IN THE SUPREME COURT OF THE UNITED STATES

No. 13A691

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, A COLORADO NON-PROFIT CORPORATION, ET AL., APPLICANTS

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON EMERGENCY APPLICATION FOR AN INJUNCTION PENDING APPELLATE REVIEW OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI AND INJUNCTION PENDING RESOLUTION

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

The Solicitor General, on behalf of respondents, respectfully files this memorandum in opposition to the emergency application for an injunction pending appellate review or, in the alternative, a petition for a writ of certiorari before judgment and injunction pending resolution.

INTRODUCTION

Applicants are non-profit nursing homes that provide health coverage to their employees through a self-insured church plan, the plan itself, and the third-party administrator that

administers the plan. Applicants challenge, under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb et seq., regulations establishing minimum women's preventive-health coverage requirements under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, insofar as they include contraceptive coverage.

Applicants are not, however, situated like the for-profit corporations that brought suit in Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir.) (en banc), cert. granted, 134 S. Ct. 678 (2013). As applicants acknowledge (Compl. ¶ 198), the employer-applicants here are eligible for religious accommodations set out in the regulations that exempt them from any requirement "to contract, arrange, pay, or refer for contraceptive coverage." 78 Fed. Reg. 39,874, 39,879 (July 2, 2013). They need only self-certify that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, and then provide a copy of their self-certification to the third-party administrator of their self-insured group health plan. See id. at 39,874-39,886; see also 29 C.F.R. 2590.715-2713A(b). At that point, the employer-applicants will have satisfied all their obligations under the contraceptive coverage provision. Thus, as this case comes to the Court, it is not about the availability or adequacy of a religious accommodation,

but rather about whether a religious objector can invoke RFRA to justify its refusal to sign a self-certification that secures the very religion-based exemption the objector seeks.

Applicants have no legal basis to challenge the self-certification requirement or to complain that it involves them in the process of providing contraceptive coverage. As both of the lower courts recognized, this case involves a church plan that is exempt from regulation under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1003(b)(2). Employer-applicants' third-party administrator therefore will be under no legal obligation to provide the coverage after applicants certify that they object to providing it. If employer-applicants' third-party administrator were nevertheless to decide to provide contraceptive coverage, applicants' employees and their covered dependents would receive such coverage <u>despite</u> applicants' assertion of their religious objections, not because of those objections.

In this case, however, as both of the lower courts again recognized, the third-party administrator of applicants' church plan says it will <u>not</u> provide contraceptive coverage. As a result, a signed certification will discharge all employer-applicants' responsibilities under the contraceptive-coverage provision, and their employees will not receive such coverage from the third-party administrator. Given these circumstances,

applicants' concern that they are "authorizing others" to provide coverage lacks any foundation in the facts or the law.

In sum, applicants claim a right to extraordinary relief even though compliance with the procedure they challenge will not result in anyone else's provision of the items and services to which applicants object. Nothing in RFRA supports such a sweeping claim, and applicants' right to relief in these circumstances is certainly not "indisputably clear," Wisconsin Right to Life, Inc. v. Federal Election Comm'n, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers). The application should be denied.

STATEMENT

1. a. Most Americans with private health coverage obtain it through an employment-based group health plan. See Congressional Budget Office, Key Issues in Analyzing Major Health Insurance Proposals 4 & Tbl. 1-1 (2008). The cost of such employment-based health coverage is typically covered by a combination of employer and employee contributions, id. at 4, with the employer's share serving as "part of an employee's compensation package," Liberty Univ., Inc. v. Lew, 733 F.3d 72, 91 (4th Cir.), cert. denied, No. 13-306 (Dec. 2, 2013) (citation omitted).

The federal government subsidizes group health plans through favorable tax treatment. While employees pay income and

payroll taxes on their cash wages, they typically do not pay taxes on their employer's contributions to their health coverage. 26 U.S.C. 106 (2006 & Supp. V 2011).

Congress also has established certain minimum coverage standards for group health plans. For example, in 1996, Congress required such plans to cover certain benefits for mothers and newborns. See 42 U.S.C. 300gg-4 (Supp. II 1996); 26 U.S.C. 9811 (Supp. III 1997); 29 U.S.C. 1185 (Supp. II 1996). In 1998, Congress required coverage of reconstructive surgery after covered mastectomies. 42 U.S.C. 300gg-6 (Supp. IV 1998); 29 U.S.C. 1185b (Supp. IV 1998).

b. In the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Affordable Care Act or Act),[1] Congress provided for additional minimum standards for group health plans and health insurers offering coverage in both the group and the individual markets.

i. The Act requires non-grandfathered group health plans to cover certain preventive-health services without cost sharing -- i.e., without requiring plan participants and beneficiaries to make copayments or pay deductibles or coinsurance. See 42 U.S.C. 300gg-13 (Supp. V 2011) (preventive-services coverage

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

provision).[2] "Prevention is a well-recognized, effective tool in improving health and well-being and has been shown to be cost-effective in addressing many conditions early." Institute of Medicine, Clinical Preventive Services for Women: Closing the Gaps 16 (2011) (IOM Report). Nonetheless, the American health-care system has "fallen short in the provision of such services" and has "relied more on responding to acute problems and the urgent needs of patients than on prevention." Id. at 16-17. To address this problem, the Act requires coverage of preventive services without cost sharing in four categories.

