coverage through a self-insured church plan exempt from ERISA, and their TPA (which was also a plaintiff) had made clear that it would not provide contraceptive coverage if the applicants invoked the accommodations. See Little Sisters of the Poor Home for the Aged v. Sebelius, No. 13-cv-2611, 2013 WL 6839900, at *10-*11, *13 (D. Colo. Dec. 27, 2013). The Court's interim order thus "did not affect any individual's access to contraceptive coverage." Wheaton, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting).

injunction conditioned on applicants' "inform[ing] the Secretary of Health and Human Services in writing that [they are] nonprofit organization[s] that hold [themselves] out as religious and ha[ve] religious objection to providing coverage for contraceptive services," and the Court should make clear that its order will not "affect[] the ability of [applicants'] employees" to obtain coverage for preventive services because HHS may "rely[] on this notice, to the extent it considers necessary, to facilitate the provision of full contraceptive coverage under the Act." 134 S. Ct. at 2807.[16] Such an approach is possible here because in this case, as in Wheaton, applicants have provided the identities of their TPAs during the course of the litigation.[17]

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[16] If the Court elects to grant applicants relief comparable to the relief it provided to Wheaton, it should enter an interim injunction rather than a stay of the court of appeals' mandate. The district court entered unconditional permanent injunctions against the enforcement of the contraceptive-coverage requirement, see Appl. App. E1-E4, and a stay of the mandate would leave those injunctions in place.

[17] See 1:13-cv-303 Docket entry No. 9-10, at 3 (Oct. 8, 2013); 2:13-cv-1459 Docket entry No. 4-11, at 3 (Oct. 8, 2013); see also Wheaton, 134 S. Ct. at 2815 (Sotomayor, J., dissenting). The other party to the Third Circuit appeals, Geneva College, is in a different position. Geneva has identified the insurer for its student plan, but the record does not appear to reflect the name of the insurer for its employee plan. Geneva has not yet filed an application for relief in this Court. To achieve the result contemplated in Wheaton, however, any interim relief granted to Geneva in response to a future application would need to be conditioned on Geneva

CONCLUSION

The application to stay the mandate of the court of appeals or to issue an injunction pending the filing and disposition of a petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

APRIL 2015

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providing a notice to HHS identifying the insurer for its employee plan.

No. 14A1065

IN THE SUPREME COURT OF THE UNITED STATES

MOST REVEREND DAVID A. ZUBIK, ET AL.;

Applicants,

v.

SYLVIA BURWELL, SECRETARY HEALTH AND HUMAN SERVICES, ET AL.,

Respondents,

Application from the U.S. Court of Appeals for the Third Circuit

(Nos. 14-1376 & 14-1377)

REPLY IN SUPPORT OF EMERGENCY APPLICATION TO RECALL AND STAY MANDATE OR ISSUE INJUNCTION PENDING RESOLUTION OF CERTIORARI PETITION

PAUL M. POHL
Counsel of Record
JOHN D. GOETZ
LEON F. DEJULIUS, JR.
IRA M. KAROLL
ALISON M. KILMARTIN
MARY PAT STAHLER
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219
(412)391-3939
pmpohl@jonesday.com

Counsel for Applicants

NOEL J. FRANCISCO
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939
njfrancisco@jonesday.com

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This Court should stay the Third Circuit's mandate and leave the district court's injunction in place pending certiorari in order to protect Applicants from being forced to violate their religious beliefs on pain of severe penalties. The Government concedes that Applicants will suffer irreparable harm in the absence of a stay. In addition, there is at least a "reasonable probability" that this Court will grant certiorari and reverse the lower court because this is a case of exceptional importance, the lower court's decision was clearly contrary to *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), and the circuit courts are divided on the critical doctrinal issues underlying this dispute. None of the Government's arguments warrants a contrary result.

I. THE DECISION BELOW CONFLICTS WITH *HOBBY LOBBY*

Hobby Lobby held that the Government substantially burdens religious exercise whenever it forces plaintiffs to "engage in conduct that seriously violates their religious beliefs" on pain of "substantial" penalties. *Hobby Lobby*, 134 S.Ct. at 2775-76. The regulations here do precisely that in at least two specific ways. First, they force Applicants to sign and submit an objectionable self-certification or notification document. Second, they force Applicants to maintain an objectionable contractual relationship with a company that will provide abortifacient and contraceptive coverage to their plan beneficiaries. It is undisputed that Applicants believe undertaking both of these actions would make them complicit in sin. But unless they undertake these actions, they are subject to massive penalties. This obviously establishes a "substantial burden" under *Hobby Lobby*, and the Government's contrary arguments are meritless.

