IN THE SUPREME COURT OF THE UNITED STATES

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No. 13A1284

WHEATON COLLEGE, APPLICANT

v.

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

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ON EMERGENCY APPLICATION FOR AN INJUNCTION PENDING APPELLATE REVIEW

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MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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The Solicitor General, on behalf of respondents, respectfully files this memorandum in opposition to the emergency application for an injunction pending appellate review.

INTRODUCTION

Applicant is a non-profit liberal arts college that provides or arranges health coverage for its employees and students. Applicant challenges regulations that establish minimum coverage requirements under the Affordable Care Act insofar as they include coverage of certain contraceptives as

part of women's preventive-health services coverage, contending that the regulations violate the Religious Freedom Restoration Act (RFRA). But unlike the employers in Burwell v. Hobby Lobby Stores, Inc., No. 13-354 (June 30, 2014) (Hobby Lobby), applicant is already free to opt out of providing or arranging contraceptive coverage under religious accommodations that "effectively exempt[]" it from the relevant requirement. Id., slip op. 9. Applicant need only self-certify that it is eligible for the accommodations and inform its insurance issuers and third party administrator. By doing so, it will avoid any requirement that it "contract, arrange, pay, or refer for contraceptive coverage" to which it objects. 78 Fed. Reg. 39,874 (July 2, 2013).

The decision in Hobby Lobby rested on the premise that these accommodations "achieve[] all of the Government's aims" underlying the preventive-health services coverage requirement "while providing greater respect for religious liberty." Slip op. 3. Applicant maintains, however, that the accommodations themselves violate RFRA. That claim lacks merit. Applicant cannot transform RFRA's protections into a means to veto regulatory requirements imposed on third parties. Moreover, even if applicant could establish that the accommodations substantially burden its exercise of religion, the

accommodations are the least restrictive means of furthering compelling governmental interests.

Applicant seeks extraordinary relief based on the extraordinary claim that it has the right not only to opt out of providing or arranging contraceptive coverage itself, but also to prevent the government from alleviating the resulting harm to its employees and students by ensuring that others provide or arrange the coverage instead. Nothing in RFRA supports such a sweeping claim, and applicant's right to relief is certainly not so "indisputably clear," Wisconsin Right to Life, Inc. v. FEC, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (citation omitted), as to warrant an original injunction. The application should be denied.

STATEMENT

1. a. Congress has long regulated employer-sponsored group health plans, including by specifying minimum coverage standards. See, e.g., 29 U.S.C. 1185 (benefits for mothers and newborns originally enacted in 1996). In 2010, the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119,[1] established additional minimum standards for group health plans and health insurance issuers offering

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

coverage in the group and individual markets. The Act requires non-grandfathered group health plans and health insurance issuers offering non-grandfathered health insurance coverage to cover four categories of recommended preventive-health services without cost sharing -- that is, without requiring copayments, deductibles, or coinsurance payments. 42 U.S.C. 300gg-13. As relevant here, those services include preventive care and screenings for 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., No. 13-354 (June 30, 2014), slip op. 8.

HHS requested the assistance of the Institute of Medicine (IOM) in developing comprehensive guidelines for preventive services for women. 77 Fed. Reg. 8726 (Feb. 15, 2012). Experts, "including specialists in disease prevention, women's health issues, adolescent health issues, and evidence-based guidelines," developed a list of services "shown to improve well-being, and/or decrease the likelihood or delay the onset of a targeted disease or condition." IOM, Clinical Preventive Services for Women: Closing the Gaps 2-3 (2011) (IOM Report). These services included the "full range" of "contraceptive methods" approved by the Food and Drug Administration (FDA), id. at 10; see id. at 102-110, which IOM found can greatly decrease

the risk of unintended pregnancies, adverse pregnancy outcomes, and other adverse health consequences, as well as vastly reduce medical expenses for women. See id. at 102-107. Consistent with those recommendations, the HRSA guidelines include "'[a]ll [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,' as prescribed" by a health care provider. 77 Fed. Reg. at 8725 (brackets in original; citation omitted); see Hobby Lobby, slip op. 8. The regulations adopted by the three Departments charged with implementing this portion of the ACA (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); see Hobby Lobby, slip op. 8-9.

b. The implementing regulations authorize an exemption from the contraceptive coverage requirement for group health plans offered by a "religious employer." 45 C.F.R. 147.131(a). A religious employer is defined as a non-profit organization described in a longstanding Internal Revenue Code provision referring to "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the

exclusively religious activities of any religious order." Ibid. (quoting 26 U.S.C. 6033(a)(3)(A)(i), (iii)).

When a modification of the regulations was finalized in 2012, the Departments announced, in response to religious objections raised by some commenters, that they would develop "'changes to these final regulations 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. at 8727). After notice and comment rulemaking, the Departments published the final regulations at issue here in July 2013. See 78 Fed. Reg. 39,892-39,896 (July 2, 2013); 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). Those regulations "devised and implemented a system that seeks 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 other employees. Hobby Lobby, slip op. 3.

