No. 14-2396

In the United States Court of Appeals for the Seventh Circuit

WHEATON COLLEGE,

Plaintiff-Appellant,

v.

SYLVIA BURWELL, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; THOMAS PEREZ, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, Secretary of the United States Department of the Treasury; and UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 1:13-cv-08910, Judge Robert M. Dow, Jr., Presiding

BRIEF OF APPELLANT WHEATON COLLEGE

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March 26, 2015

DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Wheaton College represents that it does not have any parent entities and does not issue stock. Counsel further certifies that partners or associates of the following law firms have appeared for Wheaton College in this case:

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1361, as the action arose under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*; the Religion Clauses of the First Amendment; the Free Speech Clause of the First Amendment; and the Administrative Procedure Act, 5 U.S.C. § 706. The district court had jurisdiction to render declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 2000bb-1.

On June 23, 2014, the district court denied Wheaton College's motion for a preliminary injunction. App. 1.[1] On June 24, Wheaton filed a motion to reconsider the denial pursuant to Federal Rule of Civil Procedure 62(c) and Federal Rule of Appellate Procedure 8. Dkt. 64. The district court denied the motion to reconsider on June 30. Dkt. 72. Wheaton timely appealed the June 23 order on June 26. Dkt. 65. Pursuant to this Court's request, Wheaton filed a jurisdictional memorandum on June 27. App. Dkt. 7. The merits of Wheaton's claims remain before the district court. Because this appeal is from the denial of a preliminary injunction, this Court has jurisdiction over this appeal under 28 U.S.C. § 1292(a)(1).

[1] "JA" refers to the Joint Appendix, "App." refers to the in-brief appendix, "Dkt." refers to entries in the district court docket, and "App. Dkt." refers to entries in the docket in this Court.

STATEMENT OF THE ISSUES

(1) *Religious Freedom Restoration Act ("RFRA").* Does the Mandate "substantially burden" Wheaton College's religious exercise, and if so, is the government's interest compelling, and is application of the Mandate against Wheaton the least restrictive method for the government to achieve its interest in delivering contraceptives?

(2) *First Amendment—Speech Clause.* Does the Mandate violate the Free Speech Clause by requiring Wheaton to comply with the accommodation?

(3) *First Amendment—Religion Clauses.* Does the Mandate impermissibly discriminate among religious organizations by withholding the "religious employer" exemption from organizations like Wheaton College on the basis of the government's false predictions about the religious beliefs of Wheaton's employees?

(4) *Administrative Procedure Act.* Is the Mandate arbitrary and capricious and contrary to law?

(5) *Relief.* Was the district court correct to deny Wheaton's motions for preliminary injunction?

INTRODUCTION

This case arises from the government's effort to use Wheaton College's health plans to distribute emergency contraceptive drugs. The Affordable Care Act mandates that any "group health plan" must "provide coverage" for certain "preventive care" without "any cost sharing." 42 U.S.C. § 300gg-13(a) (the "Mandate"). It is undisputed that Wheaton has a religious objection to this use of its plans. JA 130 (Defs.' Resp. to Pl.'s Statement of Material Facts (Dkt. 47) (hereafter Undisputed Facts)); *see also* Defs.' Mem. re Mot. to Dismiss or for Summ. J. (Dkt. 26) at 15 (hereafter Defendants' MSJ). Yet if Wheaton does not violate its religious beliefs and allow the government to use its plans in this way, the government threatens to assess millions of dollars in fines and penalties.

That government threat—violate your religious beliefs or pay fines—is a straightforward and substantial burden on religion under federal civil rights law. As the trial court correctly found, Wheaton is "faced with the Hobson's choice of adhering to its religious beliefs or being subjected to steep financial penalties." App. 18. Under controlling Supreme Court and Seventh Circuit precedent, that type of forced choice is a substantial burden under the Religious Freedom Restoration Act ("RFRA"). *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2775-2779 (2014); *Korte v. Sebelius*, 735 F.3d 654, 683-684 (7th Cir. 2013) *cert. denied sub nom. Burwell v. Korte*, 134 S. Ct. 2903 (2014). And because the government openly concedes that it cannot satisfy strict scrutiny, Wheaton is entitled to an injunction. *See* Defendants' MSJ at 18.

The trial court denied an injunction based on this Court's now-vacated decision in *University of Notre Dame v. Sebelius*. App. 9 (citing *Notre Dame,* 743 F.3d 547 (7th Cir. 2014). *vacated sub nom. Univ. of Notre Dame v. Burwell*, 83 U.S.L.W. 3220, 2015 WL 998533 (U.S. Mar. 9, 2015)). *Notre Dame* was expressly tentative when issued, and it has since been overtaken by Supreme Court precedent, government concessions, and observable facts about the alleged "accommodation." More than a year after *Notre Dame* was issued, it is now clear that the religious objector *is* the "trigger" for coverage, and that the coverage only occurs as a forced addition to the religious objector's health plan. As the government candidly admits, if Wheaton is forced to violate its religious beliefs and comply with the accommodation, the contraceptive coverage will be "part of the plan." *Roman Catholic Archbishop of Wash. v. Sebelius*, 19 F. Supp. 3d 48, 80 (D.D.C. 2013) *aff'd in part, vacated in part sub nom. Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014); *see also* Defendants' MSJ at 23 (noting that accommodation seeks to use "the existing *employer-based system of health coverage*") (emphasis added). And if Wheaton is not forced to allow this use of its plans, then no coverage will be provided. Defendants' P.I. Opp. (Dkt. 59) at 5-6.

Of course it is fully within the government's control to both spare Wheaton from this illegal coercion *and* provide broad access to contraceptives. That is because the United States government has many other ways to distribute drugs without involving Wheaton's plans. For example, the government can simply use its *own* exchanges to provide insurance coverage to any dissatisfied Wheaton employee who wants

it. That is precisely the approach the government finds satisfactory for those who work for small employers and those who do not like the "grandfathered" plans offered by their employers. There is no reason the government cannot use its own exchanges equally well here. And if the government for some reason does not wish to use its own exchanges, it could just adopt what the Supreme Court called "the most straightforward way" of achieving its goals: assuming the cost of the drugs itself. *Hobby Lobby*, 134 S. Ct. at 2780 ("This would certainly be less restrictive of the plaintiffs' religious liberty, and HHS has not shown, see § 2000bb-1(b)(2), that this is not a viable alternative.").

The government's refusal to tolerate Wheaton's religious objection also violates the First Amendment's Religion Clauses, because the government is willing to exempt thousands of organizations engaged in the exact same religious exercise as Wheaton—provided they are funded and controlled directly by a church so as to satisfy the IRS's definition of an "integrated auxiliary." Such "explicit and deliberate" discrimination between religious organizations violates the First Amendment. *Larson v. Valente*, 456 U.S. 228, 260-61 & n.23 (1982). It also violates common sense, because the government's stated reason for discriminating—that employees of integrated auxiliaries are more likely to share their employer's religious beliefs, 78 Fed. Reg. 39870, 39874 (July 2, 2013)—is both unsupported as a general matter, *see* note 17, *infra*, and directly contrary to the undisputed facts here. JA 129 (Undisputed Facts) (conceding as "undisputed" that Wheaton's employees and students sign a

"Community Covenant" setting forth shared religious beliefs). The First Amendment forbids such discrimination based on (wrongly) predicted religiosity.

The Mandate also violates the First Amendment's Free Speech Clause because it compels Wheaton to engage in speech against its will. Here, the government's argument collapses on itself: the very existence of the forced speech requirement demonstrates that the government needs Wheaton and its policies to make the accommodation work.

Finally, the Mandate violates the Administrative Procedure Act because it is arbitrary, capricious, and contrary to law. Among other things, the government has no ERISA authority to revise Wheaton's plan documents, remove Wheaton as the plan administrator, and insert a new plan administrator of the government's liking. ERISA only allows the government to name plan administrators where there is no existing administrator, and where the plan sponsor cannot be found. 29 U.S.C. § 1002(16)(A). Congress gave the government *no* authority to name plan administrators where, as here, there is an existing plan administrator (Wheaton) and the plan sponsor (Wheaton) can be found.

In sum, the government's effort to force Wheaton to "comply" with a statutory requirement to "provide coverage" is illegal several times over. The only theory on which that coercion has been upheld is the now-disproven theory of the *Notre Dame* case. The district court's decision should be reversed and an injunction entered.

STATEMENT OF THE CASE

I. The Mandate

The Affordable Care Act mandates that any "group health plan" must "provide coverage" for certain "preventive care" without "any cost sharing." 42 U.S.C. § 300gg-13(a) (the "Mandate"). Congress did not define "preventive care" but instead allowed Appellee HHS to define the term. 42 U.S.C. § 300gg-13(a)(4). Its definition includes all FDA-approved contraceptive methods and sterilization procedures, including abortifacient "emergency contraception" such as Plan B (the "morning-after" pill) and ella (the "week-after" pill). Wheaton's Mot. for Summ. J. (hereafter Wheaton's MSJ) Ex. B-2 (Dkt. 41-7) at 2.[2] Failure to "provide coverage" triggers severe penalties. *See*, *e.g.*, 26 U.S.C. § 4980D(b)(1) ($100 per day per affected individual); 26 U.S.C. § 4980H(c)(1) ($2000 per year per full-time employee).

