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

REPLY BRIEF OF APPELLANT WHEATON COLLEGE

Christian Poland
BRYAN CAVE LLP
161 N. Clark St., Suite 4300
Chicago, IL 60601-3315
(312) 602-5085
christian.poland@bryancave.com

Mark Rienzi
Adèle Auxier Keim
Diana M. Verm
THE BECKET FUND
FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave. NW,
Suite 700
Washington, DC 20036
(202) 955-0095
mrienzi@becketfund.org

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Counsel for Wheaton College

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations

Other Authorities

INTRODUCTION

Wheaton has benefits plans, and the government wants to use them. Rather than using its own exchanges or programs—just as it does for tens of millions of people right now—the government insists on using Wheaton's plans, despite Wheaton's undisputed religious objection to cooperating with the "accommodation." That act—the coercive use of Wheaton's plan in violation of Wheaton's religious beliefs—is a substantial burden on religion. Nothing in this Court's "tentative" analysis in *Notre Dame v. Burwell*, No. 13-3853, 2015 WL 2374764, at *13 (7th Cir. May 19, 2015) (*Notre Dame II*) changes that.

From the start, the attempted takeover of Wheaton's plans caused the government trouble, because using Wheaton's plan involves *Wheaton*. That is the *raison d'être* for Form 700: the government knew it could not change an employer's benefits contracts without the employer revising its written plan documents. *See Orth v. Wis. State Emps. Union Counsel 24*, 546 F.3d 868, 872 (7th Cir. 2008) (ERISA plan "can be modified only in writing"); *see also* 29 U.S.C. § 1002(16)(A) (defining "plan administrator" and limiting government's ability to name one). That is why the government spent years trying to force religious ministries to alter their own plans with Form 700, and why even the newest version of the "accommodation" purports to transform a bare notification to HHS into an "instrument" of Wheaton's plan. App. 25. The government wants to use Wheaton's plans, and by law it needs Wheaton's help to do so.

The government does not challenge the district court's finding that this attempted takeover imposes on Wheaton a "Hobson's choice." App. 18. It does not dispute Wheaton's religious objection to providing plans that will be used in this way, JA130, or to cooperating with the "accommodation," JA132. Nor does it dispute that severe fines will be imposed if Wheaton refuses. Most importantly, the government correctly admits that, to satisfy the substantial burden test, "*it 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*." Gov't Br. in Opp. at 12, *Notre Dame v. Burwell*, No. 14-392 (U.S. Jan. 14, 2015) (*Notre Dame* BIO) (quoting *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013)) (emphasis added). These concessions alone resolve the substantial burden question.

Yet the government persists in arguing that Wheaton "simply is trying to block the provision of contraceptive coverage by third parties." Resp. 16, 28. This argument misunderstands Wheaton's religious exercise. Wheaton seeks only to protect Wheaton's actions and Wheaton's benefits plans. Wheaton has no religious objection to the government or third parties providing coverage in ways that do not involve Wheaton and its plans. That is why Wheaton has affirmatively suggested several alternative ways in which the government can provide drugs without involving Wheaton. Br. 4-5, 25-26.

The government's argument and *Notre Dame II* misinterpret the Supreme Court's recent decisions. *Hobby Lobby* expressly did not decide the validity of the accommodation. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2782 & n.40 (2014). The

Supreme Court's relief in this case just three days after *Hobby Lobby* and its recent GVR orders in other cases confirm this understanding. Those orders required findings (that Wheaton's right to relief was "indisputably clear" and that there is a "reasonable probability" the vacated cases would come out differently on remand) that are irreconcilable with the government's view of *Hobby Lobby*.

The better reading is that the Supreme Court's decisions reject the government's view of substantial burden while leaving strict scrutiny for another day. All five times (since January 2014) that the government has presented its substantial burden theory to the Supreme Court, the government has lost. The government presents here the same rejected, recycled theories. *See infra* note 1. It is the government's crabbed view of "substantial burden" that "cannot be reconciled" with the Supreme Court record.

The government does not improve its argument by pretending that Wheaton has already invoked the accommodation. Resp. 27; *Notre Dame II*, 2015 WL 2374764, at *12. First, Wheaton has not invoked the accommodation. Federal law explains what is required, *see* 29 C.F.R. 2590.715-2713A(b)(1)(ii)(B), and Wheaton has purposefully not complied. And federal law limits the government's ability to name plan administrators unilaterally. *See* 29 U.S.C. § 1002(16)(A). Furthermore, even if Wheaton had complied, the "accommodation" would still burden Wheaton by forcing it to provide a plan for the government to use in ways that violate its religion.

The government claims this coercion is permissible because it is a "reasonable means" of advancing "compelling interests in seamlessly providing contraceptive

coverage." Resp. 33. But the government regularly uses other mechanisms to provide equally "seamless" contraceptive access to millions of people, including through its own exchanges. The government does not need Wheaton's plans to achieve its goals.