A. The Government primarily argues that there is no substantial burden because the "accommodation" allows Applicants to "opt out" of the regulatory scheme, Opp. 17, but that is plainly false. The "accommodation" is not an "opt out" because it still requires Applicants to act in violation of their religious beliefs by submitting objectionable documentation and maintaining an objectionable contractual relationship. The document they must file does not free them from the regulatory scheme but obligates, authorizes, and incentivizes their own TPAs to provide the objectionable coverage. An "accommodation" that allows a plaintiff to avoid *one* way of violating its religious beliefs (paying for abortifacient and contraceptive coverage) by taking *different* actions that violate its beliefs (signing an objectionable form and maintaining an objectionable contractual relationship) is no "opt out" at all.

The accommodation thus contrasts sharply with the full exemption for qualifying "religious employers," which are not forced to take actions that violate their religious beliefs, and are free to contract with an insurance company or TPA to provide health plans consistent with their religious beliefs. Applicants are equally religious non-profit organizations, and the Government has not explained why they are not receiving the same treatment the Government has given these other religious employers. As *Hobby Lobby* noted, the Government's decision to fully exempt an artificial category of "religious employers"—regardless of whether they even object to providing contraceptive coverage—is "not easy to square" with its refusal to exempt other religious groups such as Applicants, who actually do object

to participating in the provision of abortifacient and contraceptive coverage. 134 S.Ct. at 2777 n.33. The Government has offered no persuasive reason for "distinguishing between different religious believers—burdening one while [exempting] the other—when [the Government] may treat both equally by offering both of them the same [exemption]." *Id.* at 2786 (Kennedy, J., concurring).[1]

B. Citing *Bowen v. Roy*, 476 U.S. 693 (1986), the Government also asserts that Applicants' *real* objection is not to actions *they* are compelled to take, but rather to "the government's imposition of 'an independent obligation on a third party." Opp. 19-20. That is false. Applicants vigorously object to acts that *they themselves* are compelled to take, namely: (1) signing and submitting the required self-certification or notification form and (2) taking steps to maintain an objectionable contractual relationship, including providing their TPAs with the names of their plan beneficiaries so the TPAs can offer abortifacient and contraceptive coverage to Applicants' plan beneficiaries. Indeed, the Government has *stipulated* that Applicants object to being forced to take these actions that would obligate, authorize, or incentivize their TPA to provide the objectionable coverage *through Applicants'* health plans. Appl. 24. Applicants are thus not "'aggrieved'" by their "'inability to restrain the behavior of . . . third part[ies] that

[1] The Government notes that the Diocese of Pittsburgh has a grandfathered plan, Opp. 10 n.3, but Catholic Charities' plan, which is operated by Bishop Zubik and the Diocese, is not grandfathered. Compl. ¶ 45. Moreover, the separate grandfathered plan provides health insurance to various Diocesan-affiliated entities that do not qualify for the religious-employer exemption. Accordingly, even though the Diocese is grandfathered, as the district court found, absent relief from this Court, the Diocese will face immediate harm. 983 F. Supp. at 582-83; JA380 ¶ 15; JA390-91 ¶ 18.

conflicts with [their] religious beliefs.'" Opp. 18,19. Rather, Applicants are aggrieved because the Government is affirmatively compelling *them* to violate their beliefs.

Hobby Lobby, moreover, rejected the Government's similar attempt to recast a plaintiff's religious objection into an objection to the actions of third parties. There, the Government argued that the plaintiffs had no cognizable RFRA objection because "the ultimate event that [the plaintiffs] f[ou]nd morally wrong—the destruction of an embryo"—would occur only as a result of independent actions taken by third parties. 134 S.Ct. at 2777 & n.33. The Court recognized that the Government's argument "dodge[d] the question that RFRA presents" because it refused to acknowledge the plaintiffs' religious objections were based on their perceived moral duty to avoid "enabling or facilitating the commission of an immoral act by another." *Id.* at 2778. The same is true here.