First, non-grandfathered group health plans must cover items and services that have an "A" or "B" rating from the U.S. Preventive Services Task Force (Task Force). 42 U.S.C. 300gg-13(a)(1) (Supp. V 2011). Items and services rated "A" or "B"

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[2] The preventive-services coverage provision applies to, among other types of health coverage, employment-based group health plans covered by ERISA, and, with respect to such plans, is subject to ERISA's enforcement mechanisms. 29 U.S.C. 1185d (Supp. V 2011). It is also enforceable through imposition of tax penalties on the employers that sponsor such plans. 26 U.S.C. 4980D; see 26 U.S.C. 9815(a)(1), 9834 (Supp. V 2011). With respect to health insurers in the individual and group markets, States may enforce the Act's insurance market reforms, including the preventive-services coverage provision. 42 U.S.C. 300gg-22(a)(1) (Supp. V 2011). If the Secretary of Health and Human Services determines that a State "has failed to substantially enforce" one of the insurance market reforms with respect to such insurers, she conducts such enforcement herself and may impose civil penalties. 42 U.S.C. 300gg-22(a)(2) (Supp. V 2011); see 42 U.S.C. 300gg-22(b)(1)(A) (Supp. V 2011); 42 U.S.C. 300gg-22(b)(2).

are those for which the Task Force has the greatest certainty of a net benefit for patients. 75 Fed. Reg. 41,733 (July 19, 2010).

Second, the Act requires coverage of immunizations recommended by the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention. 42 U.S.C. 300gg-13(a)(2) (Supp. V. 2011). The Committee has recommended routine vaccination to prevent a variety of vaccine-preventable diseases that occur in children and adults. 75 Fed. Reg. at 41,740, 41,745-41,752.

Third, the Act requires coverage of "evidence-informed preventive care and screenings" for infants, children, and adolescents as provided for in guidelines supported by the Health Resources and Services Administration (HRSA), which is a component of the Department of Health and Human Services (HHS). 42 U.S.C. 300gg-13(a)(3) (Supp. V 2011). The relevant HRSA guidelines include a schedule of examinations and screenings. 75 Fed. Reg. at 41,753-41,755.

Fourth, and as particularly relevant here, the Act requires coverage "with respect to women, [of] such additional preventive care and screenings" (not covered by the Task Force's recommendations) "as provided for in comprehensive guidelines supported" by HRSA. 42 U.S.C. 300gg-13(a)(4) (Supp. V 2011). Congress included this provision in response to a legislative

record showing that "women have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. 29,070 (2009) (statement of Sen. Feinstein); see IOM Report 18. In particular, "[w]omen of childbearing age spend 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. at 29,070 (statement of Sen. Feinstein). And women often find that copayments and other cost sharing for important preventive services "are so high that they avoid getting [the services] in the first place." Id. at 29,302 (statement of Sen. Mikulski); see IOM Report 19-20.

Because HRSA did not have such comprehensive guidelines for preventive services for women at the time of the Act's enactment, HHS requested that the Institute of Medicine (Institute or IOM) develop recommendations for it. 77 Fed. Reg. 8726 (Feb. 15, 2012); IOM Report 1. The Institute is part of the National Academy of Sciences, a "semi-private" organization Congress established "for the explicit purpose of furnishing advice to the Government." Public Citizen v. Department of Justice, 491 U.S. 440, 460 & n.11 (1989) (citation omitted); see IOM Report iv.

To formulate recommendations, the Institute convened a group of experts, "including specialists in disease prevention, women's health issues, adolescent health issues, and evidence-based guidelines." IOM Report 2. The Institute defined

preventive services as measures "shown to improve well-being, and/or decrease the likelihood or delay the onset of a targeted disease or condition." Id. at 3. Based on the Institute's review of the evidence, it recommended a number of preventive services for women, such as screening for gestational diabetes for pregnant women, screening and counseling for domestic violence, and at least one well-woman preventive care visit a year. Id. at 8-12.

The Institute also recommended as a preventive service for women the "full range" of "contraceptive methods" approved by the Food and Drug Administration (FDA), as well as sterilization procedures and patient education and counseling for all women with reproductive capacity. IOM Report 10; see id. at 102-110. FDA-approved contraceptive methods include oral contraceptive pills, diaphragms, injections and implants, emergency contraceptive drugs, and intrauterine devices (IUDs). FDA, Birth Control: Medicines To Help You, http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last visited January 2, 2014).

In making that recommendation, the Institute noted that nearly half of all pregnancies in the United States are unintended and that unintended pregnancies can have adverse health consequences for both mothers and children. IOM Report 102-103 (discussing consequences, including inadequate prenatal

care, higher incidence of depression during pregnancy, and increased likelihood of preterm birth and low birth weight). In addition, the Institute observed, use of contraceptives leads to longer intervals between pregnancies, which "is important because of the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced." Id. at 103. The Institute also noted that greater use of contraceptives lowers abortion rates. Id. at 105. Finally, the Institute explained that "contraception is highly cost-effective," as the "direct medical cost of unintended pregnancy in the United States was estimated to be nearly $5 billion in 2002." Id. at 107.