"Exempt" employers. Three categories of employers are completely and automatically exempt from the Mandate's requirement to "provide coverage": employers with grandfathered plans, employers with fewer than fifty employees, and certain "religious employers."

First, employers with "grandfathered" health care plans, which cover tens of millions of Americans, are exempt from the Mandate and therefore do not need to "provide coverage." *See* 42 U.S.C. § 18011; *Hobby Lobby*, 134 S. Ct. at 2764 ("All told,

[2] The FDA's Birth Control Guide notes that emergency contraceptives may prevent "'attachment (implantation)' of a fertilized egg in the uterus." JA 130 (Undisputed Facts (¶ 8)) (Defendants' statement that this fact is "undisputed").

the contraceptive mandate 'presently does not apply to tens of millions of people.' This is attributable, in large part, to grandfathered health plans.") (quoting *Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1124 (10th Cir. 2013) (en banc)); Wheaton's MSJ Ex. B-9 (Dkt. 41-14) at 5. "Grandfathered plans may remain so indefinitely." *Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1124 (10th Cir. 2013) (en banc), *aff'd*, 134 S. Ct. 2751 (2014). Grandfathered plans do need "'to comply with a subset of the Affordable Care Act's health reform provisions' that provide what HHS has described as 'particularly significant protections.'" *Hobby Lobby*, 134 S. Ct. at 2780 (quoting 75 Fed. Reg. 34540 (June 17, 2010)). But the Mandate "is expressly excluded from this subset," an exclusion that exists "simply [to serve] the interest of employers in avoiding the inconvenience of amending an existing plan." *Id.*

Second, employers with fewer than fifty employees, covering an estimated 31 million Americans, may avoid the Mandate by not offering insurance at all. *See* 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d); Wheaton's MSJ Ex. B-10 (Dkt. 41-15) at 3; *Hobby Lobby*, 134 S. Ct. at 2764.

Third, HHS also recognized that the Mandate would cause serious problems for religious employers. Thus, it created an exemption for "religious employers"—defined to include tens of thousands of churches, associations of churches, and integrated auxiliaries, which includes entities "affiliated with" churches. 78 Fed. Reg. at 39874; 45 C.F.R. § 147.131(a). Whether a religious organization is defined as an integrated auxiliary is determined by how closely it is affiliated with or controlled by a church. 26 C.F.R. § 1.6033-2(h)(2).

All of these organizations—those with grandfathered plans, those with fewer than fifty employees, and those who meet the IRS's church or integrated auxiliary definition—are automatically and completely exempt from the "provide coverage" requirement. These exempted organizations do not need to certify their religious beliefs to anyone (even if claiming a religious exemption); do not need to execute and deliver EBSA Form 700 to anyone; do not need to provide any notice to HHS or any other government authority; do not need to create plan instruments; and do not need to otherwise designate, authorize, incentivize, or obligate anyone else to provide contraceptive coverage in connection with their plans.

"Non-Exempt" Employers. Instead of extending these exemptions to entities like Wheaton, the government developed an "accommodation" for "non-exempt" religious organizations. 77 Fed. Reg. 16501 (Mar. 21, 2012).

According to the government, this "accommodation" is a way to "comply" with the requirement to "provide coverage." 78 Fed. Reg. at 29879 ("an eligible organization is considered to comply with section 2713 of the PHS Act . . . "); 42 U.S.C. § 300gg-13(a) (requirement to "provide coverage" for preventive services). Unlike the grandfathering and religious employer exemptions, the government said that providing coverage via the "accommodation" would "assur[e] that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage." 77 Fed. Reg. at 16503.

The government has created two ways for these "accommodated" religious organizations to "provide coverage" under the statute: (1) executing and delivering a gov-

ernment form, EBSA Form 700, designating their third-party administrators ("TPAs") to deliver contraceptives for them; or (2) sending a notification to HHS stating their objection and the name of their TPA, which the government treats as a designation of their TPA.

EBSA Form 700. The original "accommodation" required non-exempt religious organizations to comply with the "provide coverage" requirement by executing and delivering EBSA Form 700 to their TPAs. 26 C.F.R. § 54.9815-2713A(a)(4). EBSA Form 700 designates the non-exempt organization's TPA as the "plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39879; 26 C.F.R. § 54.9815–2713A. Receipt of an executed EBSA Form 700 triggers a TPA's legal obligation to make "separate payments for contraceptive services directly for plan participants and beneficiaries." 78 Fed. Reg. at 39875-76; *see* 45 C.F.R. § 147.131(c)(2)(i)(B); 26 C.F.R. § 54.9815–2713A(b)(2). The Form states:

> The organization or its plan must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.
>
> Notice to Third Party Administrators of Self-Insured Health Plans
>
> In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:
>
> (1) 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
>
> (2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.
>
> This certification is an instrument under which the plan is operated.

JA 98 (Wheaton's MSJ Ex. B-4 (Dkt. 41-9)).[3] Through this legally operative language, the Form (a) directs the TPA to the Mandate's requirement that the TPA "shall be responsible for" payments for contraceptive services, (b) informs the TPA of the TPA's "obligations," and (c) purports to make the Form, including the Notice section thereof, "an instrument under which the plan is operated." Forcing the non-exempt employer to comply with the statutory "provide coverage" requirement, 42 U.S.C. § 300gg-13(a), by designating the TPA in this manner "ensures that there is a party with legal authority" to make payments to beneficiaries for contraceptive services, 78 Fed. Reg. at 39880, and ensures that employees of employers with religious objections receive these drugs "so long as [they] remain[] enrolled in the plan," 78 Fed. Reg. at 39878; *see* 26 C.F.R. § 54.9815–2713A(d); 29 C.F.R. § 2590.715–2713A(d); *see also* 45 C.F.R. § 147.131(c)(2)(i)(B).

The government has confirmed in litigation that the effects of filling out Form 700 are precisely as they appear from the regulations cited above.

- The self-certification is a but-for cause of the TPA's obligation to make payments. JA 121, 123 (Wheaton's MSJ Ex. B-8 (Dkt. 41-13)).
- "[T]he TPA becomes a plan administrator solely for the purpose of providing the separate payments." *Id.* at 123.

[3] The government issued a new version of this Form in August 2014 reflecting the creation of the "augmented" rules. App. 24. Aside from a discussion of the alternative means of compliance, the substance of the second page of the Form remains unchanged.

- If the employer changes TPAs, the employer has to give the self-certification to the new TPA, obligating it to then make payments for these drugs. *Id.* at 124-25.
- The TPA becomes eligible for payments from the government if—and only if—the religious objector fills out the Form. Hr'g Tr. at 91-92, *Reaching Souls Int'l v. Sebelius*, No. 1:13-cv-1092 (W.D. Okla. Dec. 16, 2013) (admission by counsel to the government).

"Augmented" rules. After the Supreme Court orders and decisions in *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (Jan. 24, 2014), *Hobby Lobby*, 134 S. Ct. 2751 (June 30, 2014), and this case, 134 S. Ct. 2806 (July 3, 2014), the government eventually issued a new set of regulations creating a second way for non-exempt religious organizations to comply with the Mandate's requirement that they "provide coverage." The government has called these its "augmented" rules.

Under the augmented rules, a religious objector whom the government has chosen not to exempt "must" submit a form or notice identifying its religious objection, the name and type of its health plan, and—for the first time—"the name and contact information for any of the plan's [TPAs]." 79 Fed. Reg. 51092, 51094-095 (Aug. 27, 2014). The rules dictate that if the non-exempt religious organization submits this "minimum" and "necessary" information, the government "will send a separate notification to" the religious organization's TPA creating the "obligations of the [TPA] under . . . this section and under § 54.9815-2713A"—which includes the TPA's obligation to deliver emergency contraceptives to participants in the religious or-

ganization's health plan. *Id.* at 51095, 51098; *see* 26 C.F.R. § 54.9815-2713AT (b)(1)(ii)(B). According to the government, the notice by the employer is "an instrument under which the plan is operated." App. 25 (EBSA Form 700 (revised Aug. 2014)).

The "augmented" accommodation scheme shares the objectionable features of the original scheme.

- It uses the same vehicle—the non-exempt religious organization's plan. *See* 29 C.F.R. § 2510.3-16(b) (Either Form 700 or its "alternative" are "instrument[s] under which the plan is operated"); *Archbishop of Wash.*, 19 F. Supp. 3d at 80 (noting government admission that "the contraceptive coverage is part of the [self-insured organization's health] plan."). The coverage would be available to individual employees only "so long as [they are] enrolled" in the organization's plan. 26 C.F.R. § 54.9815–2713A(d). It would be provided subject to the same network and medical management limitations as all other coverage under the plan. 78 Fed. Reg. at 39873.[4]
- It has the same effect: "Regardless of whether the eligible organization" uses Form 700 or "provides notice to HHS in accordance with the August 2014 [augmentation], the obligations of insurers and/or TPAs . . . are the same." CCIIO, *Fact Sheet: Women's Preventive Services Coverage, Non-Profit Religious Organizations, and Closely-Held For-Profit Entities*, *Pri-*

[4] The government admits as much when it insists on using "the existing *employer-based system of health coverage*." Defendants' MSJ at 23 (emphasis added).

vate Insurance, http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html (last visited Mar. 26, 2015); *see also* 26 C.F.R. § 54.9815-2713AT(b)(2) (whether Form 700 or the alternative is used, "the [TPA] shall provide or arrange payments for contraceptive services").