The accommodations are available to group health plans established or maintained by an eligible organization (and group health insurance coverage provided in connection with such a

plan). An "eligible organization" is one 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.
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> (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 these obligations, the organization need only "self-certify" that it is an eligible organization that "opposes providing coverage for particular contraceptive services" and provide a copy of that self-certification to its insurance issuer or third-party administrator. Hobby Lobby, slip op. 43; see 29 C.F.R. 2590.715-2713A(a)(4), (b)(1) and (c)(1). If an eligible organization opts out, individuals covered under its plan generally will "still have access to

insurance coverage without cost sharing for all FDA-approved contraceptives," but without involvement by the objecting organization. Hobby Lobby, slip op. 3.

If the eligible organization offers or arranges an insured plan -- that is, if it purchases insurance coverage from an issuer that bears the risk of paying health care claims -- the issuer is required to "exclude contraceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries." Hobby Lobby, slip op. 9-10; see 45 C.F.R. 147.131(c)(2). The issuer must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the * * * plan," 45 C.F.R. 147.131(c)(2)(i)(A), and "segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services," 45 C.F.R. 147.131(c)(2)(ii).[2] This accommodation for insured plans applies not only to coverage offered to an eligible organization's employees, but also "to student health insurance coverage

[2] This accommodation requires the issuer to bear the expense of providing contraceptive coverage, but does not impose any net cost because the additional expense is offset by the cost savings resulting from the coverage of contraceptive services. Hobby Lobby, slip op. 10; see 78 Fed. Reg. at 39,877.

arranged by an eligible organization that is an institution of higher education." 45 C.F.R. 147.131(f).

If the eligible employer offers a self-insured plan, its third-party administrator "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, slip op. 10 n.8 (quoting 78 Fed. Reg. at 39,893); see 29 C.F.R. 2590.715-2713A(b)(2).[3] The regulations provide that "[t]he 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." 45 C.F.R. 2590.715-2713A(b)(1)(ii)(A). The third party administrator may seek reimbursement for payments for contraceptive services from the federal government "through an adjustment to Federally-facilitated Exchange user fee[s]." 29 C.F.R. 2590.715-2713A(b)(3); see 45 C.F.R. 156.50(d).[4]

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[3] An employer has a "self-insured" plan if it bears the financial risk of paying claims. Many self-insured employers use insurance companies or other third parties to administer their plans. These third party administrators perform functions such as developing networks of providers, negotiating payment rates, and processing claims.

[4] The regulations also prohibit accommodated entities from "seek[ing] to influence a third party administrator's decision"

An eligible organization that opts out of providing contraceptive coverage has no obligation to inform plan participants or enrollees of the availability of these separate payments made by third parties. Instead, the health insurance issuer or third party administrator provides this notice, and does so "separate from" materials that are distributed in connection with the eligible organization's group health coverage. 45 C.F.R. 147.131(d); 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. Ibid.

These accommodations take effect with the first plan year beginning on or after January 1, 2014. 78 Fed. Reg. at 39,870.[5]

2. Applicant is a non-profit liberal arts college located in Wheaton, Illinois. Appl. App. 31-32. As relevant here, it offers health coverage to its employees through two insured

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to provide or arrange separate payments for contraceptive services. 29 C.F.R. 2590.715-2713A(b)(1)(iii). The Departments interpret this provision to proscribe only a self-certifying organization's use of its economic power to coerce or induce a third party administrator into not fulfilling its independent legal obligations to provide contraceptive coverage. Appl. App. 16.; cf. NLRB v. Gissel Packing Co., 395 U.S. 575, 617-618 (1969).

[5] Previously, eligible organizations had been granted a safe harbor from enforcement of the contraceptive coverage requirement pending the development of the accommodations. 78 Fed. Reg. at 39,889.

plans issued by BlueCross/BlueShield of Illinois (BlueCross) and two self-insured supplemental prescription drug plans, which are administered by BlueCross. Id. at 80.[6] These plans cover approximately 400 of applicant's 690 full-time employees. Id. at 81. Applicant arranges an insured health plan for its students issued by Companion Life Insurance Company (Companion). Id. at 52. That plan covers approximately 550 of its 3000 students. Id. at 32, 81. The plan years for its employee and student plans begin on July 1 and August 1, respectively. Ibid.

Applicant has no objection to providing or arranging coverage for most prescription contraceptives, but objects on religious grounds to the emergency contraceptives Plan B and ella because those drugs may have the effect of preventing an already-fertilized egg from implanting in the uterus. Appl. App. 83.[7] Applicant seeks to "be permitted to follow its beliefs

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[6] Applicant also offers its employees coverage through a self-insured plan, but that plan is not currently subject to the contraceptive coverage requirement because it has grandfathered status. Appl. App. 80-81.