HRSA adopted guidelines consistent with the Institute's recommendations, including a guideline covering all FDA-approved contraceptive methods as prescribed by a health-care provider. HRSA, HHS, Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines/ (last visited January 2, 2014). The relevant regulations adopted by the three Departments implementing this portion of the Act -- HHS, Labor, and Treasury -- require coverage of, among other preventive services, the contraceptive services recommended in the HRSA guidelines. 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) (collectively referred to in this opposition as the contraceptive-coverage provision).

ii. The implementing regulations authorize an exemption from the contraceptive-coverage provision for the group health plan of a "religious employer." 45 C.F.R. § 147.131(a). A religious employer is defined as a non-profit organization that is referred to in the Internal Revenue Code provision regarding churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order. Ibid. (cross-referencing 26 U.S.C. 6033(a)(3)(A)(i) and (iii)).

In response to religious objections by additional employers after the Departments established the religious employer exemption, the Departments announced that they would develop changes "'that would meet two goals' -- providing contraceptive coverage without cost-sharing to covered individuals and accommodating the religious objections of [additional] non-profit organizations." Wheaton Coll. v. Sebelius, 703 F.3d 551, 552 (D.C. Cir. 2012) (per curiam) (quoting 77 Fed. Reg. 8727 (Feb. 15, 2012)).

After notice-and-comment rulemaking, the Departments published the current regulations, which provide religion-related accommodations for group health plans of eligible organizations. The accommodations are available for group health plans established or maintained by "eligible organizations" (and group health insurance coverage provided in

connection with such plans). See 78 Fed. Reg. at 39,874-39,886; 45 C.F.R. 147.131(b) (HHS); 29 C.F.R. 2590.715-2713A(a) (Labor); 26 C.F.R. 54.9815-2713A(a) (Treasury). An "eligible organization" is an organization that satisfies the following criteria:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under [45 C.F.R.] 147.130(a)(1)(iv) on account of religious objections.
>
> (2) The organization is organized and operates as a nonprofit entity.
>
> (3) The organization holds itself out as a religious organization.
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> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies.

45 C.F.R. 147.131(b); see 29 C.F.R. 2590.715-2713A(a); 26 C.F.R. 54.9815-2713A(a); 78 Fed. Reg. at 39,874-39,875.

Under these regulations, an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874. To be relieved of any such obligations, an eligible organization need only complete the self-certification (described in the regulation quoted above) stating that it is an eligible organization, and it then must provide a copy of that self-certification to its insurance issuer or third-party

administrator. Id. at 39,874-39,875; see, e.g., 29 C.F.R. 2590.715-2713A(a)(4), (b)(1) and (c)(1).

If an eligible organization chooses not to provide contraceptive coverage and completes such a self-certification averring its eligibility for an exemption from the requirement that it do so, the regulations generally provide another mechanism for the employees (and covered family members) to receive such coverage. If an eligible organization with a self-insured group health plan decides not to provide contraceptive coverage, its third-party administrator ordinarily must provide or arrange separate payments for contraceptive services if it "agrees to enter into or remain in a contractual relationship with the eligible organization or its plan." 29 C.F.R. 2590.715-2713A(b)(2). "The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services." 29 C.F.R. 2590.715-2713A(b)(1)(ii)(A). The third-party administrator is prohibited from imposing any premium, fee, or other charge, directly or indirectly, on the eligible organization or the group health plan with respect to payments for contraceptive services. See 78 Fed. Reg. at 39,879-39,880; 29 C.F.R. 2590.715-2713A(b)(2). Any costs incurred by the third-party administrator will instead be reimbursed through an adjustment to federally facilitated

exchange user fees at the third-party administrator's option. See 78 Fed. Reg. at 39,880; 29 C.F.R. 2590.715-2713A(b)(3). "A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such." 29 C.F.R. 2590.715-2713A(b)(4).[3]

An eligible organization also has no obligation to inform plan participants and beneficiaries of the availability of these separate payments. Instead, the third-party administrator must itself ordinarily provide such notice and do so "separate from" any materials "distributed in connection with" the eligible organization's group health coverage. See 78 Fed. Reg. at 39,880, 39,881; 29 C.F.R. 2590.715-2713A(d). That notice must make clear that the eligible organization is neither administering nor funding the contraceptive benefits. 78 Fed. Reg. at 39,881; 29 C.F.R. 2590.715-2713A(d).