C. The Government further distorts Applicants' religious beliefs, asserting that "Applicants do not object to informing HHS or their TPAs that they have religious objections to providing contraceptive coverage." Opp. 18. Applicants, however, manifestly *do* object filing the self-certification or notification *in the context of this regulatory regime*, in which Applicants' actions are a necessary component of delivering objectionable products and services to their plan beneficiaries as a result of their enrollment in Applicants' health plans. The Government nevertheless belittles Applicants' objections as limited only "'to what happens after the form is provided"—that is, the provision of abortifacient and contraceptive coverage to Applicants' plan beneficiaries. Opp. at 13. But there is no

authority for the bizarre notion that RFRA does not protect the religious exercise of plaintiffs who object to taking certain actions because of their consequences. The consequences of an action, or the context in which the action takes place, are obviously relevant to whether the action itself is morally acceptable. *See Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 714-15 (1981) (plaintiff had no objection to manufacturing steel, but did object to manufacturing steel that would be used in tank turrets).

As this Court emphasized in *Hobby Lobby*, RFRA protects "*any* exercise of religion," 134 S. Ct. at 2762 (emphasis added), and it is left to *plaintiffs*, not courts, to determine whether compelled conduct—though "innocent in itself"—is "connected to" wrongdoing "in a way that is sufficient to make it immoral." *Id.* at 2778. And here, in the context of *this* regulatory scheme, it is undisputed that Applicants believe that taking the required actions would make them complicit in sin. *See, e.g.*, Appl. at 17-20 (describing Applicants' beliefs and citing the record).[2]

D. The Government argues that Applicants cannot object to complying with the regulations because Applicants "already contract with TPAs," and thus they will not be required to "change their conduct at all." Opp. 21. This too is wrong. First, it

[2] The Government notes that the Third Circuit "repeatedly emphasized that it was not 'delving into [applicants'] beliefs.'" Opp. 19. But whatever the Third Circuit claimed to be doing, by assessing whether compliance with the accommodation would make applicants "complicit in the provision of contraceptive coverage," Op. 44, it was engaging in an inherently religious inquiry. While it is certainly true that "whether a burden is 'substantial' under RFRA is a question of law, not a question of fact," Opp. 19, *Hobby Lobby* makes clear that such inquiry is limited to the substantiality *of the pressure* the Government imposes on the plaintiff to violate his beliefs. 134 S. Ct. at 2775-76.

ignores the requirement that Applicants sign and submit the Government-prescribed self-certification or notification—a religiously objectionable action they have never taken before. Second, it likewise ignores the fact that Applicants have never before been required to maintain a relationship with a TPA or sponsor a health plan that will provide abortifacient and contraceptive coverage to their employees. Indeed, they have always done precisely the opposite. Finally, it ignores the fact that an innocent relationship can become morally objectionable when the counterparty's behavior changes. It is not objectionable to give your friend a ride to the bank; it may become objectionable, however, if you learn that he plans to rob it. The same is true here: Applicants do not object to maintaining their insurance relationships *currently*, but they will object if their TPAs start providing contraceptive and abortifacient coverage to Applicants' plan beneficiaries.

E. The Government does not even attempt to defend the lower court's plainly erroneous assertion that TPAs have an "independent obligation" to provide the objectionable coverage. Indeed, if that were true, the Government would have no need to litigate this case or seek to force Applicants to take the actions required under the so-called "accommodation." The Government recognizes the difference between an "issuer" and TPA, see, e.g., Opp. at 6 ("Rather than purchasing coverage from an insurance issuer, some employers 'self-insure' . . . . [t]hose employers typically hire . . . a [TPA]."), and does not dispute that a TPA has no obligation to provide the objectionable coverage until an eligible organization submits a certification or notice. *Compare id*. at 2-3 (describing the issuer's statutory

obligation), *with id.* at 6-7 (describing the TPA's obligation after the insured acts). As Applicants have explained and the Government previously conceded, Appl. 25, any "obligation" to provide abortifacient and contraceptive coverage to Applicants' employees is entirely dependent on Applicants' submission of the objectionable documentation and maintenance of the objectionable relationship—the very actions Applicants are compelled to take on pain of substantial penalties.[3] *Hobby Lobby*, 134 S.Ct. at 2776-77. Consequently, the regulations force Applicants to play a central role in the delivery of abortifacient and contraceptive coverage to their plan beneficiaries.[4]

II. THE CIRCUITS ARE DIVIDED

For all the reasons stated above, there is "'a reasonable probability' that this Court will grant certiorari," and a "'a fair prospect' that the Court will then reverse the decision below." *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers). In addition, as this Court recognized in *Wheaton College v. Burwell*, the "Circuit Courts have divided on whether to enjoin" the accommodation for "religious

[3] The Government attempts to walk back its concession that a TPA's obligation to provide the objectionable coverage is dependent on the actions of Applicants. Opp. 21 n.9. Those stipulations, however, are binding. *E.g.*, *Christian Legal Soc'y v. Martinez*, 130 S.Ct. 2971, 2983-84 (2010) (rejecting a party's "unseemly attempt to escape from [a] stipulation").