[7] According to FDA-approved product labels, Plan B is an emergency contraceptive pill that works principally by preventing ovulation or fertilization; it may inhibit implantation of a fertilized egg in the uterus, but it is not effective once the process of fertilization has begun. FDA-approved label for Plan B (levonorgestrel) tablets, 0.75mg, 4 (July 10, 2009), http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021045s015lbl.pdf. Ella is a pill that works by inhibiting or delaying ovulation and may also work by affecting implantation. FDA-approved label for ella (ulipristal acetate)

by refusing to pay for, provide access to, or designate someone else to provide access to emergency contraceptives." Id. at 87.

There is no dispute that applicant is eligible for the religious accommodations, which allow it to opt out of any requirement "to contract, arrange, pay, or refer for contraceptive coverage" to which it objects. 78 Fed. Reg. at 39,874; see Appl. App. 5. Applicant contends, however, that the accommodations themselves violate its rights under RFRA, which provides that the government "shall not substantially burden a person's exercise of religion" unless the burden is the "least restrictive means" of furthering "a compelling governmental interest." 42 U.S.C. 2000bb-1. Applicant argues that opting out of the coverage requirement substantially burdens its religious exercise because doing so "trigger[s]" the provision of contraceptive coverage by third parties. E.g., Appl. 9.

3. Applicant filed this suit on December 13, 2013, and moved for a preliminary injunction on June 9, 2014. The district court denied the motion, holding that although applicant had established a threat of irreparable harm and a favorable balance of the equities, it could not demonstrate a likelihood of success on the merits in light of the Seventh

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tablet § 12.1 (May 2, 2012), http://www.accessdata.fda.gov/drugsatfda_docs/label/2012/022474s002lbl.pdf.

Circuit's decision in University of Notre Dame v. Sebelius, 743 F.3d 547 (2014) (Notre Dame). Appl. App. 17-19.

Notre Dame involved an appeal from the denial of a preliminary injunction in an analogous suit by a religious university claiming that the accommodations violated RFRA. 743 F.3d at 551. While emphasizing the interlocutory posture of the case, the court of appeals held that Notre Dame had not established a likelihood of success on the merits because it failed to show that the accommodations imposed a substantial burden on its exercise of religion. Id. at 554. The court explained that Notre Dame's RFRA claim was predicated on the assumption that, "by filling out the [self-certification] form and sending it," Notre Dame "'triggers'" the contraceptive coverage provided or arranged by its insurer and third party administrator. Ibid. The court held that this argument rested on a misunderstanding of the legal effect of the self-certification form required by the accommodations. Id. at 554-559. As the court explained, "[f]ederal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services." Id. at 554. The court held that although Notre Dame had sincere religious objections to the independent obligations federal law imposed on these third parties, those obligations did not

constitute a substantial burden on Notre Dame's exercise of religion. Id. at 558-559.

The district court concluded that Notre Dame's analysis foreclosed applicant's RFRA claim. Appl. App. 8-11. It also drew support from the only other appellate decision considering the validity of the accommodations, which rejected a RFRA challenge on similar grounds. Id. at 9 (citing Michigan Catholic Conference & Catholic Family Servs. v. Burwell, No. 13-2723, 2014 WL 2596753, at *8-*10 (6th Cir. June 11, 2014) (Michigan Catholic Conference)).[8]

On June 30, the district court declined to reconsider this holding in light of this Court's decision in Hobby Lobby. 6/30/14 Dist. Ct. Order 3. In the meantime, applicant appealed the denial of a preliminary injunction and sought an injunction pending appeal. The court of appeals denied the motion in a brief order, agreeing with the district court that applicant was unlikely to succeed in light of Notre Dame. 6/30/14 C.A. Order 1.

[8] The district court also held that applicant was unlikely to succeed on its claims that the accommodations violate the First Amendment and the Administrative Procedure Act. Appl. App. 11-17; 6/30/14 Dist. Ct. Order 1-3. Applicant does not press those additional claims in seeking injunctive relief from this Court.

ARGUMENT

Applicant seeks an original injunction from this Court, an extraordinary and seldom-granted form of relief. The application should be denied because applicant cannot demonstrate either that an injunction is necessary to preserve this Court's jurisdiction or that it has an indisputably clear right to an injunction. Unlike the employers in Burwell v. Hobby Lobby Stores, Inc., No. 13-354 (June 30, 2014), applicant has available accommodations that "effectively exempt[]" it from the obligation to provide or arrange coverage for emergency contraceptives. Id., slip op. 9. The conceded availability of that option means that applicant cannot establish a substantial burden on its exercise of religion. Moreover, the fact that applicant objects to the method of opting out means that in this case, unlike in Hobby Lobby, no less-restrictive alternative is available to further the compelling governmental interests advanced by the contraceptive coverage requirement.

