No. ___-_____

In the Supreme Court of the United States

WHEATON COLLEGE, an Illinois non-profit corporation,

Applicant,

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,

Respondents.

EMERGENCY APPLICATION FOR INJUNCTION PENDING APPELLATE REVIEW

CHRISTIAN POLAND
BRYAN CAVE LLP
1661 N. Clark St., Suite 4330
Chicago, IL 60601-3315
(312) 602-5085

MARK L. RIENZI
Counsel of Record
LUKE C. GOODRICH
HANNAH C. SMITH
DIANA M. VERM
ADÈLE AUXIER KEIM
THE BECKET FUND
FOR RELIGIOUS LIBERTY
3000 K Street, N.W.,
Suite 220
Washington, D.C. 20007
(202) 955-0095
mrienzi@becketfund.org

Counsel for Applicant

JUNE 29, 2014

RULE 29.6 DISCLOSURE

Wheaton College is a non-profit corporation that has no parent entities and does not issue stock.

TABLE OF CONTENTS

RULE 29.6 DISCLOSURE i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

JURISDICTION 4

BACKGROUND AND PROCEDURAL HISTORY 6

I. The Mandate. 6

II. Wheaton and its religious exercise. 10

III. The judgment below. 11

ARGUMENT 13

I. Wheaton faces critical and exigent circumstances. 14

II. Wheaton has an indisputably clear right to relief. 17

A. Wheaton asks for the same relief this Court has already granted to others 19

B. Wheaton has clearly established a substantial burden on a religious exercise. 23

C. The lower courts ignored this Court's precedent by replacing their judgment for Wheaton's religious beliefs. 27

D. Over eighty percent of courts to have considered the issue have granted preliminary injunctions. 31

E. The Mandate cannot survive strict scrutiny. 32

III. Injunctive relief would aid this Court's jurisdiction 36

A. Temporary injunctive relief will preserve the Court's ability to hear this case after a Seventh Circuit appeal has been completed. 36

B. Temporary injunctive relief will allow the Court to consider a petition for certiorari before judgment. 37

CONCLUSION 40

TABLE OF AUTHORITIES

Page(s)

Cases

Abdulhaseeb v. *Calbone*,
600 F.3d 1301 (10th Cir. 2010) 25

Adkins v. *Kaspar*,
393 F.3d 559 (5th Cir. 2004) 25

Am. Trucking Ass'ns v. *Gray*,
483 U.S. 1306 (1987) 13

Autocam Corp. v. *Sebelius*,
730 F.3d 618 (6th Cir. 2013) 26

Ave Maria Found. v. *Sebelius*,
No. 13-cv-15198, 2014 WL 117425 (E.D. Mich. Jan. 13, 2014) 19

Bowen v. *Roy*,
476 U.S. 693 (1986) 29

Brandt v. *Burwell*,
No. 14-cv-681 (W.D. Pa. June 20, 2014) 18

Catholic Benefits Ass'n LCA v. *Sebelius*,
No. 14-cv-240, 2014 WL 2522357 (W.D. Okla. June 4, 2014) 18

Catholic Charities, Archdiocese of Philadelphia v.
Sec'y, Dep't of Health & Human Servs.,
No. 14-3120 (3d Cir. June 27, 2014) 18, 37

Catholic Diocese of Beaumont v. *Sebelius*,
No. 13-cv-709, 2014 WL 31652 (E.D. Tex. Jan. 2, 2014) 19

Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*,
508 U.S. 520 (1993) 34

City of Boerne v. *Flores*,
521 U.S. 507 (1997) 32, 33

Colo. Christian Univ. v. *Burwell*,
No. 13-cv-2105 (D. Colo. June 20, 2014) 18

Communist Party of Ind. v. *Whitcomb*,
409 U.S. 1235 (1972) 13

Conestoga Wood Specialties Corp. v. *Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013) 4, 26

Conkright v. *Frommert*, 556 U.S. 1401 (2009) 15

Diocese of Cheyenne v. *Sebelius*, No. 14-cv-00021 (D. Wy. May 13, 2014) 19

Diocese of Fort Wayne-S. Bend, Inc. v. *Sebelius*, No. 12-cv-159 (N.D. Ind. Dec. 27, 2013) 19

Dobson v. *Sebelius*, No. 13-cv-3326, 2014 WL 1571967 (D. Colo. Apr. 17, 2014) 18

Doran v. *Salem Inn, Inc.*, 422 U.S. 922 (1975) 15

Dordt Coll. v. *Sebelius*, No. 13-cv-4100, 2014 WL 2115252 (N.D. Iowa May 21, 2014) 18

E. Tex. Baptist Univ. v. *Sebelius*, No. 12-cv-3009, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013) 19, 31, 32

Elrod v. *Burns*, 427 U.S. 347 (1976) 14, 15

Emp't Div. v. *Smith*, 494 U.S. 872 (1990) 23, 24

Eternal Word Television Network v. *Burwell*, No. 1:13-cv-521 (S.D. Ala. June 17, 2014) 19