- It uses the same incentives: upon receipt of either Form 700 or notification triggered by an alternative notice—and only upon such receipt—the TPA becomes eligible for 115% reimbursement for the costs of providing contraceptives. *See* 26 C.F.R. § 54.9815-2713AT(b)(3).
- It places the same duty on the religious organization: it must maintain a contractual relationship with a TPA that will provide objectionable coverage on its plan. 78 Fed. Reg. at 39880.

Each of these features that the augmented accommodation shares with the original regulations continue to make it morally objectionable to Wheaton. *See* App. 6 (describing Wheaton's moral objections).

The Gag Rule. Regardless of the accommodation on which it relies, a religious organization that the government has chosen not to exempt must also refrain from saying certain things to its TPA. The original rule stated that the non-exempt religious organization:

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

78 Fed. Reg. at 39895 (amending 29 C.F.R. § 2590.715-2713A(b)(1)(iii) (2013)). After this Court was "troubled by the seeming vagueness of the" gag rule in *Notre Dame*, and after the district court in this case found that it likely violated the First Amendment's free speech clause, the government deleted the gag rule while continuing to assert that conduct violating this section is "unlawful." 79 Fed. Reg. at 51095; *see Notre Dame*, 743 F.3d at 561; App. 16.

II. Wheaton and its religious exercise

Wheaton College is a Christian liberal arts college located in Wheaton, Illinois, and was founded by abolitionist Jonathan Blanchard. App. 3; JA 80 (Wheaton's MSJ Ex. A (Dkt. 41-1) (hereafter Ryken Declaration)). Wheaton holds and follows traditional Christian beliefs about the sanctity of life from conception until natural death. *Id.* All members of Wheaton's community assent to Wheaton's religious beliefs, including its beliefs about the sanctity of life. *Id.*; *see also* JA 129-30 (Undisputed Facts) (in which Defendants acknowledge these facts as "undisputed").

It is undisputed that, as a sincere religious exercise, Wheaton cannot comply with the accommodation. App. 9; Defendants' MSJ at 15. Although Wheaton does not object to traditional contraception, Wheaton is religiously opposed to emergency contraceptives because they may act by killing a human embryo. App. 3; JA 130 (Undisputed Facts (¶ 8)) (mechanism of action "undisputed"). Wheaton believes that complying with the accommodation and authorizing its TPA to provide these drugs in Wheaton's place makes it complicit in sin. App. 6. As a result, Wheaton cannot comply with the "provide coverage" requirement, and cannot allow its plan to be

used to provide coverage in accordance with the accommodation. *Id.* Absent relief from this Court, Wheaton could face as much as $34.8 million in annual fines—along with potential penalties and lawsuits. *Id.* at 4.

III. The ruling below

The court below held that there was "no question" that Wheaton demonstrated all of the preliminary injunction factors. App. 17. Wheaton is subject to irreparable injury with "the loss or impingement of freedoms protected by the First Amendment." *Id.* Moreover, "the balance of harms strongly weighs in [Wheaton's] favor," and without an injunction, Wheaton "will be faced with the Hobson's choice of adhering to its religious beliefs or being subjected to steep financial penalties." App. 18. And the government would suffer virtually no harm, particularly because the mandate does not even apply to "many similarly situated entities" with later plan years. App. 18. The Court below held that Wheaton *did* "demonstrate[] some likelihood of success on the merits of its 'gag rule' claim" under the Free Speech Clause. App. 16. It nevertheless "respectfully denied" the injunction, because it believed it was "unclear" whether an injunction of the "gag rule" "could give [Wheaton] this relief," App. 16, and because it felt "duty-bound" to apply the Sixth and Seventh Circuit's holdings on RFRA, the Establishment Clause, and the APA, despite noting that Judge Flaum submitted a "well-reasoned dissenting opinion" in *Notre Dame*. App. 9 & n.3. The district court based its denial of Wheaton's RFRA claim on *Notre Dame's* "tentative" reasoning that "[f]ederal law, not the religious organization's signing and mailing the form" imposes the requirement to cover contraceptive ser-

vices. App. 9; *Notre Dame*, 743 F.3d at 552, 554. The District Court also erroneously equated Wheaton's hiring procedures to Notre Dame's, thus finding no violation of the Establishment Clause. App. 12-13.

IV. Procedural history

Wheaton filed its complaint on December 13, 2013. Dkt. 1. At Defendants' request, the case was delayed in order to await this Court's decision in *Notre Dame*. Dkts. 19, 22. On April 1, 2014, Defendants filed a motion to dismiss, or in the alternative, for summary judgment. Dkt. 25. On April 22, 2014, Wheaton filed its motion for summary judgment and opposition to Defendants' motion to dismiss. Dkt. 41. At the district court's request, Wheaton also agreed to submit a motion for a preliminary injunction, which was filed on June 10. Dkt. 58.[5]

The district court denied Wheaton's motion for a preliminary injunction on June 23 (Dkt. 62), and Wheaton appealed to this Court on June 26. Dkt. 65. Because Wheaton was subject to fines beginning at midnight on June 30, Wheaton also filed an emergency motion for an injunction pending appeal in this Court.[6] App. Dkt. 4. That motion was denied on June 30 and Wheaton submitted an emergency application to Justice Kagan the same day. App. Dkt. 12; Application for Inj., *Wheaton College v. Burwell*, No. 13A1284 (S. Ct. filed June 30, 2014). Justice Kagan temporarily

[5] The district court initially planned to rule on the parties' cross-motions for summary judgment by June, so as to obviate the need for a preliminary injunction motion. *See* App. 2 & n.1.

[6] In addition, Wheaton filed a motion for reconsideration, or in the alternative, an injunction pending appeal in the district court, Fed. R. App. P. 8(a)(1)(C), which was denied on June 30. Dkt. 72.

enjoined the government from enforcing the Mandate against Wheaton and referred Wheaton's application to the entire Court. App. Dkt. 13. On July 3, the Supreme Court granted Wheaton's application and ordered:

> If [Wheaton] informs the Secretary of Health and Human Services in writing that it is a non-profit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against [Wheaton] the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of appellate review. To meet the condition for injunction pending appeal, [Wheaton] need not use the form prescribed by the Government, EBSA Form 700, and need not send copies to health insurance issuers or third-party administrators.

Wheaton College v. Burwell, 134 S. Ct. 2806, 2807 (July 3, 2014).

At this Court's request, the parties filed multiple status reports. On October 29, 2014, January 12, 2015, and February 6, 2015, the government filed reports indicating that it was treating Wheaton's simple notification prior to the Supreme Court's order as triggering the augmented accommodation issued nearly three months later. This Court ordered briefing to begin on March 26, 2015. App. Dkt. 45.

SUMMARY OF ARGUMENT

Wheaton appeals from the denial of its preliminary injunction motion. The district court found that there was "no question" that Wheaton would suffer irreparable harm if an injunction were denied, and that the balance of harms "strongly weighs in [Wheaton's] favor." App. 17, 18. Under this Court's sliding scale analysis this reduces Wheaton's burden to show that it is likely to succeed on the merits—but even if that were not so, Wheaton's likelihood of success would still be very high, because the Mandate violates RFRA, the First Amendment, and the APA.

RFRA. The Mandate violates RFRA. The district court believed that this argument was foreclosed by *Notre Dame v. Sebelius*, but since that decision, the Supreme Court has ruled in *Hobby Lobby* and vacated *Notre Dame.* Under *Hobby Lobby*, forcing a religious ministry to violate its religious beliefs or pay large penalties is a substantial burden. The government tacitly admits that it has created such a burden because it fully exempts as "religious employers" other religious ministries that are engaged in the same religious exercise as Wheaton. The augmented rules issued in August 2014 do not eliminate this burden, because under both the old and new rules, the result is the same. Forcing Wheaton to violate its religious beliefs or pay large fines is a substantial burden as a matter of law. Because the government admits that it cannot prevail on strict scrutiny, Wheaton is likely to prevail on its RFRA claim.

First Amendment – Free Speech. The Mandate violates the Speech Clause in at least two ways: it compels Wheaton's speech and it imposes a content-based restriction on Wheaton's speech. The Mandate compels Wheaton to speak either to its TPA or to the government. In either case, Wheaton is forced to "utter what is not in [its] mind." *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 634 (1943). This coerced speech is itself the harm, regardless of whether it triggers other actions.

The Mandate also restricts Wheaton's speech to its TPA. Originally, the government's regulations forbade Wheaton from attempting to dissuade its TPA from carrying out the Mandate. After this rule was closely questioned by both the district court and this Court, the government dropped its regulation while continuing to as-

sert that dissuading Wheaton's TPAs could be "unlawful." This kind of vague and content-based speech restriction violates the First Amendment.