1. The All Writs Act, 28 U.S.C. 1651(a), "is the only source of this Court's authority" to issue an injunction pending appeal. Brown v. Gilmore, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers). 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). "[I]ssuance 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. Nuclear Regulatory Comm'n, 479 U.S. 1312, 1313 (1986) (Ohio Citizens) (Scalia, J., in chambers)); see Respect Maine PAC v. McKee, 131 S. Ct. 445 (2010) (per curiam). 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)).

As applicant concedes (Appl. 13), 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). Neither prerequisite is satisfied here.

2. An injunction is not necessary or appropriate in aid of this Court's jurisdiction. See Sup. Ct. R. 20.1. Applicant

alleges that it "will face irreparable harm" if it does not receive an injunction, but that contention, even if correct,[9] does not satisfy its obligation to demonstrate "that an injunction is necessary or appropriate to aid [this Court's] jurisdiction." Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (2012) (Sotomayor, J., in chambers). "Even without an injunction pending appeal," applicant "may continue [its] challenge to the regulations in the lower courts. Following a final judgment, [it] may, if necessary, file a petition for a writ of certiorari in this Court." Ibid.

Indeed, similarly situated parties challenging the accommodations have continued to litigate their claims despite being denied preliminary injunctive relief. See, e.g., Michigan Catholic Conference & Catholic Family Servs. v. Burwell, No. 13-2723, 2014 WL 2596753, at *19 (6th Cir. June 11, 2014) (lifting stay pending appeal); University of Notre Dame v. Sebelius, 743 F.3d 547, 553 (7th Cir. 2014). Applicant may likewise continue to prosecute its case before the lower courts if this Court denies an injunction and, if it does not succeed, may seek further review from this Court. Applicant states (Appl. 37)

[9] Applicant states that "[i]t is black letter law that a violation of constitutional rights constitutes irreparable injury," Appl. 14 (emphasis added), but its principal claim in this Court is a statutory claim under RFRA.

that denial of an injunction would "risk scuttling the process of review," but it does not explain why that is so. Whether applicant chooses to sign the self-certification form or not, it may continue to litigate its appeal. The controversy between the parties would remain live.[10]

3. Applicant's 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. As applicant concedes (Appl. 18-19 n.7), the lower courts have diverged on whether to grant temporary injunctive relief in cases challenging the accommodations. Moreover, the only two courts of appeals to consider applicant's RFRA claim in a full opinion have rejected it. See Michigan Catholic Conference, 2014 WL 2596753, at *8-*10; Notre Dame, 743 F.3d at 554-559. Because the courts of appeals are -- at most -- "reaching divergent results in this area," applicant cannot establish an "indisputably clear" right to relief. Lux, 131 S. Ct. at 7; accord Hobby Lobby, 133 S. Ct. at 643.

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[10] Applicant's alternative request (Appl. 4, 37-40) for an injunction pending the filing of a petition for a writ of certiorari before judgment is likewise unwarranted. Even assuming that applicant could satisfy the demanding standard for certiorari before judgment, see Sup. Ct. R. 11, its 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, see Sup. Ct. R. 20.1.

Even putting aside the divergence of opinion in the lower courts, applicant fails to establish that it has a valid RFRA claim -- much less that its entitlement to relief is indisputably clear. Under RFRA, a party seeking an exemption must demonstrate that the challenged law "substantially burden[s] [its] exercise of religion." 42 U.S.C. 2000bb-1(a); see Hobby Lobby, slip op. 5. Even if the challenger makes that showing, the exemption must be denied if the government demonstrates that the challenged burden is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. 2000bb-1(b); see Hobby Lobby, slip op. 5-6. Applicant's claim fails at both steps: It has not demonstrated that the accommodations substantially burden its exercise of religion, and in any event the accommodations are the least restrictive means of furthering compelling governmental interests.

a. RFRA requires a plaintiff to show, as a threshold matter, that a challenged regulation "substantially burden[s] [its] exercise of religion." 42 U.S.C. 2000bb-1(a). Applicant cannot make this showing.

i. Applicant has religious objections to certain forms of contraception, and therefore seeks to refuse "to pay for, provide access to, or designate someone else to provide access to" the objectionable contraceptives. Appl. App. 87. But applicant is eligible for religious accommodations under which

it is "effectively exempted" from the requirement to provide or arrange this coverage. Hobby Lobby, slip op. 9. To opt out, it need only complete a form stating that it is eligible and provide a copy to its insurance issuers and third party administrator. See 29 C.F.R. 2590.715-2713A(a)(4), (b)(1), (c)(1); see Michigan Catholic Conference v. Sebelius, No. 13-cv-1247, 2013 WL 6838707, at *7 (W.D. Mich. Dec. 27, 2013) (eligible organizations need only "attest to [their] religious beliefs and step aside"), aff'd, No. 13-2723, 2014 WL 2596753 (6th Cir. June 11, 2014). If applicant were to opt out, its insurance issuers and third party administrator would be required to provide separate payments for contraceptive services. Hobby Lobby, slip op. 9-10; see 29 C.F.R. 2590.715-2713A(b)(2). The provision of this coverage would require no action by applicant, which would have no obligation to "contract, arrange, pay, or refer" for such coverage. 78 Fed. Reg. at 39,874.