The regulations establishing those procedures must be read against the backdrop of the underlying statutes that authorize

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[3] In a case (unlike this one) of an insured group health plan, the health insurance issuer, upon receipt of the self-certification, must provide separate payments to plan participants and beneficiaries for contraceptive services, and is prohibited from imposing any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization or on the group health plan with respect to the issuer's payments for contraceptive services. See 78 Fed. Reg. at 39,875-39,879; see, e.g., 45 C.F.R. 147.131(c)(2).

them. Of particular relevance here is the provision of ERISA providing that group health plans that are "church plan[s]" as defined in the statute are exempt entirely from regulation under ERISA (unless they elect to be covered). See 29 U.S.C. 1003(b)(2); see also 29 U.S.C. 1002(33) (definition of church plan); 26 U.S.C. 410(d) (election provision). Accordingly, in the absence of an election to be covered, there is no ERISA authority to regulate either the church plan or the third-party administrator of a self-insured church plan, and thus the third-party administrator is under no legal compulsion to provide contraceptive coverage where an eligible organization with a self-insured church plan invokes the accommodation. See District Court Order 29-30 (Dec. 27, 2013) ("Given [ERISA's] blanket exemption [for church plans], it would be unreasonable to require [the government] to specifically exempt church plans each time [it] promulgate[s] a new regulation under [its] ERISA authority. Clearly, therefore, given this regulatory framework, the fact that church plans are not specifically exempted from the requirements levied on third party administrators by the Final Rules does not mean that church plan third party administrators are bound to comply with these regulations.").

iii. The preventive-services coverage provision in general, and the contraceptive-coverage provision in particular, apply only if an employer offers a group health plan. Employers,

however, are not required to offer group health plans in the first place. Large employers (those with more than 50 full-time-equivalent employees) face a potential tax if they do not provide coverage, 26 U.S.C. 4980H (Supp. V 2011), but that gives them a "choice" between two legal options: provide a group health plan or risk payment of the tax. Liberty Univ., 733 F.3d at 98; cf. National Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2596-2597 (2012).

2. Applicants are Little Sisters of the Poor Home for the Aged, Denver, Colorado and Little Sisters of the Poor, Baltimore, Inc. (employer-applicants), which operate nursing homes and which are concededly eligible to opt out of any requirement that they furnish or pay for contraceptive coverage under the regulations described above, Compl. ¶¶ 11-15; Christian Brothers Employee Benefit Trust (plan-applicant or Trust), a self-insured church plan that provides health coverage to a number of Catholic organizations (including employer-applicants) and that is not subject to regulation under ERISA, Compl. ¶¶ 17-27; and Christian Brothers Services (third-party administrator-applicant), a third-party administrator that administers the Trust, Compl. ¶¶ 28-30. Applicants have also sought to certify a class of all present or future employers that provide group health coverage through the Trust church plan

and are eligible to opt out of furnishing contraceptive coverage under the regulations.

The employer-applicants contend that self-certifying their eligibility for the accommodation would "authorize" (e.g., Appl. 11) or "facilitate" (e.g., Appl. 16) the third-party administrator-applicant's provision of contraceptive coverage. On this basis, applicants claim that the regulations violate the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb et seq., which provides that the government shall not substantially burden a person's exercise of religion unless the application of that burden is the least restrictive means to advance a compelling governmental interest, 42 U.S.C. 2000bb-1(a) and (b).

a. The district court held that applicants have standing insofar as they will expend time reviewing the self-certification, District Court Order 14, but denied applicants' motion for a preliminary injunction because they had not demonstrated a substantial burden on their exercise of religion, see id. at 16-32. The court explained that, in contrast to the for-profit employers that brought suit in Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir.) (en banc), cert. granted, 134 S. Ct. 678 (2013), the employers here qualify as eligible organizations and therefore are exempt from any requirement to furnish or pay for contraceptive coverage if they

"sign[] the self-certification form and provid[e] [a copy] to Christian Brothers Services, their third party administrator." District Court Order 17-18. The court explained that, "[u]nder the 'eligible organizations' accommodation * * * , once [employer-applicants] complete the self-certification form and deliver it to their third party administrator, they have satisfied the [contraceptive-coverage provision's] requirements, and have no further obligations." Id. at 22.

Further, the district court explained that, under the regulatory scheme applicable to church plans, the third-party administrator of the plan at issue in this case likewise is not required "to contract, arrange for, or otherwise facilitate" contraceptive coverage. District Court Order 23. The court observed that, although the regulations state that third-party administrators will provide separate payments for contraceptive services if an eligible organization opts out of doing so, the statutory authority for this requirement "arises from ERISA," which exempts church plans, like the plan at issue here, from regulation under ERISA. Ibid. (citing 78 Fed. Reg. at 39,879-39,880 and 29 U.S.C. 1003(b)(2)). Thus, the court explained, the employer-applicants' third-party administrator is not required to provide separate payments for contraceptive services if employer-applicants invoke the accommodation. Ibid.

The district court rejected applicants' contention that opting out is nonetheless a substantial burden on their exercise of religion because doing so would "designate or authorize" their third-party administrator to provide contraceptive coverage. The court explained that the employers covered by the church plan must only complete the self-certification form and provide a copy to their third-party administrator. District Court Order 26. The court stated that the form itself "requires only that the individual signing it certify that her organization opposes providing contraceptive coverage and otherwise qualifies as an eligible organization" and that "nothing on the face of the Form expressly authorizes the provision of contraceptive care, particularly with regard to church plans." Id. at 28-29.