First Amendment – Religion Clauses. The Mandate violates the Religion Clauses because it sets up arbitrary and unjustified distinctions between religious organizations—exempting houses of worship and their "integrated auxiliaries" while forcing non-denominational religious institutions like Wheaton to comply with the accommodation. The government's rationale for exempting houses of worship—the presence of likeminded employees—applies equally to Wheaton, whose employees all share the same religious beliefs. The Mandate discriminates between religious groups in a way that the First Amendment forbids.

Administrative Procedure Act. The Mandate violates the APA because it is contrary to law—among other things, ERISA does not give the Department of Labor authority to appoint a plan administrator under the circumstances of this case. The Mandate also violates the APA because the Mandate's distinction between houses of worship and religious organizations like Wheaton that share their key characteristics is arbitrary and capricious.

ARGUMENT

To obtain a preliminary injunction, Wheaton must demonstrate that "(1) it has no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied; and (2) there is some likelihood of success on the merits of the claim." *Korte*, 735 F.3d at 665. Once Wheaton meets this threshold burden, "the court weighs the competing harms to the parties if an injunction is granted or denied and

also considers the public interest." *Id.* The stronger the plaintiff's showing on the balance of harms, the less the plaintiff must show a likelihood of success on the merits. *Id.*

Standard of Review

When reviewing the denial of a preliminary injunction, this Court "proceeds on a split standard of review" and "review[s] legal conclusions de novo, findings of fact for clear error, and equitable balancing for abuse of discretion." *Id.*

I. The equitable injunction factors strongly favor Wheaton.

An injunction is appropriate where, as here, a party who is likely to succeed on the merits can demonstrate that it "has no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied." *Id.*

Although the district court felt constrained to deny Wheaton's motion for a preliminary injunction, it correctly found that there is "no question" that Wheaton will suffer irreparable harm if it is not granted a preliminary injunction. App. 17. Wheaton is faced with the "Hobson's choice of adhering to its religious beliefs or being subject to steep financial penalties"—multi-million dollar fines that threaten its very existence. App. 18. As the court found, "[t]he loss or impingement of freedoms protected by the First Amendment 'unquestionably constitutes irreparable injury,' and such an injury cannot be remedied by the receipt of damages." *Id.* at 17-18 (citation omitted); *accord Korte*, 735 F.3d at 666; *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).

The court also correctly held that "the balance of harms strongly weighs in [Wheaton's] favor." App. 18. When compared with Wheaton's choice between violating its religious beliefs and suffering crushing fines, the government's interest in fining Wheaton during the litigation is weak. At most, it amounts to the same "purely financial" harm that the government already accepts in many other cases where it is unable "to collect tax penalties" against similarly situated religious organizations. *Id.*

Beyond that, the government has publicly conceded that it actually has *no interest* in enforcing the Mandate against religious institutions that, like Wheaton, limit hiring to co-religionists. *See* 78 Fed. Reg. at 39874 (exemption for employers expected to hire co-religionists "does not undermine the governmental interests furthered by the contraceptive coverage requirement."). The government acknowledges that it is "undisputed" that all Wheaton students and employees sign the Community Covenant setting forth Wheaton's shared religious commitments. JA 129 (Undisputed Facts). Thus the government has conceded, in this case, that Wheaton fits the precise description the government gave as justifying the religious employer exemption for other organizations. Furthermore, the government has indefinitely delayed the effective date for the Mandate for tens of millions of people in grandfathered plans, and repeatedly delayed the effective date for religious organizations like Wheaton—first delaying it by a year in 2012, then by another six months in 2013.

The government offers no reason why the Mandate should not be delayed for another short period of time while the courts consider the merits of Wheaton's claims.

This is particularly true in light of the Supreme Court's grants of relief in *Little Sisters of the Poor*, this case, and *Hobby Lobby*.

II. Wheaton is substantially likely to succeed on the merits of its claims.

Given that the equitable injunction factors strongly favor Wheaton, Wheaton bears a reduced burden to show a likelihood of success on the merits. *Korte*, 735 F.3d at 665 (describing "sliding-scale analysis"). Nevertheless, Wheaton's likelihood of success remains very high under any standard, because the Mandate violates RFRA, the First Amendment, and the APA.

A. The Mandate violates the Religious Freedom Restoration Act.

Under RFRA, the federal government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person" withstands strict scrutiny. 42 U.S.C. § 2000bb-1(b). Because under *Hobby Lobby*, forcing a religious ministry to violate its religious beliefs or pay large penalties is a substantial burden—and because the government admits[7] it cannot satisfy strict scrutiny—the Mandate violates RFRA.

1. *The Mandate imposes a substantial burden under* Hobby Lobby *and* Korte.

The substantial burden analysis here is straightforward. As a matter of undisputed religious exercise, Wheaton cannot comply with the Mandate by either (a) providing coverage, or (b) participating in the accommodation. JA 130, 132-34 (Undisputed Facts (¶¶ 9, 13-14, 16-17)). But if Wheaton continues its religious exercise,

[7] Defendants' MSJ at 18 (citing *Korte*).

the government will impose crippling fines. *E.g.* 26 U.S.C. § 4980D(b)(1). This threat—stop your religious exercise or pay fines—is a quintessential substantial burden under binding Supreme Court and Seventh Circuit precedent. *Hobby Lobby*, 134 S. Ct. at 2759; *Korte*, 735 F.3d at 683 ("[T]he substantial-burden inquiry *evaluates the coercive effect of the governmental pressure* on the adherent's religious practice and steers well clear of deciding religious questions.") (emphasis added).

The district court correctly held that the alleged "accommodation" system still subjects Wheaton to "the Hobson's choice of adhering to its religious beliefs or being subjected to steep financial penalties." App. 18. Indeed, the government itself recognizes the Mandate's profound impact on organizations with the very same religious objection as Wheaton, which is why it completely exempts tens of thousands of churches, associations of churches, and their integrated auxiliaries from complying in any way. 45 C.F.R. § 147.131(a). If the system at issue here were no burden at all, there would be no need to exempt other religious objectors from providing Form 700 or another notice. Notably, the government does not require any form, any notification, or any other method of hand-raising to take advantage of this true exemption. In contrast, the "accommodation" with which Wheaton must comply continues to use the religious objectors' actions, plan, information, and contractual relationships, which is why the government must insist on forced participation by the "accommodated" entities.

But while the government has exempted many others engaged in the same religious exercise as Wheaton, it continues to insist that Wheaton must either cease its

religious exercise or face severe punishment. That is the same impermissible choice—backed by the same financial penalties—that constituted a substantial burden in *Hobby Lobby*. There, the Court found that "[b]ecause the contraceptive mandate forces them to pay an enormous sum of money . . . if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs." 134 S. Ct. at 2779. The same is true here—if Wheaton "insist[s] on providing insurance coverage in accordance with their religious beliefs"—i.e., without participating in the government's "accommodation"—then "the contraceptive mandate forces them to pay an enormous sum of money." *Id.* As the Court explained, "If these consequences do not amount to a substantial burden, it is hard to see what would." *Id.* at 2759. The Seventh Circuit provided similar analysis in *Korte*, holding that "substantial pressure on an adherent to modify his behavior and to violate his beliefs" is a substantial burden. *Korte*, 735 F.3d at 682-684 (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)).

Hobby Lobby and *Korte* should end the matter and end the case. The government has created exemptions for many others ("religious employers" engaged in the same religious exercise as Wheaton; small employers; and those with grandfathered plans) but has refused to exempt Wheaton. Forcing Wheaton to violate its religious beliefs or pay large fines is a substantial burden as a matter of law. And because the government has conceded strict scrutiny under *Korte*, the government loses under RFRA and must simply use one of its many other available ways of providing coverage (such as using its own existing exchanges, or using the "most straightfor-

ward" route of direct government payment, *see Hobby Lobby*, 134 S. Ct. at 2780). RFRA does not prohibit the government's ultimate goal of expanding access; but it does prohibit the forced involvement of Wheaton and its plan in violation of Wheaton's religious beliefs.

The government's arguments to the contrary would require accepting one of two false premises: either that its "augmented" accommodation eliminates the substantial burden on Wheaton, or that this Court's admittedly "tentative" and now-vacated *Notre Dame* decision correctly analyzed the Mandate and trumps the Supreme Court's subsequent decisions in *Hobby Lobby*, *Wheaton College*, and *Holt v. Hobbs*, 135 S. Ct. 853 (2015). Neither premise is correct.