F.T.C v. *Dean Foods Co.*, 384 U.S. 597 (1966) 36

Fellowship of Catholic Univ. Students v. *Sebelius*, No. 13-cv-3263 (D. Colo. Apr. 23, 2014) 18

Fishman v. *Schaeffer*, 429 U.S. 1325 (1976) 13, 14

Geneva Coll. v. *Sebelius*, No. 12-cv-00207 (W.D. Pa. Dec. 23 2013) 19

Gilardi v. *U.S. Dep't of Health & Human Servs.*,
733 F.3d 1208 (D.C. Cir. 2013) 26, 34

Gonzales v. *O Centro Espirita Beneficente Uniao do Vegetal*,
546 U.S. 418 (2006) 23, 33

Grace Schs. v. *Sebelius,*
No. 12-cv-459 (N.D. Ind. Dec. 27, 2013) 19

Hernandez v. *C.I.R.*,
490 U.S. 680 (1989) 28, 29

Hobby Lobby Stores, Inc. v. *Sebelius*,
723 F.3d 1114 (10th Cir. 2013) ..... passim

Kaemmerling v. *Lappin*,
553 F.3d 669 (D.C. Cir. 2008) 29

Korte v. *Sebelius*,
735 F.3d 654 (7th Cir. 2013) 26, 33, 34, 36

Legatus v. *Sebelius,*
No. 12-cv-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013) 19

Little Sisters of the Poor Home for the Aged v. *Sebelius*,
134 S. Ct. 1022 (2014) ..... passim

Little Sisters of the Poor Home for the Aged v. *Sebelius*,
134 S. Ct. 893 (Dec. 31, 2013) 1, 4, 20

Little Sisters of the Poor v. *Sebelius*,
No. 13–cv–2611, 2013 WL 6839900 (D. Colo. Dec. 27, 2013) 18, 19

Living Water Church of God v. *Charter Twp. of Meridian*,
258 F. App'x 729 (6th Cir. 2007) 25

Lovelace v. *Lee*,
472 F.3d 174 (4th Cir. 2006) 25

Lucas v. *Townsend*,
486 U.S. 1301 (1988) 13

McClellan v. *Carland*,
217 U.S. 268 (1910) 36

McCullen v. Coakley, No. 12-1168,
2014 WL 2882079 (U.S. June 26, 2014) 35

Mich. Catholic Conference v. *Burwell*,
Nos. 13-2723, 13-6640, 2014 WL 2596753 (6th Cir. June 11, 2014) 19, 32, 38

Midrash Sephardi, Inc. v. *Town of Surfside*,
366 F.3d 1214 (11th Cir. 2004) 25

N.Y. Natural Res. Def. Council v. *Kleppe*,
429 U.S. 1307 (1976) 37

Navajo Nation v. *U.S. Forest Ser*v.,
535 F.3d 1058 (9th Cir. 2008) 25

Newland v. Sebelius,
542 F. App'x 706 (10th Cir. 2013) 36

Newland v. *Sebelius*,
881 F. Supp. 2d 1287 (D. Colo. 2012) 36

Ohio Citizens for Responsible Energy, Inc. v. *Nuclear Regulatory Comm'n*,
479 U.S. 1312 (1986) 13

Persico v. *Sebelius*,
No. 13-cv-00303, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013) 19

Priests for Life v. *U.S. Dep't of Health & Human Servs.*,
No. 13-1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013) 18

Priests for Life v. U.S. Dep't of Health & Human Servs.,
No. 13-5371 (D.C. Cir. Dec. 31, 2013) 18

Reaching Souls Int'l, Inc. v. *Sebelius,*
No. 13-cv-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013) 19, 31

Roman Catholic Archbishop of Wash. v. *Sebelius*,
No. 13–1441, 2013 WL 6729515 (D.D.C. Dec. 20, 2013) 18

Roman Catholic Archbishop of Wash. v. Sebelius,
No. 13–5371 (D.C. Cir. Dec. 31, 2013) 18, 38, 40

Roman Catholic Archdiocese of Atlanta v. *Sebelius*,
No. 12-cv-3489, 2014 WL 1256373 (N.D. Ga. Mar. 26, 2014) 18, 19

Roman Catholic Archdiocese of N.Y. v. *Sebelius*,
2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013) 19, 31

Roman Catholic Diocese of Fort Worth v. *Sebelius*,
No. 12-cv-00314 (N.D. Tex. Dec. 31, 2013) 19

S. Nazarene Univ. v. *Sebelius,*
No. 13-cv-1015, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013) 19, 31

Sharpe Holdings, Inc. v. *U.S. Dep't of Health & Human Servs.*,
No. 12-cv-92 (E.D. Mo. Dec. 30, 2013) 19

Sherbert v. *Verner*,
374 U.S. 398 (1963) 24, 25, 29

Thomas v. *Review Bd.*,
450 U.S. 707 (1981) ..... passim

Union Univ. v. *Sebelius*,
No. 14-cv-1079 (W.D. Tenn. Apr. 29, 2014) 18

United States v. *Playboy Ent'mt Grp., Inc.*,
529 U.S. 803 (2000) 35

Univ. of Notre Dame v. *Sebelius*,
743 F.3d 547 (7th Cir. Feb. 12, 2014) ..... passim