Further, the district court observed that "an eligible organization satisfies the Mandate by providing the self-certification form to [its] third party administrator, irrespective of whether that third party administrator is governed by ERISA, will act as a plan and claims administrator for contraceptive care, or will provide payments for contraceptive services." District Court Order 25. The district court explained that Christian Brothers Services administers a church plan that is "categorically exempt from ERISA," id. at 29, and is thus outside the scope of the regulatory authority

exercised in the governing regulations with respect to third-party administrators. Accordingly, although the third-party administrator could theoretically choose to provide contraceptive coverage in the manner set out in the regulations, the law does not require it to do so. And the employer-applicants' third-party administrator in this case (Christian Brothers Services), the court noted, does not currently cover contraceptive services, "and it does not intend to do so in the future." Id. at 24. Accordingly, if employer-applicants determine not to offer contraceptive coverage, their plan's participants and beneficiaries will not receive them from any other entity. Id. at 29.

b. The court of appeals denied applicants' motion for an injunction pending appeal. The court noted that the employer-applicants "may opt out" of the contraceptive-coverage provision "by completing a self-certification form and providing it to the third-party administrator, Christian Brothers Services," and that, "because the Trust is a self-insured 'church plan' exempt from ERISA, the third-party administrator, Christian Brothers Services, would not be subject to fines or penalties." Court of Appeals Order 1-2 (Dec. 31, 2013). Accordingly, the court explained, "there is no enforceable obligation -- through ERISA or otherwise -- for any of the [applicants] to provide any of the objectionable coverage." Id. at 2. The court therefore

concluded that, "[u]nder the unique factual circumstances of this case, * * * an injunction pending appeal at this stage is not warranted." Ibid.

ARGUMENT

Applicants fail to satisfy the demanding standard for the extraordinary and rarely granted relief they seek: an original injunction from this Court. They fail to demonstrate that an original injunction is necessary or appropriate in aid of this Court's jurisdiction or that they have an indisputably clear right to relief. In particular, with the stroke of their own pen, applicants can secure for themselves the relief they seek from this Court -- an exemption from the requirements of the contraceptive-coverage provision -- and the employer-applicants' employees (and their family members) will not receive contraceptive coverage through the plan's third-party administrator either. The application should be denied.

1. "The only source of authority for this Court to issue an injunction is the All Writs Act, 28 U.S.C. § 1651(a)." Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 642 (2012) (Sotomayor, J., in chambers). This Court's rules specify that an "extraordinary writ" under the All Writs Act "is not a matter of right, but of discretion sparingly exercised." Sup. Ct. R. 20.1. When an applicant asks the Court to issue such a writ, it faces an even greater burden than if it had sought a stay from

this Court of a lower court's order. See Turner Broad. Sys., Inc. v. FCC, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in chambers). "A Circuit Justice's issuance of an injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts,' and therefore 'demands a significantly higher justification' than that required for a stay." Lux v. Rodrigues, 131 S. Ct. 5, 6 (2010) (Roberts, C.J., in chambers) (quoting Ohio Citizens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312, 1313 (1986) (Ohio Citizens) (Scalia, J., in chambers)); see Respect Maine PAC v. McKee, 131 S. Ct. 445 (2010); Hobby Lobby Stores, 133 S. Ct. at 642-643. For that reason, the "injunctive power is to be used 'sparingly and only in the most critical and exigent circumstances.'" Ohio Citizens, 479 U.S. at 1313 (quoting Fishman v. Schaffer, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers)).

A writ of injunction is appropriate only if (1) an injunction is "necessary or appropriate in aid of" the Court's jurisdiction and (2) "the legal rights at issue are 'indisputably clear.'" Ohio Citizens, 479 U.S. at 1313-1314 (citations omitted). Applying these same standards, Justice Sotomayor denied an injunction pending appellate review in Hobby Lobby Stores, 133 S. Ct. at 642-643, concluding that neither

prerequisite for a writ of injunction had been met. The same result is warranted here.

2. An injunction is not necessary or appropriate in aid of this Court's jurisdiction. See Sup. Ct. R. 20.1. Here, as in Hobby Lobby Stores, "the applicants allege they will face irreparable harm" if they do not receive an injunction,[4] but that contention, even if correct, does not satisfy their obligation of demonstrating "that an injunction is necessary or appropriate to aid [this Court's] jurisdiction." 133 S. Ct. at 643. "Even without an injunction pending appeal, the applicants may continue their challenge to the regulations in the lower courts. Following a final judgment, they may, if necessary, file a petition for a writ of certiorari in this Court." Ibid.

The litigation in Hobby Lobby Stores after Justice Sotomayor denied the injunction in that case demonstrates that her conclusion that an injunction was not necessary or appropriate in aid of this Court's jurisdiction was correct. The plaintiffs continued to litigate their claim before the Tenth Circuit after denial of the injunction; that court addressed the merits of their RFRA claim in an en banc decision,

[4] Applicants state that "[i]t is black letter law that a violation of constitutional rights constitutes irreparable injury," Appl. 14 (emphasis added), but they advance only a statutory claim in this Court (under RFRA).

see Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (2013); and this Court granted the government's petition for a writ of certiorari requesting review of that decision, 134 S. Ct. 678 (2013). Applicants here may likewise continue to prosecute their appeal before the court of appeals in the event this Court denies an injunction and, if they do not succeed there, may seek further review from this Court.

Applicants state (Appl. 34) that denial of an injunction would "risk scuttling the process of review before [they] can complete the process of appellate review, including any further review by this Court," but they do not explain why that is so. Whether applicants choose to sign the certification form or not, they may continue to litigate their appeal. The controversy between the parties would remain live.