[4] Contrary to the Government's assertion, Opp. 5, Applicants have not abandoned their argument that the regulations impermissibly split the Catholic Church by granting an exemption for its "worship" wing while denying an exception for its "charitable and educational" wing. *See* Appl. 5 n.2 (arguing for certiorari to address district court's holding that the regulatory scheme violates RFRA because it "gives an exemption to houses of worship, but not other religious organizations that operate as part of the exercise of the Catholic faith").

nonprofit organizations. " 134 S.Ct. 2806, 2807 (2014). The Government argues that the split is illusory because it is the product of "interim orders" that do not "establish circuit precedent." Opp. 16. The Government, however, fails to recognize that many of the injunctions granted by circuit courts mirror entrenched circuit precedent that is flatly contrary to the decision below as well as the decisions of the Sixth and D.C. Circuits.

For example, the Tenth Circuit's decision in *Diocese of Cheyenne v. Burwell*, 14-8040 (10th Cir. June 30, 2014), reflects the fact that in that circuit, RFRA's substantial-burden test turns solely on "the intensity of the coercion" to take *any* act "contrary to [sincere religious] beliefs." *Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir. 2013) (en banc), *aff'd*, 134 S.Ct. 2751. Likewise, the Eleventh Circuit's decision in *EWTN v. HHS*, 756 F.3d 1339 (11th Cir. 2014), aligns with circuit precedent indicating that there is a substantial burden whenever the Government imposes "significant pressure" on a religious adherent to take *any* action "'prohibited by [his] religion,'" including the filing of a form. *EWTN*, 756 F.3d at 1345 (Pryor, J., concurring) (quoting *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004)).

By contrast, the Third Circuit here declined to focus on "the intensity of the coercion faced by appellees," and instead undertook to "assess whether the appellees' compliance with the [regulations] does, in fact, . . . make them complicit in the provision of contraceptive coverage." Appx. A at 29-30. The court thus found no substantial burden because it believed the actions Applicants are undisputedly

forced to take do not do not *really* make Applicants complicit in sin. *Id.* at 34-40; *see also Priests for Life v. U.S.Dep't of Health & Human Servs.*, 772 F.3d 229, 256 (D.C. Cir. 2014)(stating that the "requirement that [plaintiffs file] a sheet of paper" "is not a burden that any precedent allows us to characterize as substantial," despite their sincere religious objection to doing so); *Michigan Catholic Conference v. Burwell* , 755 F.3d 372, 386 (6th Cir. 2014) ("all [plaintiffs] must do" is file a form).

As these cases illustrate, the conflict recognized in *Wheaton* arises from different circuits' adoption of incompatible tests to determine whether a regulation substantially burdens religious exercise**.** While the Tenth and Eleventh Circuits assess whether the *pressure* placed on a plaintiff to act contrary to his religious beliefs, the Third, Sixth, and D.C. Circuit's instead assess the *nature of the compelled act*. That conflict is squarely presented here and in need of resolution.

III. THE REGULATIONS CANNOT SURVIVE STRICT SCRUTINY

The Government claims not only that it has a compelling interest in providing contraceptive-and-abortifacient coverage for employees who choose to work for non-profit Catholic employers, but also that it has no viable way to provide such coverage independently of the Catholic employers' health plans. Both prongs of that argument are implausible, and they fail for several reasons.

A. The Government suggests that "five justices" found a compelling interest in *Hobby Lobby*. In fact, the majority and Justice Kennedy's concurrence merely "*assum[ed]*" *without deciding* that the Government has a compelling interest in providing contraceptive coverage in the context of *commercial* employers. 134 S.Ct.

at 2775-76; *id.* at 2786 (Kennedy, J., concurring) (emphases added). Even in that *commercial* context, the majority opinion (which Justice Kennedy joined) took pains to point out the multiple flaws in the Government's compelling-interest arguments, which remain equally flawed here. *Id.* at 2781-82.