Applicant does not contend that its religious exercise is burdened by completing a form stating that it objects to providing or arranging contraceptive coverage. See Appl. 20 (applicant "has no objection to informing the Secretary of its religious objections"). Applicant also does not appear to object to informing its insurers and third party administrator of its religious objections -- to the contrary, applicant has

apparently done so already in order to ensure that emergency contraceptives are not covered under its current plans. See id. at 83. Instead, applicant's objection is that, after it opts out, federal law will require third parties -- BlueCross and Companion -- to make or arrange separate payments for contraceptive services for its employees and students.

Applicant's attempt to merge the provision of contraceptive coverage by BlueCross and Companion with its own decision not to provide or arrange such coverage fails. Applicant mistakenly characterizes its decision to opt out as "trigger[ing]" contraceptive coverage by others. E.g., Appl. 9. But BlueCross and Companion will be obligated to provide or arrange contraceptive coverage not because of any authorization by applicant, but rather because of independent duties imposed by federal law. As the Sixth Circuit explained, "[s]ubmitting the self-certification form to the insurance issuer or third-party administrator does not 'trigger' contraceptive coverage; it is federal law that requires the insurance issuer or the third-party administrator to provide this coverage." Michigan Catholic Conference, 2014 WL 2596753, at *9; accord Notre Dame, 743 F.3d at 554. If applicant opts out, and if BlueCross and Companion then make separate payments for contraceptive services because of independent obligations imposed on them directly by the government, then applicant's employees and students will

receive coverage for contraceptive services "despite [applicant's] religious objections, not because of them." Michigan Catholic Conference, 2014 WL 2596753, at *10 (emphasis added; citation omitted).

Applicant contends (Appl. 27-28) that this argument amounts to an assertion that the self-certification "means nothing" and claims that it contradicts the government's statements that applicant's students and employees will not receive contraceptive coverage if applicant is granted injunctive relief. But applicant mischaracterizes the accommodation regulations and the legal effect of the self-certification form. The self-certification is the mechanism by which applicant opts out of the requirement to provide contraceptive coverage. By executing the form and delivering copies to its insurers and third party administrator, applicant would be claiming the exemption and notifying those third-parties of its election. Contrary to applicant's claim, however, it would not be authorizing or requiring those third parties to provide coverage. Rather, the legal duties of those third parties are imposed by federal law.

Applicant is also wrong to suggest (Appl. 7-10) that aspects of the accommodation for self-insured organizations raise concerns that are not presented by the accommodation for insured organizations. Relying on language in the self-

certification form directed at third party administrators, applicant contends (Appl. 8-9) that "[t]he Form is the trigger that gives [third party administrators] both the legal authority and the legal obligation to provide objectionable coverage on behalf of religious objectors." But as the form itself and the accompanying regulations make clear, this is incorrect. The section of the preamble from which applicant quotes explains that the self-certification form is "a document notifying the third party administrator(s) that the eligible organization will not provide, fund, or administer payments for contraceptive services," and therefore is "one of the instruments under which the employer's plan is operated under ERISA section 3(16)(A)(i)." 78 Fed. Reg. at 39,879. The form directs third party administrators to their own "obligations set forth in the[] final regulations" and makes clear that the eligible organization has no such obligations. Ibid.; see also 29 C.F.R. 2590.715-2713A(b)(1)(ii)(A) and (B) (providing that the form "shall include notice" that "[t]he eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services" and that "[o]bligations of the third party administrator are set forth in [Department of Labor regulations]"). The preamble explains that the third party administrator's legal obligations derive from ERISA

§ 3(16), 29 U.S.C. 1002(16). Insofar as the third party administrator has its own legal obligations if the eligible organization opts out, the preamble specifies that, under the regulations, the form "will be treated as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879 (emphasis added). As in the case of an insured organization, therefore, the obligations of a self-insured employer's third party administrator arise from federal law, not from any authorization by the objecting organization.[11]

ii. Applicant contends (Appl. 28-31) that in holding that the certification mechanism for opting out does not impose a substantial burden on objecting organizations' exercise of religion, the Sixth and Seventh Circuits impermissibly second-guessed the organizations' religious beliefs. As this Court