Even apart from this case, challenges to the Departments' accommodations for religious non-profits with religious objections to contraceptive coverage are pending in multiple courts of appeals. There is no reason to believe that this Court will not have the opportunity to consider a petition for a writ of certiorari involving such a challenge in the ordinary course.

3. Applicants' request for an injunction fails for the independent reason that it falls far short of demonstrating an

"indisputably clear" right to relief. Ohio Citizens, 479 U.S. at 1313-1314.

a. Justice Sotomayor's decision denying an injunction in Hobby Lobby Stores is again directly on point. In that decision, Justice Sotomayor determined that the applicants had not established that "their entitlement to relief [was] 'indisputably clear,'" because "lower courts ha[d] diverged on whether to grant temporary injunctive relief to similarly situated plaintiffs raising similar claims" and because "[t]his Court ha[d] not previously addressed similar RFRA or free exercise claims." 133 S. Ct. at 643 (quoting Lux, 131 S. Ct. at 6); see Lux, 131 S. Ct. at 7 (applicant failed to establish "indisputably clear" right to relief when he acknowledged that "the courts of appeals appear[ed] to be reaching divergent results in this area").

As applicants acknowledge (e.g., Appl. 5), a similar divergence of opinion among the lower courts is present here. District courts have reached conflicting results in decisions involving religious non-profits' RFRA challenges to the Departments' accommodations. See Appl. 17 n.10 (collecting cases). And "[i]n the subset of non-exempt religious non-profit cases analyzing 'church plans,'" -- the most immediately relevant category for purposes of this case, see pp. 27-33, infra -- applicants state that "the split on outcome has been

three to three." Appl. 38; see Appl. 38 n.18 (collecting cases).[5]

Courts of appeals considering requests for injunctions pending appeal in cases involving religious non-profits have likewise reached divergent results. The Sixth and D.C. Circuits have granted such injunctions (over dissents). See Order, Michigan Catholic Conference v. Sebelius, No. 13-2723 (6th Cir. Dec. 31, 2013) (Michigan Order); Order, Catholic Diocese of Nashville v. Sebelius, No. 13-6640 (6th Cir. Dec. 31, 2013) (Nashville Order)[6]; Order, Priests for Life v. United States Dep't of Health & Human Servs., No. 13-5368 (D.C. Cir. Dec. 31, 2013) (Priests for Life Order). But the Seventh Circuit, see Order, University of Notre Dame v. Sebelius, No. 13-3853 (7th Cir. Dec. 30, 2013) (Notre Dame Order), and the Tenth Circuit in this case have denied such injunction requests.

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[5] There is actually an additional district court decision granting a preliminary injunction in a case involving a self-insured church plan. See Catholic Diocese of Beaumont v. Sebelius, No. 1:13-cv-00709-RC (E.D. Tex. Dec. 31, 2013).

[6] Far from establishing that applicants' entitlement to relief is indisputably clear, the Sixth Circuit's orders actually say the opposite. That court stated that, "[g]iven the divergence of opinions and the arguable merit of both the plaintiffs' and the government's position, it is not clear that the accommodation violates the RFRA." Michigan Order 3 (emphasis added); see Nashville Order 5 (same).

This divergence of outcomes in the lower courts undermines applicants' attempt to demonstrate that their entitlement to relief is indisputably clear. And just as in Hobby Lobby Stores, where this Court had "not previously addressed similar RFRA or free exercise claims," 133 S. Ct. at 643, the "Court has never considered similar RFRA claims" to those advanced by applicants here. Michigan Order 2; see Nashville Order 4 (same).

b. Even putting aside the divergence of opinion in the lower courts and the lack of authority from this Court supporting applicants' claim, applicants fail to demonstrate that their entitlement to relief is indisputably clear.

i. This case involves a self-insured church plan that is not subject to regulation under ERISA and a third-party administrator that is under no legal obligation to provide contraceptive coverage and has made clear it will not do so. In these circumstances, a signed certification form by the employer-applicants will exempt those applicants from the requirement to furnish or pay for contraceptive coverage (and shield them from any tax liability for not doing so, see supra n.2), and the employees of the nursing homes they operate will not receive such coverage. "[T]here is no enforceable obligation -- through ERISA or otherwise -- for [Christian Brothers Services, the third-party administrator] to provide any

of the objectionable coverage." Court of Appeals Order 2. Moreover, Christian Brothers Services will not provide such coverage in the absence of a regulatory requirement; it is a party to this litigation, and "[t]he record is clear that Christian Brothers Services has no intention of delivering contraceptive, sterilization, and abortifacients to Little Sisters' employees, and no intention of contracting with another entity that will provide such services." District Court Order 30; see id. at 24, 31. Therefore, applicants lack any basis for concluding that plan participants and beneficiaries will receive contraceptive coverage if the employer-applicants complete the self-certification form. Id. at 32.[7]