Washington v. *Klem*,
497 F.3d 272 (3d Cir. 2007) 25

Westchester Day Sch. v. *Vill. of Mamaroneck*,
504 F.3d 338 (2d Cir. 2007) 25

Wheaton Coll. v. *Burwell*,
No. 13-cv-8910 (N.D. Ill. June 23, 2014) ..... passim

Williams v. *Rhodes*,
89 S. Ct. 1 (1968) 13

Wisconsin v. *Yoder*,
406 U.S. 205 (1972) 24, 25, 30, 33

Zubik v. *Sebelius*,
No. 13-cv-01459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013) 19

Statutes

26 U.S.C. 4980D 6, 16, 24, 40

26 U.S.C. 4980H 6, 24, 40

28 U.S.C. 1254 5

28 U.S.C. 1291 5

28 U.S.C. 1292 5
28 U.S.C. 1331 4
28 U.S.C. 1361 4
28 U.S.C. 1651 ..... 5, 13, 36
28 U.S.C. 2201 4
28 U.S.C. 2202 4
29 U.S.C. 1132 40
42 U.S.C. 18011 6
42 U.S.C. 2000bb 4, 30
42 U.S.C. 2000bb-1 ..... 18, 32
42 U.S.C. 2000bb-2 23
42 U.S.C. 2000cc-5 ..... 24, 30
42 U.S.C. 300gg-13 ..... 6, 40
Pub. L. 111-148, sec. 1563 40

Regulations

26 C.F.R. 54.9815–2713A 7, 8
29 C.F.R. 2590.715–27131A 8, 10
42 C.F.R. 59.5 ..... 35, 36
45 C.F.R. 147.131 ..... 7, 8
45 C.F.R. 156.50 9
76 Fed. Reg. 46621 (Aug. 3, 2011) 26
77 Fed. Reg. 16501 (Mar. 21, 2012) 7
77 Fed. Reg. 8725 (February 15, 2012) 38
78 Fed. Reg. 39870 (July 2, 2013) ..... passim

Rules

Federal Rule of Appellate Procedure 8 5

Federal Rule of Civil Procedure 59 5

Federal Rule of Civil Procedure 62 5

Other Authorities

11A Charles Alan Wright et al.,
Federal Practice and Procedure 2948.1 (3d ed. 1998) 15

Becket Fund for Religious Liberty,
HHS Mandate Information Central,
http://www.becketfund.org/hhsinformationcentral 39

RTI International, *Title X Family Planning Annual Report: 2011 National Summary* 1 (2013),
http://www.hhs.gov/opa/pdfs/fpar-2011-national-summary.pdf 36

Warren Wyeth Willard, Fire on the Prairie:
the Story of Wheaton College (1950) 10

To the Honorable Elena Kagan, Associate Justice of the United States and Circuit Justice for the Seventh Circuit:

At midnight tomorrow, a regulatory mandate will expose Applicant Wheaton College ("Wheaton") to draconian financial penalties as high as $34.8 million per year unless it abandons its religious convictions and participates in the government's system to distribute and subsidize emergency contraceptives. Wheaton now seeks the same relief—from the same government mandate—that this Court granted to another religious ministry, the Little Sisters of the Poor. *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, 134 S. Ct. 893 (Dec. 31, 2013) (Sotomayor, J., in chambers); *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, 134 S. Ct. 1022 (2014).

Wheaton is a Christian College that was founded in 1860 by abolitionist preacher Jonathan Blanchard. Throughout its history, Wheaton has been committed to shared Christian principles, which today are embodied in its Community Covenant. All members of the Wheaton community—faculty, staff, and students—re-commit themselves each year to the Community Covenant, including its shared commitment to the sanctity of life. That shared Christian commitment precludes Wheaton from complying with the government's contraceptive mandate, either by providing coverage for emergency contraceptives directly or by executing the government form (EBSA Form 700) that designates others to provide coverage in Wheaton's place.

The government does not dispute that either action would violate the sincere religious beliefs upon which Wheaton is based. And the district court acknowledged

that all of the equitable injunction factors favor Wheaton, Dkt. 62, Opinion ("Op.") (Appendix at 1)[1] at 17-18, and that Wheaton faces "the Hobson's choice of adhering to its religious beliefs or being subjected to steep financial penalties." Op. at 18. Nevertheless, the district court denied Wheaton relief from the Mandate on June 23. Wheaton has asked the trial court to reconsider its ruling and enter an injunction pending appeal, and has likewise requested emergency relief from the Seventh Circuit, but neither court has ruled on these requests. Without an injunction Wheaton must either comply with the Mandate by midnight tomorrow or incur ruinous fines.

This Court has already granted the same relief to the Little Sisters of the Poor, who received a temporary injunction from Justice Sotomayor on New Year's Eve and an injunction from the Court on January 24. That injunction is still in force. Wheaton has already complied with the condition the Court placed on the injunction granted to the Little Sisters, namely that it notify the government in writing that it has a religious objection to providing coverage for contraceptive services. Dkt. 64-1 (Appendix at 203). Accordingly, Wheaton respectfully requests the same relief.