2. The "augmented" "accommodation" changes nothing.

While "religious employers" have been exempted entirely from having to sign Form 700, provide a notice or plan instrument to the government, or allow their plans to be used in ways that violate their religion, the government's "accommodation" continues to require Wheaton to either violate its religious beliefs or pay IRS fines. App. 18. Nothing in the government's newest "augmented" accommodation changes this analysis, because the new Mandate merely keeps Form 700 and adds an "alternative" way for Wheaton to violate its faith. Whether Wheaton is forced to comply by executing and delivering Form 700, or by sending the new notice described in the "augmented" accommodation, Wheaton is still being forced to violate its religious beliefs. Indeed, in all the morally relevant features, the Mandate remains unchanged:

- As the government forthrightly admits, there is no difference in effect between executing and delivering Form 700 or providing the new notice: "Regardless of whether the eligible organization" uses Form 700 or "provides notice to HHS in accordance with the August 2014 [augmentation], the obligations of insurers and/or TPAs . . . are the same."[8]
- Either action also has the same effect of creating incentives—including the right to payback of 15% over and above costs—for the TPA to provide products Wheaton deliberately excludes. *See* 26 C.F.R. § 54.9815-2713AT(b)(3). The government has agreed that, without the religious ministry's action, the provider is not eligible for these incentive payments. Hr'g Tr. at 91-92, *Reaching Souls Int'l v. Sebelius*, No. 1:13-cv-1092 (W.D. Okla. Dec. 16, 2013). *See* JA 89 (Ryken Declaration) (detailing religious objections to this aspect of the accommodation).
- The Mandate continues to interfere with Wheaton's contracts by appointing administrators of *Wheaton*'s plan against Wheaton's will and overriding Wheaton's decision to be its own plan administrator. The updated version of EBSA Form 700 specifically states that both the Form *and a notice to the*

[8] CCIIO, *Fact Sheet: Women's Preventive Services Coverage, Non-Profit Religious Organizations, and Closely-Held For-Profit Entities*, http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html (last visited Mar. 26, 2015); *accord* 26 C.F.R. § 54.9815-2713AT(b)(2) (whether Form 700 or the alternative is used, "the [TPA] shall provide or arrange payments for contraceptive services"). *See* JA 89 (Ryken Declaration) (detailing religious objections to these aspects of the accommodation).

Secretary "is an instrument under which the plan is operated." App. 27 (EBSA Form 700 (revised Aug. 2014)). *See* JA 89 (Ryken Declaration) (detailing religious objections to this aspect of the accommodation).

> The organization or its plan using this form must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.
>
> Notice to Third Party Administrators of Self-Insured Health Plans
>
> In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:
>
> (1) 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
>
> (2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.
>
> As an alternative to using this form, an eligible organization may provide notice to the Secretary of Health and Human Services that the eligible organization has a religious objection to providing coverage for all or a subset of contraceptive services, pursuant to 26 CFR 54.9815-2713A(b)(1)(ii)(B) and (c)(1)(ii), 29 CFR 2590.715-2713A(b)(1)(ii)(B) and (c)(1)(ii), and 45 CFR 147.131(c)(1)(ii). A model notice is available at: http://www.cms.gov/cciio/resources/Regulations-and-Guidance/index.html#Prevention.
>
> This form or a notice to the Secretary is an instrument under which the plan is operated.

Id.

- Wheaton's contract with its TPA is carefully crafted to avoid making the TPA into a plan administrator with fiduciary duties under ERISA.[9] Under the

[9] Under its existing agreement, Wheaton's TPA is merely a "claim administrator" whose responsibilities are limited to "rendering advice . . . and administering claims" and who is "not a fiduciary with respect to" Wheaton's self-funded plan. JA 96 (Wheaton's MSJ Ex. A-3 (Dkt. 41-4) (hereafter "BlueCross Administrative Ser-

terms of Wheaton's health plan, *Wheaton* is the plan administrator, and its TPA contract expressly disclaims any fiduciary duties on the part of the TPA. *Id.*; JA 83 (Ryken Declaration). Nothing in ERISA permits the government to appoint a plan administrator where, as here, the plan already has an ERISA administrator (Wheaton) and the plan sponsor (Wheaton) can be identified. 29 U.S.C. § 1002(16)(A).

- The Mandate still requires Wheaton to maintain a contractual relationship with a TPA that will provide objectionable coverage on its plan. 78 Fed. Reg. at 39880. *See* JA 88-89 (Ryken Declaration) (detailing religious objections to this aspect of the accommodation).
- The Mandate continues to use Wheaton's plan as the vehicle to provide these products.[10] The coverage would be available to individual employees only "so long as [they] are enrolled" in Wheaton's plan. 26 C.F.R. § 54.9815–2713A(d). It would be provided subject to the same network and medical management limitations as all other coverage under the plan. 78 Fed. Reg. at 39873. *See*

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vices Agreement")). *See also* JA 88-89 (Ryken Declaration) (detailing religious objections to this aspect of the accommodation). *Contra Notre Dame*, 743 F.3d at 555 ("Notre Dame has presented no evidence that its contract with Meritain forbids the latter to be a plan fiduciary.").

[10] *See* 29 C.F.R. § 2510.3-16(b) (either Form 700 or its "alternative" are "instrument[s] under which the plan is operated."); *Roman Catholic Archbishop of Washington v. Sebelius*, 19 F. Supp. 3d 48, 80 (noting government admission that "the contraceptive coverage is part of the [self-insured organization's health] plan.").

JA 88-90 (Ryken Declaration) (detailing religious objections to these aspects of the accommodation).[11]

- The end result is Wheaton is still required to provide a health plan that comes with "seamless" access to emergency contraceptives. *See* 26 U.S.C. § 4980H; *see also Priests for Life*, 772 F.3d at 257 (noting coverage must be "seamless"); *id.* at 235 (noting that Mandate "operate[s] through" the "market-based system of employer-sponsored" coverage); *See* JA 87-90 (Ryken Declaration) (detailing religious objections to these aspects of the accommodation).

In sum, the "augmented" "accommodation" is just as bad as before. To use this alternative, Wheaton "must" submit a form or notice identifying its religious objection, the name and type of its plan, and—for the first time—"the name and contact information for any of the plan's [TPAs]." 79 Fed. Reg. at 51094-95. According to the regulations, if Wheaton submits this "necessary" information, the government "will send a separate notification to" Wheaton's TPA creating the "obligations of the [TPA] under . . . this section and under § 54.9815-2713A"—which includes the TPA's obligation to deliver contraceptives to participants in Wheaton's health plan. *Id.* at 51098; *see* 26 C.F.R. § 54.9815-2713AT(b)(1)(ii)(B). This arrangement does nothing to solve the underlying moral problem that the government is taking over Wheaton's plan for purposes Wheaton opposes. Nor does the government's belated

[11] The government admits as much when it insists on using "the existing *employer-based system of health coverage*." Defendants' MSJ at 23 (emphasis added).

claim that Wheaton *already* provided such notice solve the problem, because the government is still trying to illegally take over Wheaton's plan.[12] *See* JA 87-89 (Ryken Declaration).

An analogy may be helpful here. Suppose the government ordered hospitals to perform elective surgical abortions. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2783 (raising a similar illustration). If religious hospitals object, the government allows their doctors to "opt out" of performing the elective abortions *if* the objecting hospitals allow external doctors to perform the abortions in the hospital. Because the "opt-out" still requires *the hospital's facilities* for the abortions, the hospital would still be participating. In the same way, the government's insistence that *Wheaton* provide a plan and that *Wheaton* allow the government to use *Wheaton's plan* to distribute emergency contraceptives still makes Wheaton complicit as a religious matter. *See* JA 87-89 (Ryken Declaration).

To be sure, questions of moral complicity can be thorny. Reasonable and well-intentioned people can reach different conclusions as to when and whether one person is complicit in another's actions. But it is for Wheaton and not the government

[12] Several months after Wheaton sent the government its notification, the government suddenly claimed that Wheaton had triggered an accommodation under a rule that had not even existed when Wheaton sent the notification. *See* Status Report, App. Dkt. 38 (claiming, on October 29, 2014, that Wheaton's June 6, 2014 notification satisfied a rule issued in late August 2014). The government has begun trying to use that argument to take over Wheaton's plans. *Id.* Of course if "federal law" independently required this coverage, and if the government did not need to use Wheaton's actions and plans to make its system work, this strange tactic would not even be necessary.

to decide whether Wheaton's religion forbids the actions required by the accommodation. As the Supreme Court explained, such religious questions:

> implicate[] a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.

Hobby Lobby, 134 S. Ct. at 2778. This Circuit has likewise held that "the substantial burden [inquiry] does not ask whether the claimant has correctly interpreted his religious obligations." *Korte*, 735 F.3d at 683. Such inquiries are, in fact, "prohibited." *Id.* (citing *Thomas*, 450 U.S. at 716). Under RFRA, "[i]t is enough that the claimant has an 'honest conviction' that what the government is requiring, prohibiting, or pressuring him to do conflicts with his religion." *Id.* (quoting *Thomas*, 450 U.S. at 716); *see also Thomas*, 450 U.S. at 715 ("Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one.").

For these reasons, the "augmented" accommodation changes nothing. Wheaton still faces the same impermissible choice: violate your religious beliefs or pay fines. That Hobson's choice is a substantial burden under *Hobby Lobby* and *Korte*. The government could of course remove this substantial burden if it would simply use its *own* exchanges or its *own* programs to deliver products it thinks people should have. But so long as it insists on using *Wheaton* and its plans to achieve that goal, it cannot avoid RFRA.

3. *This Court's "tentative" and early analysis in* Notre Dame *has proven incorrect, and cannot trump* Hobby Lobby*,* Wheaton College*, and* Holt.

Nor can the government save its Mandate by relying on this Court's now-vacated decision in *Notre Dame*. This Court appropriately cautioned in *Notre Dame* that "everything we say in this opinion about the merits" of the parties' claims was "necessarily tentative, and should not be considered a forecast of the ultimate resolution of this still so young litigation." *Notre Dame*, 743 F.3d at 552. That qualification made perfect sense at the time, in part because "the evidentiary record [was] virtually a blank," *id.*, and in part because the Court heard the matter on an unusually accelerated briefing and argument schedule.