[7] Applicants worry that the self-certification "could * * * be construed by a TPA [an acronym for a third-party administrator] as authorizing provision of contraceptives," Appl. 11, but such an abstract concern about what some hypothetical "TPA" might think is not relevant here. Employer-applicants' third-party administrator -- Christian Brothers Services -- is a party here, and, as applicants elsewhere acknowledge (Appl. 16; see District Court Order 24, 30, 31) would not provide the coverage if it received a copy of the certification. In a footnote (Appl. 24 n.14), applicants cryptically refer to another entity: Express Scripts, Inc., "which provides pharmaceutical claim administrative services under the Trust." This company is not discussed in either the district court or court of appeals decisions. Even assuming this entity is a third-party administrator, applicants' wholly unsupported speculation that it might rely on a self-certification as a basis for voluntarily providing contraceptive coverage to employer-applicants' employees (absent any regulatory compulsion to do so) does not provide any basis for an injunction. Applicants bear the burden of establishing their

RFRA requires a plaintiff to show, as a threshold matter, that a challenged regulation "substantially burden[s] [the plaintiff's] exercise of religion." 42 U.S.C. 2000bb-1(a). "[O]nly substantial burdens on the exercise of religion trigger the compelling interest requirement." Henderson v. Kennedy, 253 F.3d 12, 17 (D.C. Cir. 2001) (emphasis added). Whether a burden is "substantial" is a question of law, not a "question[] of fact, proven by the credibility of the claimant." Mahoney v. Doe, 642 F.3d 1112, 1121 (D.C. Cir. 2011); see, e.g., Bowen v. Roy, 476 U.S. 693, 701 n.6 (1986) ("[Plaintiff's] religious views may not accept this distinction between individual and governmental conduct," but the law "recognize[s] such a distinction"); Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008) ("[a]ccepting as true the factual allegations that [plaintiff's] beliefs are sincere and of a religious nature -- but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened").[8]

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entitlement to injunctive relief, and they have wholly failed to do so with respect to any possible coverage by Express Scripts.

[8] Courts do not "question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." Hernandez v. Commissioner, 490 U.S. 680, 699 (1989). But that area of prohibited inquiry is entirely distinct from the question whether a particular burden on the exercise of religion is substantial. The question of substantial burden is one of law

In this case, applicants' religious exercise is not substantially burdened by the requirement that they sign the certification form expressing their religious objection to contraceptive coverage in order to exempt themselves from the contraceptive-coverage provision. See District Court Order 23-32; see also Roman Catholic Archbishop of Washington v. Sebelius, No. 13-1441, 2013 WL 6729515, at *24-*26 (D.D.C. Dec. 20, 2013), injunction pending appeal granted, Priests for Life Order. As explained above, completion of that certification would result in the complete denial of coverage for the drugs and devices to which applicants object. Applicants are therefore simply wrong as a factual matter when they state (Appl. 19) that the self-certification would "be used to provide contraceptives, sterilization, and abortion-inducing drugs to their employees."

Applicants contend that the self-certification could end up leading to provision of contraceptive coverage if Congress were to amend the Affordable Care Act "at some point in the future" to grant the government "some authority outside of ERISA to enforce" the contraceptive-coverage provision or if the Departments "promulgate new regulations that apply to church

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for the courts, and they are not bound by a plaintiff's characterization. See ibid.; Roy, 476 U.S. at 701 n.6.

plans." Appl. 24 n.14 (quoting District Court Order 33). The district court correctly concluded that it should "not hypothesize or speculate about how such future changes" in the law "may impact" applicants, and that it was instead required to evaluate their claim "[g]iven the current version of the regulations, as applied to the facts of and parties to this case." District Court Order 33-34. And the court of appeals denied injunctive relief "[u]nder the unique factual circumstances of this case" and at "this stage" of the litigation. Court of Appeals Order 2-3. In the unlikely event that Congress were to enact the type of amendment contemplated by applicants, or if relevant new regulations were issued, applicants could renew their request for injunctive relief in light of the changed circumstances.

Although it is not entirely clear, applicants appear to separately contend that the requirement that the employer-applicants sign the self-certification form substantially burdens their religious exercise -- regardless of whether contraceptive coverage would actually be provided to their employees. See Appl. 23; Appl. 23 n.13 (contending that signing the self-certification constitutes "participating in this coverage scheme"). Applicants cannot establish that it is indisputably clear that such a RFRA claim would succeed. Indeed, that reading of RFRA, if accepted, would seemingly

invalidate any scheme in which an individual or entity with religious objections is required to complete a certification of entitlement to an opt-out in order to secure the opt-out. That cannot be correct.

Applicants draw flawed analogies when they say that under the court of appeals' reasoning, "Quaker conscientious objectors would suffer no penalties if they would just join the military; Jewish prisoners would suffer no burden if they would just eat the pork; Seventh Day Adventists would not lose their benefits if they would just work on Saturdays." Appl. 26-27. To mirror the situation here, the question in all of those cases would be whether the religious objector could be required to sign a certification form in order to secure the religion-based exemption he sought. It is applicants' position, not that of the court of appeals, that would lead to absurd results in those cases, for it would seemingly mean that the Quaker could not be made to attest to his status as a conscientious objector before being absolved of his military obligations; that the Jewish prisoner could not be required to fill out a form saying he had a religious objection to the consumption of pork before he was provided an alternative meal; and that the Seventh Day Adventist could not be obligated to state that he had a religious objection to working on Saturdays before being relieved of his shift.