Finally, the government cannot claim a compelling—or even a *rational*—interest in enforcing the accommodation against religious non-profits that—like Wheaton and unlike Notre Dame—hire only coreligionists. The government has already conceded that the "religious employer" exemption is justified because churches and "integrated auxiliaries" are "more likely" to hire like Wheaton, *i.e.*, by hiring people who share their religious beliefs. 78 Fed. Reg. 39870, 39874 (July 2, 2013). Simply put, if the government gives full exemptions to employers it *guesses* will hire like Wheaton, it cannot deny Wheaton itself the same exemption, particularly where Wheaton's hiring practices are undisputed. JA129. RFRA, the First Amendment, the APA, and common sense prohibit such arbitrary discrimination.

If a further record is required to understand exactly how the most recent version of the accommodation functions, *Notre Dame II*, 2015 WL 2374764, at *5-6, or to determine whether the government carried its strict-scrutiny burdens below, *id.* at *12-13, Wheaton respectfully requests remand with an injunction prohibiting the government's efforts to use Wheaton's plans. The government should not be permitted to change the law during the appeal and then avoid an injunction because courts find an absence of evidence about the newly changed rule.

ARGUMENT

Wheaton is entitled to an injunction if it is likely to succeed on the merits of any of its claims.

I. The Mandate violates the Religious Freedom Restoration Act.

A. The Mandate imposes a substantial burden.

The government has now offered its views about the substantial burden test to the Supreme Court five times in the past seventeen months. The government has lost every time.[1] Those defeats at the Supreme Court are consistent with Wheaton's

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[1] *Compare* Resp. 31 (arguing no substantial burden because "it is the government that requires or offers to pay third parties to provide contraceptive coverage if an eligible organization declines to do so"), *with*:

- Gov't Br. at 13, *Mich. Catholic Conference v. Burwell,* No. 14-701 (U.S. Mar. 19, 2015) (unsuccessfully opposing certiorari by arguing that plaintiffs' "objections are based on obligations imposed on third parties");
- *Notre Dame* BIO at 15 n.6 (unsuccessfully opposing certiorari by arguing that "petitioner's argument ... focuses on the actions of third parties");
- Gov't Br. in Opp. at 22, *Wheaton Coll. v. Burwell*, No. 13A1284 (U.S. July 2, 2014) (unsuccessfully opposing injunction by arguing that Wheaton "would not be authorizing or requiring those third parties to provide coverage," because "the legal duties of those third parties are imposed by federal law"); *id.* at 3 (noting that Wheaton's right to relief must be "indisputably clear … to warrant an original injunction") (citing *Wis. Right to Life, Inc. v. FEC*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers));
- Gov't Merits Br. at 14, *Hobby Lobby v. Burwell*, No. 13-354 (U.S. Jan. 10, 2014) (unsuccessfully arguing that there was no substantial burden because "decisions by independent third parties are not attributable to the employer");
- Gov't Br. in Opp. at 30, 33, *Little Sisters of the Poor v. Sebelius*, No. 13A691 (U.S. Jan. 3, 2014) (unsuccessfully opposing injunction by arguing that "contraceptive coverage might actually be provided by entities other than [the Little Sisters] if [the Little Sisters] signed the self-certification").

understanding of substantial burden; they are irreconcilable with the government's. The government's substantial burden argument rests on two premises: first, that "[i]t is federal law, rather than the religious organization's signing and mailing the form," that results in contraception coverage (*Notre Dame II*, 2015 WL 2374764, at *8-*9); and second, that *Hobby Lobby* and the Supreme Court's *Wheaton* order support the "accommodation." Resp. 22-26. Both premises are wrong.

1. The first premise—that contraception coverage is provided "no matter what" due to the independent operation of "federal law," *Notre Dame II*, 2015 WL 2374764, at *8-*9—is demonstrably false. Coverage only occurs if the religious objector contracts for the coverage or if the government coerces the religious objector into complying with the "accommodation." Contrast *Wheaton* and *Notre Dame*. When Notre Dame did not receive relief and complied, what happened? Coverage was provided. But last July when Wheaton received an injunction and did not have to comply, what happened? Coverage was not provided. The government had to write a *new* rule after the *Wheaton* order and pretend that Wheaton had complied with it. If coverage were provided automatically as a result of federal law—and if the only question were, as *Notre Dame II* suggests (*id.*), who would pay for it—there would have been no reason for the government to even try this charade. Indeed, the government admits that it cannot require third-party administrators (TPAs) to provide coverage "no matter what." It concedes that designating another plan administrator is necessary to "ensure[]" that someone has "legal authority" to make payments to

beneficiaries for contraceptive services. 78 Fed. Reg. at 39880. Without Wheaton's involvement, no one would have authority to use its plans in this way.

Other Mandate cases confirm this point repeatedly. In *Reaching Souls International v. Sebelius*, the ministries' TPA, Highmark, stated it would provide contraceptive coverage "upon receipt of the self-certification form." No. 13-cv-1092, 2013 WL 6804259, at *7 n.8 (W.D. Okla. Dec. 20, 2013). Because the ministries received an injunction protecting them from being compelled to self-certify, Highmark is not providing the contraceptive coverage. *See* Oral Arg. at 26:05-29:03, *Reaching Souls Int'l v. Burwell*, No. 14-6028 (10th Cir. Dec. 8, 2014), https://www.ca10.uscourts.gov/sites/default/files/clerk/14-6028.mp3. While *Reaching Souls* concerns a church plan, Form 700 acts as a trigger for both church plans and non-church plans. *See, e.g.*, Gov't Br. at 24, *Eternal Word Television Network v. Sec'y*, No. 14-12696-CC (11th Cir. June 18, 2014) (admitting that, without an executed self-certification, contraceptives are not provided on an objecting ministry's non-church plan).