B. Even if the Government could show a "compelling" interest in mandating employer-based coverage for abortifacients and contraceptives in the *commercial* context, the same interest does not apply here: The affected employees in this case have voluntarily chosen to work for avowedly religious Catholic non-profit groups that vociferously oppose abortion and contraception. Having made that choice, the employees cannot reasonably expect to receive "seamless" coverage for abortifacients and contraceptives as part of their employer-based health plans. At the very least, it is eminently reasonable for such employees to be expected to undertake modest steps to obtain such coverage so as not the force the Catholic employers for whom they work to undertake actions contrary to their sincerely held religious beliefs. Indeed, the Government concedes that despite bearing the burden of proof, it has offered *no evidence* to support its asserted interest in the specific context of avowedly religious non-profit employers. *See* Appl. 30-31.

C. The Government fails to explain how extending the existing "religious employer" exemption to Applicants could undercut any compelling interest in light of the numerous *other* employers (both religious and nonreligious) who are already exempt. Appl. 28-29. The Government does not even attempt to rebut the point that "[e]verything [it] says about exempt religious employers applies in equal measure to

non-exempt religious non-profits like Applicants," which makes it "difficult to see how the Government can preclude" consideration of a similar exemption here. *Id.*[5]

D. Despite the existing exemptions for *other* religious employers, the Government paradoxically insists that granting the same exemption for Applicants here would impose unacceptable "burdens" on employees who would not be able to obtain coverage for abortifacients and contraceptives through Applicants' employer-based health plans. Opp. 25. This argument fails because, as Applicants have demonstrated, the Government has many ways to provide the objectionable coverage without using Applicants' health plans as the conduit. *See* Appl. at 31-35.

E. The Government claims that it needs to commandeer Applicants' health plans because it "lack[s] the legal authority to adopt applicants' suggested alternatives." Appl. 24-25. But the entire point of strict scrutiny is that some laws and regulations must be struck down because the Government *could* enact less-restrictive alternatives. *E.g.*, *McCutcheon v. FEC*, 134 S.Ct. 1434, 1458 (2014); *see also Hobby Lobby*, 134 S.Ct. at 2781 ("[N]othing in RFRA . . . supports . . . drawing [a] line between the creation of an entirely new program and the modification of an existing program (which RFRA surely allows).").

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[5] Although the Government has baldly asserted that qualifying "religious employers" are more "likely" than other non-profit religious groups "to employ people of the same faith who share the same objection" to "contraceptive services," 78 Fed. Reg. 39,870, 39,874 (July 2, 2013), the Government has submitted no evidence to support that notion. For example, the Government cannot explain why the employees of a Catholic school incorporated as part of a diocese are more "likely" share Catholic beliefs about abortion and contraception than employees of a Catholic school that is incorporated separately.

F. The Government asserts that using alternative means to provide the objectionable coverage independently of Applicants' health plans would be unworkable because it would not be a "system familiar to women," and would impose "administrative or logistical burdens" by requiring women to sign up for free benefits provided directly by the Government. Appl. 26 (quoting *Priests for Life*, 772 F.3d at 265. In other words, the Government claims that it can force Applicants to violate their religious conscience simply to ensure that women do not have to take what the D.C. Circuit described as "minor added steps" to receive *free* abortifacient and contraceptive coverage. *Priests for Life*, 772 F.3d at 265. Ultimately, then, the Government's asserted "compelling interest" is not the much-touted need to *provide* free contraceptive coverage, but instead its desire to conscript religious objectors to help provide the coverage more *conveniently*. That cannot possibly be enough to satisfy the "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). And notably, despite bearing the burden of proof on this point, the Government has provided *no* evidence that the "minor added steps" it posits would actually impede women's efforts to obtain free contraceptives in any significant way. *See* Appl. 32-35.

G. The Government claims that the revised regulations are just like the injunctive relief granted in *Wheaton*. *See* Appl. 28-31. That is false. Unlike the *Wheaton* injunction, which freed the plaintiff from having to take *any* religiously objectionable action, the regulations here do *not* allow Applicants to "opt out," but instead force them to sign and submit an objectionable document and then maintain

an objectionable contractual relationship. By contrast, the plaintiff in *Wheaton* did not object to filing the notice required under that injunction, which did not trigger any obligation, authority, or incentives for the plaintiff's TPA to provide the objectionable coverage.[6]

The Government emphasizes *Wheaton*'s statement that the Government could "rely" on the notice "to facilitate the provision of full contraceptive coverage," and that Wheaton's plan beneficiaries could still "obtain, without cost, the full range of FDA approved contraceptives." Opp. 28 (quoting 134 S.Ct. at 2807). But that merely recognized that the Government could provide the objectionable coverage independently of Wheaton College's plan, through many less-restrictive alternatives. The Court did not state that the Government had independent authority to force Wheaton's insurers to provide the objectionable coverage (which it clearly does not). And even if the Court believed that Wheaton would have no objection to maintaining a relationship with its insurers while they delivered the coverage, that would be irrelevant here because Applicants *do* object. 134 S.Ct. at 2778.