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[11] In any event, if applicant objects to particular aspects of the accommodation for self-insured plans, it is free to offer its employees an insured plan -- indeed, applicant already provides or arranges multiple insured plans for its employees and students. This option forecloses any objection that is based on the particulars of the accommodation for self-insured organizations. See Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 303-305 (1985) (option to compensate employees by furnishing room and board obviates religious objection to paying cash wages); cf. Braunfeld v. Brown, 366 U.S. 599, 605 (1961) (plurality opinion) (rejecting Orthodox Jewish merchants' free exercise challenge to Sunday closing law that "operates so as to make the practice of their religious beliefs more expensive").

emphasized in Hobby Lobby, it is not for a court to ask "whether the religious belief asserted in a RFRA case is reasonable." Slip op. 36. But asking whether a challenged law imposes a substantial burden on a party's exercise of religion is not the same thing as questioning that party's religious beliefs. See, e.g., Bowen v. Roy, 476 U.S. 693, 701 n.6 (1986)

In determining whether a challenged law imposes a substantial burden on religious exercise, moreover, courts have long drawn lines that cabin the scope of the right protected by the First Amendment -- and, by extension, RFRA. In Roy, for example, this Court emphasized that "[t]he Free Exercise Clause 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." 476 U.S. at 699. An individual's religious views "may not accept this distinction between individual and governmental conduct," but the law does. Id. at 701 n.6. In doing so, moreover, the law does not question the individual's beliefs or "[a]rrogat[e] the authority" to answer "religious and philosophical question[s]." Hobby Lobby, slip op. 36. Rather, it recognizes an inherent limitation on what the law will treat as a substantial burden on the exercise of religion.

Another such limitation is that although "a religious institution has a broad immunity from being required to engage

in acts that violate the tenets of its faith, it has no right to prevent other institutions * * * from engaging in acts that merely offend" its sincerely held religious beliefs. Notre Dame, 743 F.3d at 552; see Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-451 (1988); Roy, 476 U.S. at 699-700. For example, in Kaemmerling v. Lappin, 553 F.3d 669 (D.C. Cir. 2008), the court rejected a prisoner's RFRA challenge to a requirement that he submit a tissue sample for DNA analysis. Id. at 673-674, 678-679. The court explained that, while the prisoner framed his claim as a challenge to the requirement that he provide a tissue sample, he had no religious objection to providing the sample in and of itself -- only to the government's subsequent "extract[ion] of DNA information." Id. at 679. Accordingly, the court held that the prisoner had not established a substantial burden on his own religious exercise because his claim effectively sought "to require the government itself to conduct its affairs in conformance with his religion." Id. at 680.

The same is true here: Applicant does not have a religious objection to anything that it is required to do to exempt itself from the obligation to furnish contraceptive coverage; indeed, "the only thing that the exemption and accommodation framework requires of [applicant] is conduct in which [it] already engage[s]." Michigan Catholic Conference, 2014 WL 2596753, at

*10. Because applicant already sponsors health plans, it need only inform its insurers and third party administrator of its objection to providing coverage of contraceptives. The only difference is that the accommodation imposes additional obligations on those third parties. But "[t]he fact that the regulations require the insurance issuers and third-party administrators to modify their behavior does not demonstrate a substantial burden on [applicant]." Ibid.

Applicant's contrary view of what can constitute a substantial burden under RFRA is at odds with our Nation's history of allowing religious objectors to opt out and the government then requiring others to fill the objectors' shoes. Cf. EEOC Compliance Manual § 12-IV.C. (Example 43) (July 22, 2008) (explaining that reasonable accommodations of workplace religious objections can include requiring the objecting employee to transfer objectionable tasks to co-workers). On applicant's reasoning, a conscientious objector could object not only to his own military service, but also to opting out, on the theory that his opt-out would "'trigger' the drafting of a replacement who was not a conscientious objector." Notre Dame, 743 F.3d at 556. Similarly, the claimant in Thomas v. Review Board of the 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

his opt-out would cause someone else to take his place on the assembly line.

Nothing in the cases on which applicant relies, or in this Court's free-exercise and RFRA precedents, supports the remarkable contention that opting out of an obligation may itself be deemed a substantial burden if someone else will take the objector's place. See, e.g., Notre Dame, 743 F.3d at 557 (emphasizing the "novelty" of a claim that seeks not only an exemption from a generally applicable requirement, but "the right to have it without having to ask for it"). When extending religious accommodations, the government must be allowed to provide regularized, orderly means for eligible individuals or entities to declare that they intend to take advantage of them -- and to establish alternative mechanisms to secure the important interests of third parties that would otherwise be threatened. Such accommodations do not impose a substantial burden on the exercise of religion.

b. In any event, applicant's claim would fail even if the accommodations were subject to RFRA's compelling-interest test.