The government is well aware of this game-changing difference between Notre Dame and everyone else. The government told the Supreme Court that *Notre Dame* was unique because the school "had executed and transmitted the self-certification and its TPA had begun providing coverage to petitioners' employees—a case-specific holding not implicated by this Court's intervening decisions." *Notre Dame* BIO at 11. The government told this Court that *Notre Dame* stood in "sharp contrast" to other cases because it had signed the form so coverage occurred. Gov't Br. at 5,

Notre Dame v. Burwell, No. 13-3853 (7th Cir. Feb. 4, 2014). Where a party complies with the accommodation, they "seamlessly" provide coverage. When a party does not comply, coverage is not provided. Period.

The government's litigation behavior also offers powerful confirmation. If the government believed that "independent obligations of law" required coverage, it is hard to understand why the government fought the Little Sisters of the Poor and Wheaton College to the Supreme Court to force their compliance with the accommodation. *See, e.g.*, Defendants' P.I. Opp. (Dkt. 59) at 3 (opposing a delay of even a few days pending the Supreme Court's decision in *Hobby Lobby*). Why would the government fight even small delays if coverage occurred "no matter what"? And why would the government claim that even a preliminary injunction protecting Wheaton from forced compliance would "inflict a very real harm" on Wheaton's plan beneficiaries (Defendants' P.I. Opp. at 6)? The government's unyielding litigation position confirms that, under the system it has adopted, the government knows that it needs the forced participation of religious ministries and their plans.[2]

2. The government's second key premise (Resp. 22-26)—that *Hobby Lobby* and the Supreme Court's *Wheaton* order support the "accommodation"—is also wrong. *Hobby Lobby* was clear: the Court did "not decide today whether an [accommodation] of this type complies with RFRA for purposes of all religious claims." *Hobby*

[2] For a detailed—and unrebutted—explanation of the many ways in which the accommodation relies on forced actions by "non-exempt" entities to "comply" with the requirement to "provide coverage," *see* Br. 9-14 and 33-36.

Lobby, 134 S. Ct. at 2782. Nor did the Court "h[o]ld" that Hobby Lobby "would be entitled to the 'accommodation,'" *Notre Dame II*, 2015 WL 2374764, at *10. Furthermore, it is simply untrue that "[t]he companies in *Hobby Lobby requested* the accommodation" or that they "did it without protesting." *Compare id. with Hobby Lobby*, 134 S. Ct. at 2803 (Ginsburg, J., dissenting) (noting that the Court "hedge[d]" on the accommodation and Hobby Lobby was "noncommittal" because accommodation had not been offered). Hobby Lobby requested—and received—an injunction against the only law that applied to it: the Mandate. To this day, the government has not issued any new rule offering the accommodation to Hobby Lobby. Neither Hobby Lobby nor any other for-profit business in the country participates in the accommodation.

The government and *Notre Dame II* are equally wrong about the *Wheaton* order. The *Wheaton* order did two things. First, it showed that *Hobby Lobby* had not blessed the accommodation. 134 S. Ct. at 2808 (Sotomayor, J., dissenting). Second, it called the government's bluff on its claim that its accommodation system worked "independently" of Wheaton and its plans. *See id.* at 2807. After the order, coverage was not provided, proving the government's claims to be false. That is why the government needed to pass a *new* regulation purporting to designate a *new* document to be an "instrument" under Wheaton's plan. But this "augmented" rule shares the same fatal flaw: it relies on coercing Wheaton to provide and alter a plan for coverage that violates its religious beliefs. Wheaton had previously notified the government of its objection to the Mandate as required by the Supreme Court's injunction;

but it certainly has not "sought and received" the "augmented accommodation" at issue here. *Notre Dame II*, 2015 WL 2374764, at *13.

The tentative *Notre Dame II* analysis also errs in its discussion of *Bowen v. Roy*. 2015 WL 2374764, at *13. In the only part of that case analogous to this one—whether Roy could be forced to provide his daughter's social security number—"five Members of the Court agree[d] that *Sherbert* and *Thomas,* in which the government was required to accommodate sincere religious beliefs, control the outcome." *Bowen v. Roy*, 476 U.S. 693, 731 (1986) (O'Connor, J., concurring in part and dissenting in part). Thus while Roy could not control the government's "internal" use of a number, he would have won against the requirement that he take action in violation of his religious beliefs. Here, Wheaton has no objection to the government's "internal" use of its knowledge that Wheaton objects; Wheaton only objects to being forced to provide a plan to be used in violation of Wheaton's religious beliefs. Under *Bowen,* that is precisely the kind of claim that five Justices agreed the government would have been "required to accommodate," even before RFRA. *Id.*

3. The government also resorts to mistaken analogies. It says that its accommodation scheme is like the conscientious objector system used by the modern U.S. military. Resp. 28. Not so. An analogous system would require the objector to authorize a substitute whom the government was previously powerless to draft, and remain continually involved in that person's military service by providing him with