Wheaton's RFRA claim is straightforward: It is undisputed that Wheaton's religious beliefs prohibit it from providing coverage for emergency contraceptives or executing EBSA Form 700, and it is undisputed that the government will impose massive fines on Wheaton if it does not. That easily qualifies as a substantial burden

[1] "Dkt." refers to docket entries in the district court. "Appendix" refers to the appendix to this application, and the cited page is to the first page of the relevant document within the appendix.

on Wheaton's religious exercise, and the government has no prospect of satisfying strict scrutiny.

The only reason Wheaton did not obtain relief below is that the trial court felt constrained to follow the Seventh Circuit's decision in *University of Notre Dame* v. *Sebelius*, 743 F.3d 547 (7th Cir. Feb. 12, 2014). That was error, both because the *Notre Dame* decision is expressly tentative and non-binding, and because the *Notre Dame* decision is wrong. In particular, *Notre Dame* rested on the belief that "[f]ederal law, not the religious organization's signing and mailing the form," is what " 'triggers' the[] coverage of the contraception costs of the university's female employees and students." *Notre Dame*, 743 F.3d at 554; see also Op. at 9. Yet this reasoning squarely contradicts the plain text of the Form, the government's own admissions about the effect of the Form, the decisions in 26 out of 31 other cases to consider the Form, and this Court's own order in *Little Sisters of the Poor*. And if the Form really were meaningless, it would be beyond perverse for the government to crush religious ministries like Wheaton for not signing meaningless forms. Yet that is precisely what the government will do unless Wheaton gives up its religious exercise by Monday night.

Injunctive relief under the All Writs Act is necessary to prevent immediate and irreparable harm to Wheaton during the appellate process, including any further review by this Court. The issues presented here are already the subject of decisions by dozens of federal district and circuit courts, and are at issue in the *Hobby Lobby*

and *Conestoga* cases currently pending before the Court.[2] Furthermore, because of the overriding importance of the legal issues presented in this case, because numerous lower courts have already reached conflicting decisions concerning them, and because this Court is already considering other matters raising similar RFRA challenges to the Mandate, Wheaton also asks the Court to grant a temporary injunction while Wheaton seeks certiorari before judgment.

Finally, at a minimum, Wheaton requests a temporary injunction to allow for full briefing and consideration of this Application, without the accumulation of daily fines. See, *e.g.*, *Little Sisters*, 134 S. Ct. 893; *Little Sisters*, 134 S. Ct. 1022.

JURISDICTION

Wheaton filed its complaint on December 13, 2013, challenging the mandate under the Religious Freedom Restoration Act, the First Amendment, the Fourteenth Amendment, and the Administrative Procedure Act. Dkt. 1, Compl. (Appendix at 27). The district court had jurisdiction over Wheaton's lawsuit under 28 U.S.C. 1331 and 1361 and had authority to issue an injunction under 28 U.S.C. 2201 and 2202 and 42 U.S.C. 2000bb, *et seq*.

On April 1, 2014, Respondents filed a motion to dismiss, or in the alternative, for summary judgment. Dkt. 25. Wheaton filed a motion for summary judgment on its claims under the Religious Freedom Restoration Act, the First Amendment, and the Administrative Procedure Act and its opposition to Respondents' motion to dismiss

---

[2] *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted,* 134 S. Ct. 678 (2013); *Conestoga Wood Specialties Corp.* v. *Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013), *cert. granted,* 134 S. Ct. 678 (2013).

on April 22, 2014. Dkt. 41. At a status hearing on June 9, the district court asked the parties to agree to a temporary injunction pending the Supreme Court's decision in *Burwell v. Hobby Lobby*. See Dkt. 57. The government declined to accept this arrangement, and Wheaton agreed to submit a motion for a preliminary injunction, which was filed on June 10. Dkt. 58. The district court denied Wheaton's motion for a preliminary injunction on Monday, June 23 and set a status conference for Monday, June 30 at 10am. Dkt. 62.

At the invitation of the district court, 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), but has received no ruling. Because the impending deadline made awaiting relief from the district court "impracticable," Fed. R. App. P. 8(a)(2)(A)(i), Wheaton also filed a notice of appeal and motion for injunction pending appeal in the Seventh Circuit. Dkt. 65, Notice of Appeal (Appendix at 20). The Seventh Circuit had jurisdiction over this appeal under 28 U.S.C. 1292(a).[3] The Seventh Circuit has yet to rule on Wheaton's motion for injunction pending appeal.

This Court has jurisdiction over this Application under 28 U.S.C. 1254(1) and has authority to grant Wheaton's requested relief under the All Writs Act, 28 U.S.C. 1651.

---

[3] The Seventh Circuit issued a pro forma jurisdictional notice on Friday, June 27, to which Wheaton responded with a jurisdictional memorandum the same day. Appendix at 22, 23. In its Jurisdictional Memorandum, Wheaton explained that its appeal was taken under 28 U.S.C. 1292 (not section 1291, as the Seventh Circuit notice assumed), and that its pending district court motion for reconsideration, or in the alternative, an injunction pending appeal was made under Federal Rule of Civil Procedure 62(c) and Federal Rule of Appellate Procedure 8 (not Federal Rule of Civil Procedure 59, also cited in the Seventh Circuit notice). As a result, the Seventh Circuit had jurisdiction over Wheaton's appeal. Appendix at 23.