IV. THE GOVERNMENT'S PROPOSED INJUNCTION IS INADEQUATE

The Government acknowledges that "[t]he district court entered unconditional permanent injunctions against the enforcement of the contraceptive-coverage requirement, and a stay of the mandate would leave those injunctions in

[6] Contrary to the Government's assertion, Opp. 29-30, Applicants *do* object to the new notification option and *have* explained how it differs materially from the *Wheaton* notice, *see* Appl. 6-7 n.3. The Government claims that the information required is "the minimum information necessary" to grant an exemption, Opp. 30 n.14, but that is wrong: neither Wheaton College, the Little Sisters, nor exempt "religious employers" are required to provide this information.

place." Opp. 31 n.16. Nonetheless, even though the standard for a stay is lower than the standard for an injunction, the Government argues that this Court should not grant a stay but instead issue a limited injunction requiring Applicants to send a notice to the Government and allowing the Government to force Applicants' TPAs to provide the objectionable coverage to Applicants' plan beneficiaries.

A stay should issue, rather than an injunction, for two reasons. First, Applicants are seeking a stay of the mandate, not the injunction proposed by the Government. If the Court believes Applicants meet the standard for such a stay—and they clearly do—it should accord the relief requested, and not reach Applicants' alternative request for an injunction, which the Government concedes has a higher standard. Opp. at 16 n.6. Second, the injunction proposed by the Government would not resolve the dispute in this case. Unlike when this Court issued the *Wheaton* order, the Government has now made clear that it is treating a notification under the *Wheaton* order as identical to the notification under the accommodation to which Applicants vigorously object. *See* Opp. 29-30 &nn 13-14. Being forced to file that notification, therefore, would impose the same burden on Applicants' religious exercise as compliance with the "accommodation." In addition, Applicants would object to maintaining a contractual relationship with their TPAs while the TPAs provide the objectionable coverage to Applicants' plan beneficiaries. Accordingly, this Court should grant the relief that Applicants have actually requested—namely, a stay of the Third Circuit's mandate.

Finally, granting a stay here would best ensure the orderly resolution of the vitally important question of religious liberty presented by this case and many like it around the country. A stay will not impose any lengthy delay because this Court currently has pending before it a fully briefed petition for certiorari raising the same issues. *See Mich. Catholic Conf. v. Burwell*, No. 14-701 (distributed for April 24, 2015 conference). There are numerous others that will likewise be before the Court in the near future.[7] This Court, therefore, will likely soon resolve this issue, either in this case or in one of the numerous others being litigated nationwide. But this issue should not be resolved through inaction, which could result in non-profit religious organizations like Applicants being forced to engage in conduct that the Government concedes is contrary to their sincerely held religious beliefs before this Court even has an opportunity to weigh in on the matter.

CONCLUSION

For the foregoing reasons, Applicants respectfully ask this Court to stay the Third Circuit's mandate and leave the district court's injunction in place pending consideration of Applicants' forthcoming petition for certiorari.

[7] *E.g.*, *Roman Catholic Archbishop of Washington v. Burwell*, Nos. 13-5371 & 14-5021 (D.C. Cir.) (fully briefed petition for rehearing en banc); *Diocese of Fort Wayne-South Bend v. Burwell*, No. 14-1431 (7th Cir.) (oral argument held on December 3, 2014); *Roman Catholic Archdiocese of N.Y. v. Burwell*, No. 14-427 (2d Cir.) (oral argument held on January 22, 2015); *Roman Catholic Archdiocese of Atlanta v. Burwell*, No. 14-13239 (11th Cir.) (oral argument held February 4, 2015).

Respectfully submitted,

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/s/ Paul M. Pohl

PAUL M. POHL
Counsel of Record
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219
Telephone: (412) 391-3939
pmpohl@jonesday.com

Counsel to Applicants