(1) financial incentives and (2) mission-critical information. This is not the system we have today; it is more like the system used by the Confederacy in the Civil War.[3]

The government fares no better in suggesting that Wheaton's objection is like the Jehovah's Witness in *Thomas* refusing to "opt out" of making weapons "because his opt-out would cause someone else to take his place on the assembly line." Resp. 29. But after opting out, an objector like Thomas would have no continuing involvement in the assembly line, which he did not own. For that analogy to be accurate, the comparison would be to a factory owner who refuses to use his own assembly line to make weapons and is told that the government will "accommodate" him by imposing an "independent legal obligation" on others to use his assembly line to build the weapons for him. Factory-owner Thomas would be no more "accommodated" by the government takeover of his factory than Wheaton is "accommodated" by the attempted takeover of its health plans.

The best analogy is the one Wheaton raised and the government ignores: a religious hospital forced by law to allow external doctors to perform abortions on the premises. Br. 31. It would not matter if the hospital's own doctors were exempted; such a rule involves the hospital *itself* in actions that violate its religious beliefs. Wheaton is likewise involved because it is Wheaton's plan that the government seeks to use. The government nowhere disputes the accuracy of this analogy.

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[3] Statutes at Large of the Confederate States of America 2, 78 (1862) (Quakers "shall furnish substitutes or pay a tax of five hundred dollars").

B. The Mandate fails strict scrutiny.

The government conceded below that it cannot satisfy strict scrutiny in light of *Korte*. Defendants' MSJ (Dkt. 26) at 18. Nothing in *Hobby Lobby* undermines *Korte*. The government's certiorari petition in *Korte* was denied. *Burwell v. Korte*, 134 S. Ct. 2903 (2014). This Court's decision in *Notre Dame II* turned on substantial burden, not strict scrutiny. *See Notre Dame II*, 2015 WL 2374764, at *19. *Korte* remains the law of this circuit, and under *Korte*, the government loses.

1. The government failed to prove a compelling interest.

The government asserts three interests: public health, gender equality, and "seamless" coverage. Resp. 36-37. As to public health and gender equality: both *Korte* and *Hobby Lobby* rejected these interests as overbroad. *Hobby Lobby*, 134 S. Ct. at 2779 ("many of [HHS's interests] are couched in very broad terms, such as promoting 'public health' and 'gender equality.'"); *Korte*, 735 F.3d at 686 ("By stating the public interests so generally, the government guarantees that the mandate will flunk the test."). And no matter how broadly the government tries to read Justice Kennedy's concurrence, he fully joined the majority's rejection of those interests. Nor did Justice Kennedy say anything to suggest the government's interests would be compelling as applied "to the person" here—a Christian school whose employees share its religious beliefs such that an exemption "does not undermine the governmental interest." 78 Fed. Reg. at 39874. Thus the only two interests asserted below—and therefore the only two properly before this Court—fail as a matter of law.

The government's interest in "seamless" coverage was not asserted below. S*ee* Defendants' MSJ at 19-22. Even on its own terms, it fails. Simply put, there is no compelling interest in shielding employees from the "small burdens" of "learn[ing] about" and "sign[ing] up for" a health benefit. Resp. 44. The government offers *no evidence* that such "small burdens" have ever deterred anyone from obtaining contraception. And, of course, *all* employees must "learn about" and "sign up for" health benefits, regardless of where their benefits come from. In fact, many employers are seen as generous for "forcing" their employees to choose among multiple plans.[4] Beyond that, the government has waived any claimed interest in providing emergency contraceptives through *Wheaton's* plans, because it has urged Wheaton to drop those plans entirely, Defendants' P.I. Opp. at 4 n.2—thereby sending *all* of its employees to the exchanges. If the exchanges are sufficiently "seamless" for Wheaton's employees should they *lose* their plan, then they are no less "seamless" if Wheaton's employees *keep* their plan.

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[4] Indeed, outside of this litigation, the government says the ability to choose between different health plans is a good thing that "make[s] buying health coverage easier." *See, e.g.*, HHS, Health Insurance Marketplace (Nov. 28, 2014), http://www.hhs.gov/healthcare/insurance/ ("The Health Insurance Marketplace is designed to make buying health coverage easier .... The Marketplace allows you to ... [c]ompare health insurance plans [and e]nroll in a health insurance plan that meets your needs"); HealthCare.gov, Doctor Choice and Emergency Room Access, https://www.healthcare.gov/health-care-law-protections/doctor-choice-emergency-room-access/ (last visited May 28, 2015) ("You can choose any available primary care provider in your insurance plan's network."). The claim that the same options pose intolerable burdens here cannot be taken seriously, particularly given the complete absence of evidence.

The mandate is also underinclusive in three additional respects. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (law protecting public health "cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited") (internal citation omitted).