BACKGROUND AND PROCEDURAL HISTORY

I. The Mandate.

The Affordable Care Act requires some employers to provide coverage for certain "preventive care" in their group health plans without "any cost sharing." 42 U.S.C. 300gg-13 (a). Congress did not define "preventive care" but instead allowed Respondent 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 "emergency contraception" such as Plan B (the "morning-after" pill) and ella (the "week-after" pill). Dkt. 41-7 at 2 (Appendix at 95). As the government has acknowledged here and elsewhere, several of these methods may prevent pregnancy by stopping implantation of an already-fertilized egg. Dkt. 41-8 at 11-12 (Appendix at 98); see also *Hobby Lobby*, 723 F.3d at 1123 n.3. 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 if no coverage by 2015).

"Exempt" employers. Many employers are exempt from the mandate, including employers with "grandfathered" health care plans covering millions of employees, Dkt. 41-14 at 5 (Appendix at 152), and employers with fewer than fifty employees, which may decline to offer coverage. See 42 U.S.C. 18011 (grandfathering); 26 U.S.C. 4980H (c)(2)(A) (employer mandate); 26 U.S.C. 4980D (d) (same).

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. 78 Fed. Reg. 39870, 39874 (July 2, 2013); 45 C.F.R.147.131(a). All of these organizations are automatically exempt; they need not certify their religious beliefs to anyone, sign EBSA Form 700, or otherwise designate, authorize, incentivize, or obligate anyone else to provide contraceptive coverage in their place.

"Non-Exempt" Employers and EBSA Form 700. Religious non-profits such as Wheaton, however, do not qualify under HHS's narrow definition of "religious employers." Dkt. 1 at ¶¶ 44-45. Instead, defendant agencies developed an "accommodation" for "non-exempt" religious organizations. 77 Fed. Reg. 16501 (Mar. 21, 2012). Unlike the grandfathering and religious employer exemptions, the government said that the "accommodation" would "assur[e] that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage." *Id.* at 16503.

The final rule requires non-exempt religious organizations to do two things to obtain an accommodation: (1) execute and deliver EBSA Form 700 to the third-party administrator (TPA) of their health plan and (2) refrain from trying to influence the TPA's decision about providing coverage (the "Gag Rule"). 78 Fed. Reg. at 39875; 26 C.F.R. 54.9815–2713A(b)(1)(ii) and (iii).

EBSA Form 700 is essential to the operation of this system. Non-exempt employers with self-insured plans are required to use the Form to expressly designate their 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. Doing so 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). Forcing the non-exempt employer to designate 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 religious organizations receive these drugs "so long as [they remain] enrolled in [the] group health plan." 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 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.

Dkt. 41-9, EBSA Form 700 (Appendix at 116). 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) instructs the TPA as to the TPA's "obligations," and (c) purports to make the Form, including the Notice section thereof, "an instrument under which the plan is operated." The Form is *the* trigger that gives TPAs both the legal authority and the legal obligation to provide

objectionable coverage on behalf of religious objectors. If the employer does not sign and deliver the Form, the TPA does not have authority to provide the drugs.

Respondents have repeatedly admitted in court that the Form has these legal effects. For instance, Respondents have conceded that TPAs "become a plan administrator and are required to make these payments *by virtue of the fact that they receive the self-certification form from the employer*." See Dkt. 41-13, *Archbishop of Wash.* Tr. (Appendix at 141) (emphasis added). They also stated in open court that, "for an ERISA plan—in order for the TPA, essentially, to have the authority to provide coverage, the self-certification has to designate—has to be an instrument under which the third-party administrator is designated as a provider of those specific benefits." Dkt. 41-12, *Reaching Souls* Tr. (Appendix at 135). Respondents have also conceded that, after delivery of EBSA Form 700, "technically, the contraceptive coverage is part of [the religious objector's health care] plan." *EWTN* v. *Burwell*, No. 1:13-cv-00521, Dkt. 49-3 at 12 (S.D. Ala. filed Oct. 28, 2013). In writing on Friday, Respondents conceded that Wheaton's executed Form is a "prerequisite" of the TPA's independent obligation, and that the "independent" "operation of law" happens only "once plaintiff has . . . complet[ed] the self-certification form." Dkt. 68 at 8 (Appendix at 207).

Not only does EBSA Form 700 trigger the administrators' legal obligations, it also triggers government incentives in the form of extra government payment to TPAs. Those payments cover not only the costs, but also an additional payment to make Respondents' scheme profitable. 45 C.F.R. 156.50. Respondents acknowledge that

this bonus payment is wholly dependent on receipt of the Form. *EWTN* v. *Burwell*, No. 1:13-cv-00521, Dkt. 29-12 at 97 ("I will concede that the TPA is eligible—once—if they receive the certification, they are eligible for reimbursement. They would not otherwise be eligible.").

The second requirement for receiving the accommodation is for Wheaton to refrain from saying certain things to its TPA. Wheaton

> 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.