i. In Hobby Lobby, this Court assumed without deciding that the contraceptive coverage provision furthered compelling interests. Slip op. 40. Five members of the Court, however, appeared to agree that the provision "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." Id. at 2 (Kennedy, J., concurring); accord id. at 23-25 & n.23 (Ginsburg, J., dissenting).[12]

Applicant identifies no sound reason to doubt that this interest qualifies as compelling. It primarily argues (Appl. 34-35) that a number of employers are currently exempt from the requirement to cover contraceptives, largely by virtue of the statute's grandfathering provision, 42 U.S.C. 18011. Cf. Hobby Lobby, slip op. 39-40. That provision, in effect, allows a transition period for compliance with a number of the Act's requirements (not just the contraceptive coverage and other preventive-services coverage provisions) until a health plan makes one or more specified changes. Its impact is thus "temporary, intended to be a means for gradually transitioning employers into mandatory coverage." Gilardi v. HHS, 733 F.3d

[12] As the government demonstrated in its brief in Hobby Lobby (No. 13-354, at 46-48), the contraceptive-coverage requirement furthers compelling interests because it directly and substantially advances the public health by reducing the incidence of unintended pregnancies, improving birth spacing, protecting women with certain health conditions for whom pregnancy is contraindicated, and otherwise preventing adverse health conditions. See 78 Fed. Reg. at 39,872; IOM Report 103-107. Accordingly, medical and public health organizations, such as the American Medical Association, the American Academy of Pediatrics, and the March of Dimes "recommend the use of family planning services as part of preventive care for women." IOM Report 104.

1208, 1241 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part), cert. denied, No. 13-915 (July 1, 2014). Consistent with that effect, the percentage of employees in grandfathered plans is steadily declining, having dropped from 56% in 2011 to 48% in 2012 to 36% in 2013. Kaiser Family Found. & Health Research & Educ. Trust, Employer Health Benefits 2013 Annual Survey 7, 196 (2013).

The compelling nature of an interest is not diminished because the government phases in a regulation advancing it in order to avoid undue disruption. Cf. Heckler v. Mathews, 465 U.S. 728, 746-748 (1984) (the "protection of reasonable reliance interests is * * * a legitimate governmental objective"). Congress specified that various crucial ACA provisions would not be immediately effective. The grandfathering provision does not undermine the government's compelling interest in contraceptive coverage any more than it undermines the compelling interest in the coverage of immunizations. See 42 U.S.C. 300gg-13(a)(2); cf. Hobby Lobby, slip op. 46. Similarly, the minimum coverage provision, 26 U.S.C. 5000A, as well as the guaranteed-issue and community-rating insurance market reforms at the heart of the Act, did not take effect until 2014, four years after enactment. See National Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2565, 2580 (2012); see 42 U.S.C. 300gg-1, 300gg-3, 300gg-4(a) (guaranteed-issue provision); see also 42 U.S.C. 300gg(a)(1),

300gg-4(b) (community-rating provision). These post-2010 effective dates do not in any way call into question the compelling nature of the interests that these key provisions advance.

ii. The accommodations are the least restrictive means of serving these compelling interests. In Hobby Lobby, this Court concluded that the availability of the accommodations meant that HHS "ha[d] at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs." Slip op. 43. The Court explained that the accommodations "serve[] HHS's stated interests equally well" because "female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to 'face minimal logistical and administrative obstacles'" in obtaining the coverage. Id. at 44-45 (citation omitted).

In this case, in contrast, there is no "existing, recognized, workable, and already-implemented framework," Hobby Lobby, slip op. 3 (Kennedy, J., concurring), that would be a less-restrictive means for providing contraceptive coverage. To the contrary, applicant asserts that the accommodations on which the Court relied in Hobby Lobby themselves violate RFRA. And applicant identifies no viable alternative means for protecting the compelling interests at issue. First, applicant asserts

(Appl. 35) that the government could simply exempt it from the contraceptive coverage requirement. But individualized religion-based exemptions would directly and materially harm the individuals the scheme was intended to benefit -- including hundreds of applicant's employees and students and their covered family members, who could otherwise choose to take advantage of the full coverage of contraceptive services required under the ACA.[13]

Second, applicant contends (Appl. 35-36) that the government could fund contraceptive coverage "through Title X of the Public Health Service Act." But unlike employer-based coverage, Title X grantees provide services directly, not through reimbursement to third-party providers. By statute, moreover, priority for services must be given to "low-income families." 42 U.S.C. 300a-4(c). Consistent with this requirement, patients whose income exceeds 250% of the federal poverty level must pay the reasonable cost of any services they

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[13] Applicant errs in contending (Appl. 33-34) that the existing exemption for churches and other houses of worship undermines the compelling nature of the government's interests or compels a broader exemption. It would be perverse to hold that the government's provision of a religious exemption for churches and houses of worship eliminates the compelling interests in the underlying regulations, thus effectively extending the same exemption, through RFRA, to anyone else who wants it. Such a reading of RFRA would discourage the government from accommodating religion, the opposite of what Congress intended in enacting the statute.