First, we now know that for the past two years, HHS guidance allowed insurance companies to exclude some contraceptives from their plans for cost reasons.[5] These insurers, some of whom excluded the drugs at issue here, were not subject to fines and now have up to fourteen months—until plan years starting in July *2016*—to come into compliance.[6] The contrast with this appeal—where Wheaton only excludes a handful of contraceptives, seeks only a preliminary injunction, and yet was forced to seek a Supreme Court order to protect it from millions of dollars in fines in July *2014*—could not be starker. The government cannot possibly have a compelling interest in forcing Wheaton's plans to cover these drugs right now, while other plans have been given an extra year to comply.

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[5] CMS.gov, FAQs About Affordable Care Act Implementation (Part XXVI), 4-5 (May 11, 2015), http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/aca_implementation_faqs26.pdf (stating that prior agency guidance may have been reasonably interpreted not to require insurers to offer no-cost coverage of all contraceptives).

[6] *Id.* (establishing fourteen-month compliance window); *see also* Laurie Sobel et al., Kaiser Family Foundation, Coverage of Contraceptive Services: A Review of Health Insurance Plans in Five States, 2 (Apr. 16, 2015), http://files.kff.org/attachment/report-coverage-of-contraceptive-services-a-review-of-health-insurance-plans-in-five-states (surveying twenty plans and finding five FDA-approved contraceptives that were not covered on at least one plan).

Second, "the contraceptive mandate 'presently does not apply to tens of millions of people'" on grandfathered health plans. *Hobby Lobby*, 134 S. Ct. at 2764. The government asserts that grandfathering "allow[s] a transition period for compliance," Resp. 40, but in fact "there is no legal requirement that grandfathered plans ever be phased out." *Hobby Lobby*, 134 S. Ct. at 2764 n.10. Last week, the government announced that more than forty-six million people are on grandfathered plans exempted from the Mandate.[7] Although grandfathered plans must still "provide what HHS has described as 'particularly significant protections,'" the Mandate is not included. *Hobby Lobby*, 134 S. Ct. at 2780 (quoting 75 Fed. Reg. 34538, 34540 (June 17, 2010)). If the government willingly tolerates a possibly unlimited "transition period," Resp. 40, for "simply the interest of employers in avoiding the inconvenience of amending an existing plan," *Hobby Lobby*, 134 S. Ct. at 2780, it cannot have a compelling interest in opposing a preliminary injunction here.

Third, the government has exempted whole classes of employers from compliance with the mandate. Small businesses employing thirty-six million people are exempt. *Id.* at 2764. Their employees must often obtain insurance on the same exchanges the government denigrates here. Likewise, 4.5 million people covered by the military's TRICARE health plans do not have access to all FDA-approved con-

[7] HHS, ASPE Data Point, The Affordable Care Act is Improving Access to Preventive Services for Millions of Americans, 3 (May 14, 2015), http://aspe.hhs.gov/health/reports/2015/Prevention/ib_Prevention.pdf (estimating that 26% of the 177 million non-elderly Americans with private insurance are on grandfathered plans) (hereinafter "ASPE Data Point").

traceptives without co-pays—an issue Congress is considering but hasn't yet addressed. S. 358, 114th Cong. (2015). The government cannot possibly have a compelling interest in forcing Wheaton to provide more access to contraceptives than it provides to its own military.

The most damning exception to the government's case is the church and integrated auxiliary exemption. The government has already conceded that fully exempting religious non-profits that are "likely" to "employ people of the same faith who share the same objection" "does not undermine the governmental interests furthered by" the mandate. 78 Fed. Reg. at 39874. The government does not dispute that Wheaton's employees sign its community covenant, affirming that they share Wheaton's beliefs.[8] JA129-30. And the government never explains how the IRS's classification, Resp. 41, is relevant to its interests in *this* case. Given these admissions, the government lacks even a rational interest, much less a compelling one, in enforcing the mandate against Wheaton.

The government's arguments ultimately fail because it refuses to grapple with the demands of the compelling interest test. RFRA "requires us … to look to the marginal interest in enforcing the contraceptive mandate in [this] case[]." *Hobby Lobby*, 134 S. Ct. at 2779. "Ambiguous proof will not suffice" and the government

[8] To distract from its dispositive admission, the government resorts to scare tactics about taking intrusive individual discovery. Resp. 38-39. Wheaton agrees that the prospect of the government questioning individuals under oath about their sexual behavior and religious beliefs is repugnant. That is yet another reason why the government should not discriminate among religious institutions based on government guesswork about employee sexual behavior and religious beliefs.

"bears the risk of uncertainty." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2739 (2011). For the reasons above, the government has failed to demonstrate a compelling interest in enforcing the mandate in *this case*.

2. The government has not used the least restrictive means.

As this Court has held, HHS has "many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty." *Korte*, 735 F.3d at 686. Wheaton proposed multiple less restrictive means in the court below. Wheaton's MSJ (Dkt. 41) at 27-28. The government failed to rebut them with evidence, as it was required to do. *See* Defendants' MSJ at 23-24; *Hobby Lobby*, 134 S. Ct at 2780. Its arguments on appeal cannot cure this defect.