29 C.F.R. 2590.715-2713A(b)(1)(iii). This is the "Gag Rule."

II. Wheaton and its religious exercise.

Wheaton College is a Christian liberal arts college located in Wheaton, Illinois, and founded in 1860 by abolitionist Jonathan Blanchard. Dkt. 41-1, Dkt. 41-1 at ¶ 5 (Appendix at 75). At Wheaton's founding, its leaders knelt on the ground and "dedicated the hill and all that should be upon it to that God in whom trusting they had boldly gone into the thickest fight, not only for the freedom of human bodies, but of human souls as well."[4]

Consistent with its Christian faith and its abolitionist roots, Wheaton believes in and teaches the sanctity of human life from conception until natural death. Dkt. 41-1 at ¶¶ 17-19. All members of Wheaton's community assent to Wheaton's religious

[4] Warren Wyeth Willard, Fire On The Prairie: The Story Of Wheaton College 21 (1950).

beliefs, including its beliefs about the sanctity of life. Dkt. 41-1 at ¶¶ 14-16. Each year, all Wheaton College students and employees voluntarily commit themselves to the Wheaton community by signing a Community Covenant. Dkt. 41-1 at ¶ 14. In addition to signing the Community Covenant, Wheaton's Board of Trustees, faculty, and staff annually reaffirm the College's doctrinal statement. Dkt. 41-1 at ¶ 15. Wheaton's Community Covenant specifically recognizes that Scripture condemns the taking of innocent life. Dkt. 41-1 at ¶ 15.

Consistent with these beliefs, although Wheaton does not object to traditional contraception (*i.e.*, contraceptives that work before fertilization), it is religiously opposed to emergency contraceptives because they may act by killing a human embryo. Dkt. 41-1 at ¶ 41. Wheaton believes that authorizing its TPA to provide these drugs in Wheaton's place makes it complicit in grave moral evil. Dkt. 41-1 at ¶ 56. As a result, Wheaton can neither provide the mandated coverage nor execute and deliver EBSA Form 700 to its TPA (and comply with the accompanying Gag Rule). The sincerity of these beliefs is undisputed. Op. at 9. Absent relief from this Court, Wheaton could face as much as $34.8 million in annual fines—along with potential penalties and lawsuits—with fines beginning on July 1, 2014, less than thirty hours from now. Dkt. 41-1 ¶ 3-4, 67-69.

III. The judgment below.

The district court held that there was "no question" that the balance of equities favors a preliminary injunction. Op. at 17. Wheaton will suffer irreparable injury due to "the loss or impingement of freedoms protected by the First Amendment," and "the

balance of harms strongly weighs in [Wheaton's] favor." Op. at 17-18. The court found that 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." Op. at 18. But with an injunction, the government would suffer virtually no harm, particularly because the mandate does not even apply to "many similarly situated entities" with later plan years. Op. at 18.

Nevertheless, the Court denied the injunction because it believed it was "duty-bound" to reach the same result as the Seventh Circuit in *Notre Dame*. Op. at 9 n.3. In particular, it relied on *Notre Dame's* "tentative" reasoning—over a "well-reasoned dissenting opinion" by Judge Flaum—that "[f]ederal law, not the religious organization's signing and mailing the form" imposes the requirement to cover contraceptive services. Op. at 9; see *Notre Dame*, 743 F.3d at 552.[5]

The district court said that its order was subject to reconsideration, and following a telephone conference with the parties on the afternoon after the order was issued, Wheaton filed a combined motion for reconsideration and for an injunction pending appeal. Dkt. 63; Dkt. 64. Wheaton filed a notice of appeal and a motion for injunction pending appeal with the Seventh Circuit on June 26, because waiting for further

[5] The trial court did find that Wheaton had satisfied all four factors for a preliminary injunction on its claim that the Gag Rule violates the First Amendment—a claim that the *Notre Dame* decision did not reach. Op. at 16. However, the trial court did not enter an injunction, finding it "unclear" how an injunction for the free speech violation could protect Wheaton from being forced to sign the Form. Op. at 16-17. The parties have submitted supplemental briefs on the scope of relief, and Wheaton expects those briefs to be discussed during tomorrow's 11:00 a.m. telephone hearing. Op. at 2 (setting hearing for 10am Central on June 30, 2014); Dkt. 63 (minute order setting briefing schedule for supplemental briefing).

relief from the district court was "impracticable" in light of the impending July 1 deadline. Dkt. 65; Document 2 at 9, *Wheaton* v. *Burwell*, No. 14-2396 (7th Cir. filed June 26, 2014) (citing Fed. R. App. P. 8). Neither the district court nor the Seventh Circuit have ruled on Wheaton's motions for an injunction pending appeal, and the trial court has set a telephone conference for 11:00a.m. Monday morning. Op. at 2.

This application followed.