The passage of additional time, however, makes it possible to observe objective facts on the ground about how the Mandate operates. Those facts about the Mandate's operation, coupled with the Supreme Court's rulings in *Hobby Lobby, Holt v. Hobbs,* and *Wheaton College*, demonstrate that the *Notre Dame* decision was incorrect and should not be followed even as persuasive authority.

a. Contraceptive coverage is not provided by independent operation of federal law.

Notre Dame denied relief in part because it rejected the plaintiffs' "trigger theory" and found instead that "[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 plans, to cover contraceptive services." 743 F.3d at 554.

Experience now demonstrates that *Notre Dame's* conclusion was wrong. Coverage provided under the accommodation is entirely dependent on the employer's conduct and the employer's policy. If the employer provides a policy and complies with

the accommodation, coverage flows. If the employer does not provide a policy or does not comply with the accommodation, the coverage does not flow. Everything is dependent on the religious objector and its policy. Federal law alone does nothing.

Thus, where a religious employer complies with the accommodation, the drugs are made available. *See, e.g.*, *Notre Dame*, 743 F.3d at 552. But in the many cases in which injunctions protect religious employers from having to sign the government's forms, the drugs do not flow. *See, e.g., Little Sisters*, 134 S. Ct. 1022 (granting injunction); Supplemental Br. for the Government at 5, *Little Sisters of the Poor v. Burwell*, No. 13-1540, September 8, 2014 ("Because of the injunctions issued in these cases,[13] the women employed by plaintiffs have been and continue to be denied access to contraceptive coverage.").

Indeed, in opposing an injunction for Wheaton College in this case, the government argued that allowing Wheaton not to sign would "inflict a very real harm on the public and, in particular, a readily identifiable group of individuals"—Wheaton's employees. Defendants' P.I. Opp. at 6.[14] If the drugs flowed simply by virtue of "in-

[13] The government's reference to "these cases" refers not only to *Little Sisters*, but also to two other cases that were the subject of some combined briefing at the Tenth Circuit: *Southern Nazarene University v. Burwell*, No. 14-6026 (10th Cir.) and *Reaching Souls International v. Burwell*, No. 14-6028 (10th Cir.). Collectively, these cases involved all three types of plans (insured, self-insured, and church plans).

[14] The government also offered an even longer parade of horribles that would occur if Wheaton was not forced to sign the form, including undermining Congress's ability to achieve its goals of equal treatment, denying employees contraceptives, and (without a trace of irony) risking harm to "developing fetuses." Defendants' P.I. Opp. at 5-6. If the Form were not the trigger, then *none* of these harms could possibly flow from protecting Wheaton from being forced to sign.

dependent legal obligations"—and if Wheaton's actions did not trigger, enable, and authorize the drugs to flow in connection with Wheaton's plan—then no harm whatsoever would follow from allowing Wheaton not to sign. The government's harm argument, and its longstanding insistence that Wheaton must provide the required notice or Form and allow the government to use Wheaton's plan, confirm that Wheaton's actions are, in fact, the trigger. Simply put: no plan and no signature = no coverage.

The centrality of Wheaton's role in this system is further confirmed by the regulations themselves. As a matter of federal law, participating in the accommodation is the way Wheaton would "comply" with a statutory obligation to "provide coverage." 78 Fed. Reg. at 39879 ("an eligible organization is considered to comply with section 2713 of the PHS Act . . . "); 42 U.S.C. § 300gg-13(a) (requirement to "provide coverage" for preventive services). Whether through the original accommodation or the "augmented" accommodation, the system requires Wheaton to execute plan instruments—which only makes sense if it is *Wheaton's* plan the government is using. *See* App. 24 (EBSA Form 700 (revised Aug. 2014)). And as the government admitted when announcing the accommodation scheme, Wheaton's participation is necessary to "ensure[]" that Wheaton's TPA has "legal authority to arrange for payments for contraceptive services and administer claims in accordance with ERISA's protections for plan participants and beneficiaries." 78 Fed. Reg. at 39880; *see* Wheaton's MSJ at 23; Wheaton's Reply in Supp. of Summ. J. (Dkt. 52) at 13-14. Likewise, Wheaton's existing contract with its TPA prevents the TPA from acting as a plan

administrator or taking on the kinds of fiduciary duties that the government's accommodation scheme requires. *See* Wheaton's MSJ at 22-23 (quoting and discussing the Administrative Services Agreement between Wheaton College and BlueCross BlueShield of Illinois); *see also* JA 96 (BlueCross Administrative Services Agreement). The government's system thus depends on forcing Wheaton to violate its religion by using EBSA Form 700 or sending a different notice to amend this contractual agreement, replace Wheaton as administrator of its own plan, create new fiduciary duties on the part of the TPA, and enable the flow of abortion-inducing drugs. *See* JA 96 (BlueCross Administrative Services Agreement); JA 83 (Ryken Declaration). And the end result of and reason for this required participation is so that the government can make this coverage "seamless" with Wheaton's coverage. *See Priests for Life*, 772 F.3d at 257. Surely Wheaton is involved in this system and has a right to have religious beliefs about the moral consequences of that involvement.[15]

b. *Notre Dame*'s "substantial burden" analysis cannot be reconciled with subsequent Supreme Court precedent.

The vacatur in *Notre Dame* reflects the Supreme Court's view that there is "a reasonable probability that the decision below rests upon a premise that the lower

[15] Indeed, given that *federal law* deems the required actions to be "provid[ing] coverage," it should hardly be surprising that Wheaton and other religious objectors also believe they are providing coverage. It makes no sense for the government to treat the required actions as "provid[ing] coverage," for the government to argue that it has a compelling need to force Wheaton's actions in order to provide coverage, and for the coverage to be received by employees as "seamless" with Wheaton's plan, but then to claim Wheaton has nothing to do with the matter and no right to object to its coerced involvement.

court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). The *Notre Dame* panel erred by focusing its substantial burden analysis on the particulars of the religious exercise at issue, rejecting Notre Dame's religious claim that compliance would "make[] the university an accomplice in the provision of contraception," and emphasizing the physical ease of signing the form. 743 F.3d at 554 (Form "could have taken no more than five minutes" to sign and send).

Hobby Lobby forecloses that approach. Instead, *Hobby Lobby* focuses the substantial burden inquiry on the magnitude of the government pressure on the believer to give up the religious exercise. 134 S. Ct. at 2759, 2775-2779. This is the same approach this Circuit applied in *Korte*, which explained that "the substantial-burden inquiry evaluates the coercive effect of the governmental pressure on the adherent's religious practice and steers well clear of deciding religious questions." 735 F.3d at 683. Thus it is irrelevant that participating in the accommodation "amounts to signing one's name and mailing the signed form to two addresses." *Notre Dame*, 743 F.3d at 558. The question is not whether the actions required of Wheaton College are physically demanding or time-consuming, but only whether the enormous government pressure on Wheaton to abandon its undisputed religious exercise is substantial or not. And *Hobby Lobby* authoritatively answered that question. 134 S. Ct. at 2779 ("Because the contraceptive mandate forces them to pay an enormous sum of money . . . if they insist on providing insurance coverage in ac-

cordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.").

This analysis is supported by the Supreme Court's orders in *Little Sisters* and *Wheaton College*, and by its decision in *Holt v. Hobbs*. In *Little Sisters*, as here, the government emphasized the physical ease with which the nuns could comply with the accommodation. No. 13A691 Memorandum of Respondents in Opposition at 21 (arguing unsuccessfully that the Little Sisters should be denied relief because they could comply "with the stroke of their own pen"). The government's argument was unsuccessful and the Court protected the Little Sisters. 134 S. Ct. 1022. Likewise, in *Wheaton College*, the government unsuccessfully urged the Court to deny relief because Wheaton "need only self-certify" to comply with the accommodation. No. 13A1284 Memorandum of Respondents in Opposition at 2. The Court again granted relief despite these arguments. And in *Holt*, the Court recognized a substantial burden on a prisoner's religion from being forced to shave a beard—despite the fact that shaving is obviously a physically easy and quick task for most people.[16] 135 S. Ct. at 862. These cases confirm that the substantial burden inquiry focuses on the substantiality of the government's pressure rather than the physical difficulty or time-consuming nature of the coerced action. That is the approach of *Hobby Lobby*

[16] Although *Holt* involved the Religious Land Use and Institutionalized Persons Act (RLUIPA), it applies here because "RLUIPA . . . allows prisoners 'to seek religious accommodations pursuant to the same standard as set forth in RFRA.'" *Holt*, 135 S. Ct. at 860 (citation omitted).

and *Korte*, and it forecloses the approach taken in the now-vacated *Notre Dame* decision.

B. The Mandate violates the First Amendment's Free Speech Clause.

The Mandate violates the Speech Clause because it compels Wheaton's speech and because it imposes a content-based restriction on Wheaton's speech. Each violation merits strict scrutiny, *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988), a test the government concedes it cannot pass in light of *Korte*. Defendants' MSJ at 18.