The least restrictive means requirement is "exceptionally demanding." *Hobby Lobby*, 134 S. Ct. at 2780; *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015). If a less restrictive alternative would serve the government's purpose, "the legislature *must* use that alternative." *U.S. v. Playboy Ent'mt Grp., Inc.*, 529 U.S. 803, 813 (2000) (emphasis added). To make this showing, the government must introduce evidence into the record. *Playboy*, 529 U.S. at 816, 826. *Hobby Lobby* suggested possible evidence, such as "the average cost per employee of providing access to these contraceptives," or "the number of employees who might be affected" at Wheaton should they not receive coverage. *Hobby Lobby*, 134 S. Ct. at 2780. The government provided no evidence that less restrictive alternatives are not viable.[9]

[9] In this regard, the Court's "tentative" ruling in *Notre Dame II* erred by placing the burden on the plaintiff, rather than the government. 2015 WL 2374764, at *11.

Most obviously, any dissatisfied Wheaton employee can obtain plans with full contraceptive coverage on the government's exchanges. The government has conceded in litigation across the country that its interests are satisfied if employees purchase insurance on these exchanges. Gov't Br. at 56, *Hobby Lobby*. ("Such employees may obtain coverage on a health insurance exchange, and all policies offered on exchanges will provide contraceptive coverage without cost sharing."); Gov't Br. in Opp. at 20 n.5, *EWTN v. Burwell* (11th Cir. June 20, 2014) (inviting EWTN to "choose to discontinue offering health coverage" since "its employees could purchase health insurance … on exchanges where many may qualify for subsidies."). HHS trumpets that nearly seven million Americans now receive no-cost contraceptive coverage through these exchanges. ASPE Data Point at 3. This is also how the government ensures coverage to millions of Americans who work for small employers. *See Hobby Lobby*, 134 S. Ct. at 2764.

The government now objects to these alternatives because women would have to sign up for services. Resp. 43. But they have to sign up for Wheaton's plans too. The government points to no evidence that having employees sign up for a plan would actually impede its public health goals, or deter women from using contraceptives.[10] Even if it had such evidence, it could not explain why this method is insufficient for

[10] The government also relies on the IOM report for the proposition that women need "seamless[]" coverage. Resp. 36. But that portion of the report says nothing about emergency contraceptives, or contraceptives at all, and focuses entirely on cost, *not* on "seamless" coverage. *See* IOM, Clinical Preventive Services for Women: Closing the Gaps 19 (2011). Wheaton's suggested alternatives would provide contraceptives at no cost to employees.

Wheaton's employees but perfectly fine for thirty-four million Americans employed by small businesses. *See supra*.

The government's only other objection—that the government itself has not decided to subsidize such employees—is entirely within the *government's* control. By all means if Congress wishes to add "employees of religious objectors" to the long list of exchange customers it is willing to subsidize, that is well within the government's power. But nothing about the least restrictive means test suggests that Congress's decision not to provide a subsidy for such coverage somehow creates a compelling interest to allow the agencies to force Wheaton to provide that coverage instead.

Beyond the exchanges, the Supreme Court recognized that "[t]he most straightforward way of [providing contraceptives] would be for the Government to assume the cost of providing" the items directly, and "HHS has not shown, see §2000bb-1(b)(2), that this is not a viable alternative." *Hobby Lobby*, 134 S. Ct. at 2780. That same failure remains present here and controls the outcome of this case. The government spends hundreds of millions per year through Title X of the Public Health Service Act to "[p]rovide a broad range of acceptable and effective medically approved family planning methods … and services." 42 C.F.R. 59.5(a)(1). The government argues that Title X is limited to low-income families. Resp. 45 n.16. But the statute only requires "priority" for low-income families; it does not exclude others. 42 U.S.C. § 300a-4(c)(1). HHS itself sets the definition of "low income," 42 C.F.R. 59.5(a)(8), and could choose to define "low income" to include persons whose em-

ployers cannot provide certain contraceptives the government wants to provide. HHS has also emphasized that these drugs are available at community health centers, which just received $101 million in additional funding from HHS.[11]

Wheaton has pointed to multiple alternatives that do not require the government to "create entirely new programs" or "adopt alternatives not currently authorized by law," as it claims it would have to do. Resp. 44-45. However, even if the least restrictive means does lead to a new government program, strict scrutiny requires it. *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1458-59 (2014) (election laws failed strict scrutiny because alternative laws could be imposed).

II. The Mandate violates the Religion Clauses.

As Justice Ginsburg recognized in *Hobby Lobby,* the Religion Clauses give "special solicitude to the rights of" religious "nonprofit[s]" that "exist to foster the interests of persons subscribing to the same religious faith." *Hobby Lobby*, 134 S. Ct. at 2794-96 (Ginsburg, J., dissenting). That "special solicitude" supports Wheaton's position here.

The Mandate facially discriminates among religious organizations based on government speculation about the religiosity of the organizations and their employees. Br. 41-45. The government seeks to excuse this irrational discrimination via a theo-

[11] HHS.gov, Press Release (Jan. 20, 2012) https://web.archive.org/web/20150110170807/http://www.hhs.gov/news/press/2012pres/01/20120120a.html (stating that employees of religious organizations can access contraceptives at community health centers); HHS.gov, Press Release, HHS Announces $101 Million in Affordable Care Act Funding to 164 New Community Health Centers (May 5, 2015), http://www.hhs.gov/news/press/2015pres/05/20150505a.html.

ry that the Establishment Clause bans *only* discrimination among religious denominations, not among religious institutions. Resp. 49-50. Both courts and the government have rejected that view.