receive. 42 C.F.R. 59.5(a)(8). Title X thus is not available to provide contraceptive coverage for employees and students of objecting organizations. And even if it were, providing such coverage through Title X -- or, for that matter, some other existing or potential government program -- would not effectively implement Congress's objective of "providing coverage of recommended preventive services through the existing employer-based system of health coverage so that women face minimal logistical and administrative obstacles." 78 Fed. Reg. at 39,888. To the contrary, "[i]mposing additional barriers to women receiving the intended coverage * * * by requiring them to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women." Ibid.[14]

Third applicant contends (Appl. 36) that the government could "offer subsidies to employees who wish to purchase contraceptive coverage on the government-run exchanges." But by statute, exchanges may only make available "qualified health plans" providing comprehensive health coverage, and could not

[14] Accordingly, even if RFRA's least-restrictive-means requirement could under some circumstances compel the government to create entirely new programs to accommodate religious objectors, but see Hobby Lobby, slip op. 3-4 (Kennedy, J., concurring), a government-funded program like the one applicant contemplates would not qualify as a less-restrictive means for advancing the interests at issue here.

make available contraception-coverage-only policies. 42 U.S.C. 18031(d)(2)(B)(i); see 42 U.S.C. 18021(a)(1)(B). Moreover, as the Departments explained in promulgating the accommodations, HHS "does not have the authority to require issuers offering coverage through the Exchanges to provide separate contraceptive coverage at no cost to [employees or] students." 78 Fed. Reg. at 39,882.

More fundamentally, it appears that no alternative -- other than a complete exemption -- would eliminate applicant's objection to the accommodations. Applicant appears to object to any scheme in which its claim of an exemption leads another party to provide the coverage it finds objectionable. But that is an inevitable feature of any accommodation under which an organization's ability to opt out of providing contraceptive coverage is balanced by provisions allowing its employees or students to obtain that coverage from the government or a third party.

4. Finally, applicant relies heavily (Appl. 1-2, 17-23) on this Court's order granting an injunction in Little Sisters of the Poor Home for the Aged v. Sebelius, 134 S. Ct. 1022 (2014) (Little Sisters). That case also involved a challenge to an accommodation brought by religious nonprofit organizations, and the Court "ordered that, pending appeal, the eligible organizations be permitted to opt out of the contraceptive

mandate by providing written notification of their objections to the Secretary of HHS" rather than to their third party administrators. Hobby Lobby, slip op. 10 n.9. But this Court explicitly stated that the "order should not be construed as an expression of the Court's views on the merits," and emphasized that the order was based "on all the circumstances of the case." Little Sisters, 134 S. Ct. at 1022.

Those circumstances are quite different from the facts of this case. In Little Sisters, the group health plan at issue was a self-insured church plan exempt from ERISA. As a result, the eligible organizations' third party administrator could not be required to assume responsibility for contraceptive coverage; and that third party administrator (which was also a plaintiff in the litigation) made clear that it "d[id] not intend" to provide payments for contraceptive services voluntarily. 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); see also id. at *15 (explaining that, if plaintiffs certify that they are eligible for the accommodation, "[i]t is clear that these services will not be offered to the[ir] employees"). Thus, the Court's order did not alter whether any employees would receive coverage. In sharp contrast, applicant's insurance issuers and third party administrator are required to make or arrange separate payments for contraception

after applicant opts out of providing or arranging coverage itself. Unlike in Little Sisters, therefore, an injunction pending appeal would deprive hundreds of employees and students and their dependents of coverage for these important services. See Notre Dame, 743 F.3d at 562 (distinguishing Little Sisters on this basis).

Applicant contends (Appl. 22) that this distinction is "irrelevant" because "[t]he burden on Wheaton's religious exercise is no different than the burden on the Little Sisters." But as Hobby Lobby makes clear, the potential effect of an exemption on third parties is critically important in assessing the viability of a RFRA claim. In holding that the employers in Hobby Lobby should be permitted to claim the accommodations at issue here as a less-restrictive means, the Court emphasized its view that "[t]he effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero" because "these women would still be entitled to all FDA-approved contraceptives without cost-sharing." Slip op. 4; see id. at 44-45. The Court also reiterated that "in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'" Id. at 42 n.37 (quoting Cutter v. Wilkinson, 544 U.S. 709, 720 (2005)). This consideration of third-party harms appropriately reflects the principle that the

free exercise of religion guaranteed by RFRA cannot "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." Id. at 4 (Kennedy, J., concurring).

CONCLUSION

The application for an injunction pending appellate review should be denied.

Respectfully submitted.

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Solicitor General

JULY 2014