ARGUMENT

The All Writs Act, 28 U.S.C. 1651(a), authorizes an individual Justice or the Court to issue an injunction when (1) the circumstances presented are "critical and exigent"; (2) the legal rights at issue are "indisputably clear"; and (3) injunctive relief is "necessary or appropriate in aid of [the Court's] jurisdictio[n]." *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Comm'n*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (quoting *Fishman* v. *Schaeffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers); *Communist Party of Ind.* v. *Whitcomb*, 409 U.S. 1235 (1972) (Rehnquist, J., in chambers); and 28 U.S.C. 1651(a)) (alterations in original). This extraordinary relief is warranted in cases involving the imminent and indisputable violation of civil rights. See *Lucas* v. *Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) (enjoining election where applicants established likely violation of Voting Rights Act); *Am. Trucking Ass'ns* v. *Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J., in chambers) (granting injunction); *Williams* v. *Rhodes*, 89 S. Ct. 1 (1968) (Stewart, J., in chambers) (same). Just as the organizations at issue in the *Little Sisters* application required relief from this Court to avoid being crushed with

fines while litigating their claims, and to standardize the Mandate cases to allow for an orderly and equitable judicial process, so too does Wheaton.

I. Wheaton faces critical and exigent circumstances.

Tomorrow, Wheaton faces an impossible choice: sign and submit a form forbidden by its faith, or decline to do so and incur what could be more than $34 million in penalties. The Religious Freedom Restoration Act exists precisely to prevent this type of enormous government pressure to violate one's religious beliefs. Without emergency relief from this Court, Wheaton will suffer this illegal coercion beginning at midnight tomorrow night and continuing each and every day thereafter. Those penalties will continue to accumulate, day by day, unless and until Wheaton abandons its religious exercise or collapses from the mounting burden.

Wheaton has no acceptable options. If it violates its faith under this enormous pressure and participates in the Mandate (either by providing the drugs or by executing authorization forms authorizing, ordering, and incentivizing others to do so), no future relief can repair the injury to its religious liberty. If Wheaton remains true to the teachings it was founded to spread, the penalties for doing so are potentially so large that it is unclear whether Wheaton could bear the risk long enough to pursue its case. In short, Wheaton finds itself in "the most critical and exigent circumstances," *Fishman*, 429 U.S. at 1326 (Marshall, J., in chambers), both as to its ability to exercise its faith and as to the continued viability of its ministry.

The threat to Wheaton's religious freedom derives from the sheer enormity of the government's pressure to forego a particular religious exercise. It is black letter law that a violation of constitutional rights constitutes irreparable injury. See, *e.g.*, *Elrod*

v. *Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); 11A Charles Alan Wright et al., *Federal Practice and Procedure* 2948.1 (3d ed. 1998) ("When an alleged deprivation of a constitutional right is involved, * * * most courts hold that no further showing of irreparable injury is necessary."). Few laws in American history have threatened financial penalties as severe as those potentially available under the Mandate; no law has ever imposed such a price on the exercise of religion. Such unprecedented government pressure to abandon a religious exercise by midnight Monday creates extraordinarily exigent circumstances for Wheaton.

Additionally, Wheaton faces critical and exigent circumstances concerning the financial viability of its ministry. As the Court explained in *Doran* v. *Salem Inn, Inc.*, where a business "would suffer a substantial loss of business and perhaps even bankruptcy," the case "[c]ertainly * * * meets the standards for granting interim relief, for otherwise a favorable final judgment might well be useless." 422 U.S. 922, 932 (1975); *cf. Conkright* v. *Frommert*, 556 U.S. 1401 (2009) (Ginsburg, J., in chambers) (denying a stay where applicants did not allege that required payments would "place the [benefit] plan itself in jeopardy").

That is exactly what Wheaton faces. If it terminates health insurance for its approximately 400 employees on non-grandfathered plans, it will face penalties totaling more than $1.3 million per year, have to increase its wages by an undetermined amount to make up for the fact that it can no longer offer health benefits to its employees, and betray its religious obligation to provide for its

employees in accordance with its religious beliefs. Dkt. 41-1 at ¶¶ 27, 67. Even the possibility that Wheaton may not be able to offer health coverage has affected Wheaton's ability to recruit and retain employees. Dkt. 41-1 at ¶¶ 80-81. Moreover, dropping health coverage at the eleventh hour would jeopardize employees' health and the health of their family members, who depend on Wheaton for coverage. See Dkt. 41-1 at ¶¶ 79-83.

If Wheaton chooses to maintain the same excellent, religiously compliant health insurance policies it maintains today, Wheaton will face fines of up to $14.7 million per year for its employee health plans, and an additional $20.1 million per year for its student health plans.[6] Dkt. 41-1 at ¶ 69. All told, Wheaton could face up to $34.8 million in fines for continuing to offer health coverage to its students and employees, *ibid*, which is roughly $95,000 *each day*. Even profit-making businesses could not endure daily, recurring fines of that magnitude for any extended period of time. Nor could they long continue to hire new employees and serve the public in the face of such overwhelming potential liabilities. Wheaton is small, non-profit liberal arts college. Dkt. 41-1 at ¶ 68. The daily fines would force it to choose between the reason it exists, and its very existence. *Ibid.*

[6] Respondents have never fully explained how they intend to calculate the section 4980D fines. Over the two years of litigation concerning the HHS Mandate, however, most plaintiffs have alleged that the fine might be calculated on a per-employee basis (*i.e.*, fine = (number of employees) * ($100) * (number of days refusing to cover emergency contraceptives)). Wheaton's counsel is not aware of any case in which Respondents have disputed this method of calculating such fines.