Two years ago when it (wrongly) told this Court that religious exercise rights do not extend to profit-making entities, the government characterized *Hosanna-Tabor*'s "special solicitude" as extending to "religious organizations" and explained that "religious organizations" have long received special protection in federal law. *See, e.g.*, Gov't Br. at 18-22, *Grote v. Sebelius*, No. 13-1077 (7th Cir. March 18, 2013). The attempted limitation to churches was developed for this litigation and is inconsistent with the First Amendment.

Larson v. Valente stated that "explicit and deliberate" governmental discrimination "between different *religious organizations*" was unconstitutional. 456 U.S. 228, 246 n.23 (1982) (emphasis added). Relying on the United States' amicus brief, the Ninth Circuit applied *Larson* to find that Title VII's exception for "religious corporations" must include religious non-profits. *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011); *accord Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002). As the government explained, "allow[ing] houses of worship to engage in religious-based employment practices, but deny[ing] equal privileges to other, independent [religious] organizations that also have sincerely held religious tenets" would "create a serious Establishment Clause problem." Gov't Amicus Br. at 11, *Spencer v. World Vision*, No. 08-35532 (9th Cir. Nov. 28, 2008).

The government was right then and wrong now. The government tries to take refuge in its co-opting of 26 U.S.C. § 6033 to pick and choose who gets religious liberty rights. Resp. 49-50. But while § 6033 may have specific usefulness for tax reporting purposes, it is—as the government's own briefing in *World Vision* indicates—an unfit tool for determining religious exemptions. *Cf. Larson*, 456 U.S. at 246 n.23 (rejecting harmful religious discrimination even when it "result[s] from application of secular criteria"). The Mandate, unlike § 6033, is *explicitly* based on government speculation about the religious beliefs of a ministry's employees. 78 Fed. Reg. at 39874. Likewise, the inclusion of "integrated auxiliaries"—essentially organizations that are funded and controlled by churches—impermissibly discriminates against institutions like Wheaton that are obviously religious but non-denominational. A law that "facially regulate[s] religious issues"—as the Mandate does—"must treat individual religions *and religious institutions* without discrimination or preference." *Weaver*, 534 F.3d at 1257 (internal quotation omitted) (emphasis added). The Mandate fails this test.[12]

III. The Mandate violates the Administrative Procedure Act.

Contrary to law—inappropriate deference. The district court erred when it applied a "significantly more deferential standard of review" to the agencies' interpre-

[12] It is no answer to say that the mandate does not interfere with Wheaton's internal governance. Resp. 50-51 (citing *Priests for Life v. HHS*, 772 F.3d 229, 274 (D.C. Cir. 2014)). The mandate conditions Wheaton's degree of religious liberty on the extent to which it is controlled by a particular church, and directly interferes in the relationship between Wheaton and its coreligionists who join in the school's ministry.

tation of RFRA and the First Amendment, laws over which they have no interpretive authority. App. 14. The agencies' actions violate RFRA and the First Amendment and for that reason, violate the APA. The application of *Chevron* deference to this claim was legal error and should be reversed.

Contrary to law—ERISA. The government does not dispute that Wheaton already has an ERISA 3(16) plan administrator. The government also does not dispute that Wheaton has taken specific steps to *prevent* its TPA from serving as an ERISA 3(16) plan administrator for the provision of emergency contraceptives and to exclude such drugs from its plan. Br. 46-47. Finally, the government does not dispute that Wheaton's plan can only be modified in writing. *Orth*, 546 F.3d at 872. The government's attempt to change Wheaton's plan by forcing Wheaton to execute documents modifying the plan—via EBSA Form 700 or Wheaton's notice to HHS—and by attempting to generate plan documents itself—the Department of Labor's notice to Wheaton's TPA—is both ineffective and contrary to ERISA.

The government's attempt to force Wheaton to designate BlueCross/BlueShield of Illinois as an additional plan "administrator" violates ERISA. Wheaton is the "one and only 'administrator[],'" which requires it "to produce plan documents," subject to penalties if it fails to do so. *Mondry v. Am. Family Mut. Ins. Co.*, 557 F.3d 781, 794 (7th Cir. 2009). Designating a single administrator "ensure[s]" that each participant "knows exactly where he stands with respect to the plan[.]" *See id.* at 793.

The government argues that it has complied with ERISA by "treating its own direction as the new plan instrument" and then "'naming the plan administrator'" in that "instrument." Resp. 54 (quoting *Priests for Life*, 772 F.3d at 255). But nothing in ERISA authorizes the Secretary of Labor to treat a person as an administrator of an employer's plan in order to manufacture statutory ERISA authority over that person. Congress gave the Secretary authority to designate a plan administrator only when two conditions are both met: the plan has no designated administrator, and a plan sponsor cannot be identified. 29 U.S.C. § 1002(16)(A). Neither condition is met in this case, where Wheaton is the plan administrator. Br. 47-48.