When extending religious accommodations, the government must be allowed to provide for regularized, orderly means of permitting eligible individuals or entities to declare that they intend to take advantage of them. That is what the self-certification under the regulations accomplishes, and it does so by requiring only that employer-applicants say something that they have said repeatedly in this litigation, namely, that they object on religious grounds to providing contraceptive coverage to their employees. To interpret RFRA to negate even such a certification requirement would be extraordinary. Cf. Roy, 476 U.S. at 699-700 (no free-exercise right to dictate how the government conducts its internal affairs). At the very least, it is not indisputably clear that applicants would be entitled to relief on that sweeping theory.

ii. Applicants' RFRA claim would fail (and, a fortiori, applicants' entitlement to relief would not be indisputably clear) even if this case did not involve a church plan -- i.e., if, contrary to the circumstances here, contraceptive coverage might actually be provided by entities other than the objecting employers if the employers signed the self-certification. See Catholic Diocese of Nashville v. Sebelius, No. 3:13-01303, 2013 WL 6834375, at *4-*5 (M.D. Tenn. Dec. 26, 2013) (holding that employer had failed to establish substantial likelihood of success on such a claim), injunction pending appeal granted,

Nashville Order; University of Notre Dame v. Sebelius, No. 3:13-cv-01276-PPS, 2013 WL 6804773, at *6-*14 (N.D. Ind. Dec. 20, 2013) (same), injunction pending appeal denied, Notre Dame Order; Priests for Life v. United States Dep't of Health & Human Servs., No. 13-1261, 2013 WL 6672400, at *5-*10 (D.D.C. Dec. 19, 2013) (dismissing such a claim), injunction pending appeal granted, Priests for Life Order.

The Court need not address that question, however, to deny the injunction here, given that the self-certification would exempt the employer-applicants from any obligation to provide contraceptive coverage, and that the third-party administrator has no legal obligation to provide such services to employer-applicants' employees and has made clear that it will not do so. Cf. District Court Order 31 n.9 (declining to address "hypotheticals," not presented here, in which employer-applicants' self-certification would result in an insurance company's "deliver[y] [of] contraceptive care to Little Sisters' employees").

4. Applicants' alternative request for a writ of certiorari before judgment and injunction against enforcement pending the case's disposition on the merits is likewise unwarranted. As an initial matter, applicants' request for an injunction in this alternative context would be subject to the

same standard described above and would fail for all the same reasons already articulated.

Moreover, this case does not meet the criteria for granting a writ of certiorari, much less for certiorari before judgment. See Sup. Ct. R. 11 (a petition for a writ of certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court"); see also Stephen M. Shapiro et al., Supreme Court Practice 85 (10th ed. 2013) ("Certiorari before judgment is, of course, 'an extremely rare occurrence.'") (quoting Coleman v. PACCAR, Inc., 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers)).

No court of appeals has issued a merits decision on the RFRA question posed by applicants. The court of appeals in this case (like the Sixth, Seventh, and D.C. Circuits) merely addressed an injunction pending appeal in a brief unpublished order. The lack of even one court of appeals decision addressing the merits of applicants' claim is reason enough to deny their petition for certiorari before judgment. See FCC v. Fox Television Stations, Inc., 556 U.S. 502, 529 (2009) ("This Court * * * is one of final review, 'not of first view.'") (quoting Cutter v. Wilkinson, 544 U.S. 709, 718, n. 7 (2005)); see also United States v. Mendoza, 464 U.S. 154, 160 (1984) (The

Court "benefit[s]" from allowing circuit courts to consider a question "before this Court grants certiorari.").

Rather than pointing to any merits decisions from courts of appeals (much less conflicting ones), applicants suggest that their petition for a writ of certiorari before judgment should be granted so that their case can be considered alongside Sebelius v. Hobby Lobby Stores, Inc., cert. granted, No. 13-354 (Nov. 26, 2013), and Conestoga Wood Specialties Corp. v. Sebelius, cert. granted, No. 13-356 (Nov. 26, 2013).[9] The issues in the two sets of cases are, however, distinct. As applicants acknowledge (Appl. 37), the granted cases "present some threshold questions that cases involving non-exempt religious non-profits like the Little Sisters of the Poor do not," such as whether for-profit corporations are persons exercising religion within the meaning of RFRA. Furthermore, the regulations that govern this case provide a mechanism for eligible organizations to opt out of coverage, which for-profit corporations may not do. And to the extent that the Court's ultimate decision in those for-profit cases might inform analysis of the legal issues presented in religious non-profit cases like this one, the lower courts, not this Court, should have the first opportunity to consider the question. See Fox Television Stations, 556 U.S. at

[9] Opening briefs in those cases are due on January 10, 2014.

529. Finally, even if the Court were inclined to immediately grant certiorari in a religious non-profit case, applicants fail to explain why it should do so in one involving a self-insured church plan to which ERISA and its enforcement mechanisms do not even apply.

CONCLUSION

The application for an injunction pending appellate review and the alternative request for certiorari before judgment should be denied.

Respectfully submitted.

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JANUARY 2014