Compelled Speech. The Mandate compels Wheaton's speech by forcing it to either sign and deliver EBSA Form 700, or provide the "information necessary . . . to implement" the government's employer-based contraceptive distribution scheme. 79 Fed. Reg. at 51095. It is "a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *Agency for Int'l Dev. v. AOSI*, 133 S. Ct. 2321, 2327 (2013). The government cannot "mandate[] speech that a speaker would not otherwise make." *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 651 (7th Cir. 2006). The district court rejected the compelled speech claim because it mistakenly believed the claim was "predicated on the 'trigger theory'" and therefore could not succeed in light of *Notre Dame*. App. 15.

Though the trigger theory is correct for the reasons set forth above, the compelled speech argument does not rest on that theory, because a compelled speech claim does *not* require that the compelled speech trigger any particular result. Being compelled to "utter what is not in [one's] mind" is itself the harm, regardless of whether that utterance triggers other actions. *W. Va. Bd. of Ed. v. Barnette*, 319

U.S. 624, 634 (1943). When West Virginia forced a child to salute the flag, that salute did not trigger any legal authorization or obligation. *Id.* at 627-29. When New Hampshire forced its citizens to bear its message on their license plates, nothing was "triggered" by that forced speech. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Yet the Court still rejected the states' compulsion to engage in speech that was "repugnant to [the speaker's] moral [and] religious . . . beliefs." *Id.* at 705.

Here, the law requires Wheaton to say something it has not yet said and that it does not want to say. The Supreme Court, in both this case and *Little Sisters*, merely required religious objectors to tell the government that they "hold[] [themselves] out as religious and [have] religious objections to providing coverage for contraceptive services." *Wheaton Coll.*, 134 S. Ct. at 2807. Yet the "augmented" accommodation requires more. *See* 79 Fed. Reg. 51094-95 (discussing "minimum" "necessary" information). Having chosen to pursue its goals by coercing speech, the government must carry its burden under strict scrutiny, *United States v. Playboy Entm't Group*, 529 U.S. 803, 816 (2000), which it concedes it cannot do. *See supra* note 7.

Gag Rule. The original Mandate made it a condition of accepting the accommodation that religious objectors must refrain from trying to influence the TPA's decision about providing coverage. 78 Fed. Reg. at 39879-80. The trial court correctly found that Wheaton is likely to succeed on its argument that this violates the Free Speech Clause, as the *Notre Dame* court left it an open question. App. 16; *Notre Dame*, 743 F.3d at 561. This ruling was obviously correct, because the First Amendment "does not countenance government control over the content of messag-

es expressed by private individuals." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994); *see* Wheaton's MSJ Ex. B-7 (Dkt. 41-12) (describing statements that objectors are not allowed to make under the gag rule). The augmented regulations backed away from the gag rule. This is a beneficial change that resulted at least partially from this litigation, which means that Wheaton has prevailed on its argument against the gag rule as such. *See, e.g.*, 10 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2667 (2014). But the new gag rule still states that it is "unlawful" for Wheaton to instruct its TPA not to provide contraceptives—without identifying any actual law that makes it so. 79 Fed. Reg. at 51095. Because the regulations have no text to guide Wheaton's speech or cabin the government's enforcement, the law still violates the Free Speech clause. *See Wis. Right To Life, Inc. v. Barland*, 751 F.3d 804, 833 (7th Cir. 2014) (striking down law for "residual vagueness and overbreadth" even after revisions).

C. The Mandate violates the Religion Clauses.

The Mandate violates the Religion Clauses by discriminating among religious institutions that are engaged in the same religious exercise. The Mandate exempts favored groups the government deems "religious employers": "houses of worship," "integrated auxiliaries," and the "exclusively religious activities of any religious orders." 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013). These entities are entirely exempt—they face no requirement to cede control of their health plans to the government or a third party, no requirement to certify anything to the government or a third party, and no requirement to amend their plan documents or allow the government to amend their plan documents. Yet Wheaton, which seeks to engage in the exact

same religious exercise as thousands of exempt "religious employers," must comply with the "accommodation" or pay massive penalties.

Instead of denying this discrimination, the government attempts to justify it by subjecting organizations like Wheaton to its own baseless assumptions:

> Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are *more likely* than other employers to employ people of the same faith who share the same objection, and who would therefore be *less likely* than other people to use contraceptive services even if such services were covered under their plan.

78 Fed. Reg. at 39874 (emphases added). In other words, the government discriminates against Wheaton because it believes Wheaton's faith has less influence over its religious ministry than does a church's. But that assumption is false, *as the government has openly conceded in this litigation*. JA 129-30 (Undisputed Facts) (government acknowledgement of Wheaton's Community Covenant as an "undisputed fact"); *see also* JA 102 (Wheaton's MSJ Ex. B-5 (Dkt. 41-10) (hereafter Cohen Deposition Trans.)) ("no evidence" for government's discriminatory conclusion). All of Wheaton's employees share its religious faith. *Id*. According to the government's own reasoning, Wheaton should be exempt.

According to the First Amendment, when the government adopts a rule that makes "explicit and deliberate distinctions between different religious organizations," it must meet strict scrutiny. *Larson v. Valente*, 456 U.S. 228, 246-47 & n.23 (1982). The Mandate cannot do so.

Larson invalidated a Minnesota law that discriminated among religious organizations, imposing disclosure requirements only on those that did not "receive[ ]

more than half of their total contributions from members or affiliated organizations." *Id.* at 231-32. The law thus exempted self-supported churches while targeting churches that relied on outside donations. *Id.* at 246 n.23. This "explicit and deliberate distinction[] between different religious organizations" failed strict scrutiny and violated the Establishment Clause. *Id.* at 246 n.23, 255.

The discrimination among religious organizations here is even less defensible than the program in *Larson*. Rather than creating its own criteria for the religious employer exemption, the government borrowed the strict rules that the IRS uses for the completely unrelated purpose of determining which religious organizations are exempt from reporting their income. This narrow IRS exemption applies only to institutional churches or organizations controlled by an institutional church. *See* 78 Fed. Reg. at 39874; 45 C.F.R. § 147.131(a); 26 C.F.R. § 1.6033-2(h)(2) & (3) (affiliation); 26 C.F.R. § 1.6033-2(h)(4) (funding). And under the IRS rules, an exempt organization must not "normally receive[] more than 50 percent of its support" from non-church sources—a qualification that closely parallels the criteria condemned in *Larson*. *Compare* 26 C.F.R. § 1.6033-2(h)(2)-(4) *with Larson*, 456 U.S. at 230 (law "impos[ed] . . . requirements upon only those religious organizations that solicit more than fifty per cent of their funds from nonmembers").

Thus, Wheaton's status under the Mandate's exemption depends on the religious composition of its internal authority structure. Although they remain closely associated with the many churches that share their Evangelical Protestant beliefs, due to their religious tradition, Evangelical colleges like Wheaton are less likely to have

the kinds of close financial and administrative ties to a particular church that the IRS reporting rules require. *See* JA 129 (Undisputed Facts) (government concession that it is "undisputed" that "Wheaton's non-denominational identity is one that is often favored by Evangelical Christian institutions because of its ability to foster cooperation between members of different churches that share common religious convictions."). Because Wheaton has made a choice to remain independent from any one church or denomination, it is faced with a choice between violating its beliefs or paying millions of dollars in penalties if it refuses to go along with the government's scheme.

Yet, Wheaton shares the exact same religious beliefs and seeks to engage in the exact same religious exercise as thousands of exempt churches and integrated auxiliaries. The government should be agnostic about how religious organizations should be organized, and it should have no preference for religious ministries to remain financially tied to any particular church hierarchy. By preferring certain church-run organizations to other types of religious organizations, the Mandate inappropriately "interfer[es] with an internal . . . decision that affects the faith and mission" of a religious organization, namely whether a religious mission is best achieved by ceding control to centralized church authorities. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 707 (2012). The IRS's strict rules may be justified in the income reporting context, but they are completely unjustified as Defendants seek to use them here—as a limitation on the exercise of religious liberty. The Mandate thus discriminates "expressly based on the degree of religiosity of

the institution and the extent to which that religiosity affects its operations . . . ." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (McConnell, J.) (applying *Larson* to invalidate distinction between "sectarian" and "pervasively sectarian" organizations). Because the government admits that it cannot satisfy strict scrutiny, this discrimination violates the Religion Clauses.

D. The Mandate violates the Administrative Procedure Act.

The Mandate also violates the Administrative Procedure Act. It does this in two ways. First, the Mandate is contrary to law—not just RFRA and the First Amendment, but also ERISA. 5 U.S.C. § 706(2)(A). The district court rejected this claim in part because it applied heightened *Chevron* deference to the agencies' interpretations of laws they do not administer. App. 14. This was legal error.

Second, the Mandate is arbitrary and capricious because the federal agencies that promulgated it "offered an explanation for its decision that runs counter to the evidence" before the agency. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The district court erred when it relieved the agencies of their burden to explain why the thousands of religious non-profits that, like Wheaton, hire employees of the same faith were not entitled to the exemption offered to houses of worship. App. 14.