The government's ERISA argument is also circular. An ERISA plan "may be amended only pursuant to its express terms." *Downs v. World Color Press*, 214 F.3d 802, 805 (7th Cir. 2000); *see also Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 79 (1995) (observing that once a plan identifies "the Company" as the person with authority to amend the plan, "one must look only to '[t]he Company' and *not* to any other person"). The government has not pointed to anything in ERISA or elsewhere that gives it the authority to circumvent Wheaton's existing amendment process and create new instruments to amend Wheaton's plan without Wheaton's involvement.[13]

[13] The DOL regulations cited by the government are not to the contrary. Resp. 53 n.20 (citing 63 Fed. Reg. 48376, 48378 n.8 (Sept. 9, 1998)). They simply clarify that procedures *adopted by an ERISA plan administrator* to deal with certain court orders are "plan instruments" that must be disclosed to plan participants. Identifying

That is why the government has long sought to force Wheaton to execute plan-altering documents on pain of millions of dollars in fines. If it could have accomplished this goal without Wheaton's involvement, it would have done so years ago. But the government needs Wheaton to act. That is why the first accommodation relied on a form executed by Wheaton and why the augmented rules attempt to transform Wheaton's objection notice into a plan-modifying "instrument." 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."). ERISA does not authorize any such takeover of Wheaton's plans.

The government cannot avoid this flaw in the new accommodation by arguing it should be pursued below. Resp. 52 n.19. The government cannot have it both ways: if it is going to rely on the new accommodation issued during this appeal, then Wheaton must have an equal right to point out the illegality of that new accommodation. And if this Court finds that more evidence would be helpful, then remand (with an injunction) is the appropriate course.

Arbitrary and capricious. The government offers two reasons for treating Wheaton differently from what it terms "religious employers"—churches and "integrated auxiliaries," *i.e.*, religious non-profits that are controlled and funded by churches. First, integrated auxiliary employees are "more likely" to share the em-

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plan-adopted documents for disclosure is a far cry from creating such documents out of whole cloth, as the government seeks to do here.

ployer's faith than employees of religious non-profits like Wheaton.[14] 78 Fed. Reg. at 39874. But Wheaton and hundreds of other non-profits exercise their Title VII and First Amendment right to hire only employees that share their faith, and the agencies knew this when they promulgated their rules. JA108-109; Wheaton Augmented Rule Comments at 1 (Oct. 27, 2014), http://www.regulations.gov/#!documentDetail;D=EBSA-2014-0013-11076. It was arbitrary and capricious to treat Wheaton differently from others with the same hiring practices and same religious exercise. *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996) ("The treatment of cases A and B, where the two cases are functionally indistinguishable, must be consistent. That is the very meaning of the arbitrary and capricious standard.").

The government also asserts that the integrated auxiliary exemption was intended to "respect[] the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011). But the ministerial exception in *Hosanna-Tabor* protects more than just churches (*Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 833 (6th Cir. 2015)), and the HHS Mandate exemption applies to all church employees, not just those in ministerial

[14] The government also asserts that Wheaton lacks standing to challenge the church exemption because it is not harmed by an exemption offered to others. Resp. 54-55. This argument is frivolous. Wheaton is clearly injured by the government's failure to exempt it from the HHS Mandate, and the agencies have never offered a reasoned explanation for treating Wheaton differently from churches that share Wheaton's beliefs and hiring practices.

positions. Thus, under this rationale, the current exemption is both under- and over-inclusive. For this reason too, the agencies' rule was arbitrary and capricious.

CONCLUSION

Wheaton respectfully requests that the Court reverse the district court and order entry of an injunction against the government during the pendency of this case. In the alternative, Wheaton requests that this appeal be stayed and the case remanded to allow the district court to consider the augmented rules in the first instance.

Respectfully submitted,

s/ *Mark Rienzi*

Mark Rienzi
Adèle Auxier Keim
Diana M. Verm
THE BECKET FUND
FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave. NW
Suite 700
Washington, DC 20036
(202) 955-0095
mrienzi@becketfund.org

Christian Poland
BRYAN CAVE LLP
161 N. Clark St., Suite 4300
Chicago, IL 60601-3315
(312) 602-5085
Christian.Poland@bryancave.com

Counsel for Wheaton College

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Respectfully submitted,

s/ *Mark Rienzi*
Mark Rienzi
THE BECKET FUND
FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave. NW
Suite 700
Washington, DC 20036
(202) 955-0095
mrienzi@becketfund.org

Counsel for Wheaton College

Dated: May 29, 2015

CERTIFICATE OF SERVICE

I certify that on May 29, 2015, I caused the foregoing brief to be served by CM/ECF to the following parties, who have consented in writing to service in this manner:

Julie Saltman, Julie.saltman@usdoj.gov
Patrick Nemeroff, Patrick.G.Nemeroff@usdoj.gov
Alisa Klein, Alisa.Klein@usdoj.gov
Adam Jed, Adam.C.Jed@usdoj.gov
Mark Stern, Mark.Stern@usdoj.gov

U.S. Department of Justice

Counsel for Appellees

Respectfully submitted,

s/ *Mark Rienzi*
Mark Rienzi
THE BECKET FUND
FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave. NW
Suite 700
Washington, DC 20036
(202) 955-0095
mrienzi@becketfund.org

Counsel for Wheaton College