Contrary to law. The district court rejected Wheaton's argument that the Mandate was "contrary to law" in part because the APA "affords the Government a significantly more deferential standard of review." App. 14. That is legal error. "[A]gencies enjoy broad power to construe statutory provisions *over which they have been given interpretive authority*." *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863,

1878 (2013) (emphasis added); *see also Chevron U.S.A., Inc. v. Natural Res's Defense Council, Inc.*, 467 U.S. 837, 842 (1984). *Chevron* deference is not a shield that agencies can use to excuse their own non-compliance with laws they do not interpret. And although they are bound by the Constitution and RFRA, none of the three agencies in this case are charged by Congress with interpreting these laws. Applying *Chevron* deference to the agencies' claims of compliance with RFRA and the Constitution was legal error. The Mandate fails the proper RFRA and constitutional standards for the reasons set forth above.

The Mandate is contrary to law in another way as well. The augmented rules rely on the Department of Labor to "designate the relevant [TPA] as plan administrator under section 3(16) of ERISA" by sending a written notification. 79 Fed. Reg. at 51095. And because Wheaton and many others have taken specific steps to *prevent* their TPAs from serving as plan administrators and to *forbid* those TPAs from providing emergency contraceptives under the plan, *see supra* note 9, the augmented rules also state that the Department of Labor's notification "supersede[s] any earlier designation," and is "an instrument under which the plan is operated." *Id.* Likewise, the government contends that a religious objector's notice to the government is also "an instrument under which the plan is operated." App. 25 (EBSA Form 700 (revised Aug. 2014)).

It is clear why the agencies are so insistent that there be a separate notification: "because a[n ERISA] plan must be maintained pursuant to a writing, it can be modified only in writing." *Orth v. Wis. State Emps. Union Counsel 24*, 546 F.3d 868, 872

(7th Cir. 2008) (Posner, J.). Wheaton's plan documents exclude emergency contraceptives, identify Wheaton as the plan administrator, and state that Wheaton's TPA has no fiduciary duties; in order to modify Wheaton's ERISA plan, there must be a writing. Under the original accommodation, that writing was EBSA Form 700. Under the augmentation, that writing is Wheaton's notice to the Department of Labor. App. 25 (EBSA Form 700 (revised Aug. 2014)) ("This form or a notice to the Secretary is an instrument under which the plan is operated.").

The agencies candidly admit that their authority to rewrite the terms of Wheaton's plan through the notification turns on the Department of Labor's "authority under Title I of ERISA, which includes the ability to interpret and apply the definition of plan administrator under ERISA section 3(16)A." 79 Fed. Reg. at 51095. But ERISA section 3(16)A does not give the Secretary of Labor freewheeling authority to designate plan administrators and override plan documents. It says:

> (16)(A) The term "administrator" means--
>
> > (i) the person specifically so designated by the terms of the instrument under which the plan is operated;
> >
> > (ii) if an administrator is not so designated, the plan sponsor; or
> >
> > (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

29 U.S.C. § 1002(16)(A). Congress only gave the Secretary of Labor authority to designate a plan administrator when two conditions are met: the plan has no designated administrator and a plan sponsor cannot be identified. Designation as a plan administrator is not a mere formality; a plan's administrator is "a trustee-like fiduciary," that "manages the plan, follows its terms in doing so, and provides partici-

pants with the summary documents that describe the plan (and modifications) in readily understandable form"—and can be sued under 29 U.S.C. § 1132 for failing to do so. *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1877 (2011). Nothing in the statutory text suggests that Congress gave the Secretary of Labor authority to impose this kind of liability on the TPA of a plan whose administrator and sponsor are known.

The Supreme Court has specifically warned against "tamper[ing] with an enforcement scheme crafted with such evident care as the one in ERISA." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985). Congress gave the Secretary of Labor authority to name a plan administrator only under very narrow circumstances, none of which are met here. Where "'Congress has directly spoken to the precise question at issue,'" this Court "'must reject administrative constructions which are contrary to clear congressional intent.'" *Akram v. Holder*, 721 F.3d 853, 859 (7th Cir. 2013) (quoting *Chevron*, 467 U.S. at 842, 843 n.9); *accord City of Arlington*, 133 S. Ct. at 1868. The Department of Labor's regulation defining "plan administrator" to include an entity designated by the Secretary following receipt of a notice from an "eligible organization" (29 C.F.R. § 2510.3–16) is flatly inconsistent with the plain text of ERISA, and for that reason contrary to law.

Arbitrary and capricious. It is likewise blackletter law that an agency may not "offer[] an explanation for its decision that runs counter to the evidence" before it. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. This rule was reemphasized just this month. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). ("An agency must consider and respond to significant comments received during the period for

public comment."). As a result, agency decisions are arbitrary and capricious where a regulated organization "clearly inform[s]" the agency that one of its key assumptions is invalid, and the agency nevertheless acts on that assumption. *Monsanto Co. v. E.P.A.*, 19 F.3d 1201, 1207 (7th Cir. 1994). But when adopting the Mandate, the agencies did just that.

The Mandate completely exempts churches and other houses of worship: unlike other religious non-profits, churches may continue to exclude contraceptives from their health plans and neither their insurers nor their TPAs are required to provide them through any mechanism whatsoever. The agencies stated that they exempted houses of worship because they assumed that church employees are "more likely" to object to the use of contraceptives than employees of religious non-profits like Wheaton. 78 Fed. Reg. 39874.

In parallel litigation, the government has conceded that it has "no evidence" to support this "key assumption."[17] *Monsanto*, 19 F.3d at 1207. In fact, the opposite is true. All members of Wheaton's community assent to Wheaton's religious beliefs, including its beliefs about the sanctity of life. JA 129-30 (Undisputed Facts) (government concession that these facts are "undisputed"). During their prior rulemaking, the agencies received comments from the Council for Christian Colleges and Universities (CCCU), which represents 121 Evangelical Protestant colleges and

[17] JA 102 (Cohen Deposition Trans.) (HHS witness admitting that that the agency had "no evidence" to support its assumption about the employees of religious non-profit organizations).

universities, including Wheaton (or nearly 15% of the 900 religiously-affiliated institutions of higher education in the United States).[18] CCCU pointed out that the agencies' rationale did not apply to CCCU's Evangelical Protestant members:

> The CCCU is particularly frustrated by that rationale for the exemption-accommodation paradigm, **because a requirement for membership in the CCCU is that full-time administrators and faculty at our institutions share the Christian faith of the institution.** Obviously our administrators and faculty do share the deeply held religious convictions of their employers, contrary to the Department's view. Ironically, churches, on the other hand, some of which do not hire only Christians, remain exempt in this scheme. This exposes why this is not a coherent criterion – rather, the religious mission of the organization should drive the distinction.[19]

Thus, the agencies were "clearly informed" that one of their key assumptions about the employees of the religious organizations they were regulating was invalid. Because the agencies nevertheless relied on that false assumption, the Mandate is arbitrary and capricious. *Monsanto*, 19 F.3d at 1207.

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[18] CCCU, Profile of U.S. Post-Secondary Education, *available at* https://www.cccu.org/about (last visited March 26, 2015); CCCU, *Members and Affiliates*, https://www.cccu.org/members_and_affiliates (last visited March 26, 2015).

[19] JA 108-109 (Wheaton's MSJ Ex. B-6 (Dkt. 41-11)) (emphasis in original). Wheaton made the same point in the comments it submitted on the augmented rules, observing that

> [Wheaton's] faculty and staff all share Wheaton College's evangelical Christian beliefs, including its beliefs about the obligation to protect innocent human life from conception until natural death. In fact, all of Wheaton College's employees and students sign a community covenant in which they promise to live in a way that reflects Wheaton College's commitment to the sanctity of human life.

Wheaton Augmented Rule Comments at 1 (Oct. 27, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=EBSA-2014-0013-11076.

The district court's discussion of this failure amounts to hand waving. App. 14. ("The Government is required only to provide a 'concise general statement' of a rule's basis and purpose . . . not to furnish a detailed explanation that specifically addresses every single evidentiary submission . . . ."). But that will not do. Wheaton College and the other CCCU members are precisely the organizations that the agencies sought to regulate, and precisely those about which the government made demonstrably false factual assumptions. They represent nearly 15% of all religiously-affiliated institutions of higher education in the U.S. Their practice of hiring co-religionists is so well-established and longstanding that it is expressly protected in Title VII. 42 U.S.C. § 2000e-1(a). To ignore this evidence was to "entirely fail[] to consider an important aspect of the problem" before the agencies. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. This glaring failure renders the Mandate arbitrary and capricious.

CONCLUSION

Wheaton respectfully requests that the Court reverse the district court and enter an injunction against the government during the pendency of this appeal requiring it to treat Wheaton as an exempt "religious employer" and otherwise enjoining it from enforcing the substantive requirements imposed in 42 U.S.C. § 300gg-13(a) (4) and enforcement actions for noncompliance related thereto, including those found in 26 U.S.C. §§ 4980D, 4980H and 29 U.S.C. §§ 1132, 1185d, against Wheaton and its insurers and TPAs.

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2. This brief complies with the requirements of Fed. R. App. P. 32(a) and Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using "Word 2013" with Century Schoolbook, size 12 font.

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CERTIFICATE OF SERVICE

I certify that on March 26, 2015, I caused the foregoing brief and required short appendix to be served by CM/ECF to the following parties, who have consented in writing to service in this manner:

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