These exigencies are compounded by the unique confluence of (a) the start of Wheaton's plan year at midnight tomorrow night, (b) the end of this Court's term tomorrow, and (c) the decision of this Court concerning the same civil rights statute and the same regulatory Mandate in the *Hobby Lobby* litigation, also expected tomorrow. These circumstances will make it virtually impossible for the lower courts to apply this Court's decision before Wheaton is irreparably harmed at midnight.

In light of the burden on religious exercise to be imposed by the Mandate on Tuesday, and the massive fines threatened against any organization that fails to comply, Wheaton faces critical and exigent circumstances.

In contrast, the government cannot identify any countervailing interest or exigent circumstances that would counsel for denying an injunction. The government has already voluntarily delayed the Mandate against religious non-profits on two separate occasions. *Infra* n.9. And the Mandate does not apply at all to grandfathered plans, to exempt "religious employers," or to religious non-profits with plan years beginning in August, September, October, November, or December of this year. As the district court correctly found, any harm to the government in the short term would be "minimal." Op. at 18.

II. Wheaton has an indisputably clear right to relief.

Wheaton asks for the same relief that this Court granted to the Little Sisters of the Poor. *Little Sisters*, 134 S. Ct. 1022. There, the Court held that the Sisters "need not use the form prescribed by the Government and need not send copies to third party-administrators," and instead could merely inform Respondents in writing that

the Little Sisters are a non-profit organization that holds itself out as religious and has religious objections to participating in Respondents' scheme.

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 (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1(b).

Wheaton presents a straightforward RFRA claim and, as a result, has an overwhelming likelihood of prevailing. As the great majority of courts to consider this precise issue have found, threatening to severely fine non-profit religious organizations unless they abandon their objection to participating in the Mandate—either by providing drugs or authorizing others to do so in their place—substantially burdens religion, triggering strict scrutiny.[7] In finding otherwise, however, the court

[7] Injunctions have been granted in twenty-six cases. See *Little Sisters of the Poor* v. *Sebelius*, No. 13–cv–2611, 2013 WL 6839900 (D. Colo. Dec. 27, 2013), *injunction pending appeal granted*, 134 S. Ct. 1022 (2014); *Catholic Charities, Archdiocese of Philadelphia* v. *Sec'y, Dep't of Health & Human Servs.*, No. 14-3120 (3d Cir., court of appeals granted temporary injunction June 27, 2014); *Roman Catholic Archbishop of Wash.* v. *Sebelius*, No. 13–1441, 2013 WL 6729515 (D.D.C. Dec. 20, 2013), *injunction pending appeal granted*, No. 13–5371 (D.C. Cir. Dec. 31, 2013); *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, No. 13-1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013), *injunction pending appeal granted*, No. 13-5371 (D.C. Cir. Dec. 31, 2013); *Colo. Christian Univ.* v. *Burwell*, No. 13-cv-2105 (D. Colo. June 20, 2014) (granting injunction); *Brandt* v. *Burwell*, No. 14-cv-681 (W.D. Pa. June 20, 2014); *Catholic Benefits Ass'n LCA* v. *Sebelius*, No. 14-cv-240, 2014 WL 2522357 (W.D. Okla. June 4, 2014); *Dordt Coll.* v. *Sebelius*, No. 13-cv-4100, 2014 WL 2115252 (N.D. Iowa May 21, 2014); *Union Univ.* v. *Sebelius*, No. 14-cv-1079 (W.D. Tenn. Apr. 29, 2014); *Fellowship of Catholic Univ. Students* v. *Sebelius*, No. 13-cv-3263 (D. Colo. Apr. 23, 2014); *Dobson* v. *Sebelius*, No. 13-cv-3326, 2014 WL 1571967 (D. Colo. Apr. 17, 2014); *Roman*

below failed to apply the controlling legal standard for "substantial burden" and inappropriately second-guessed the substance of Wheaton's religious beliefs.

A. Wheaton asks for the same relief this Court has already granted to others.

Wheaton's request is neither novel nor unprecedented—this Court recently granted the same relief from the same Mandate to ministries that share the same beliefs. On December 31, 2013, the Little Sisters of the Poor, their church plan provider, and other members of the plan sought emergency relief from this Court.

Catholic Archdiocese of Atlanta v. *Sebelius*, No. 12-cv-3489, 2014 WL 1256373 (N.D. Ga. Mar. 26, 2014); *Catholic Diocese of Beaumont* v. *Sebelius*, No. 13-cv-709, 2014 WL 31652 (E.D. Tex. Jan. 2, 2014); *Ave Maria Found.* v. *Sebelius*, No. 13-cv-15198, 2014 WL 117425 (E.D. Mich. Jan. 13, 2014); *Roman Catholic Diocese of Fort Worth* v. *Sebelius*, No. 12-cv-00314 (N.D. Tex. Dec. 31, 2013) (granting relief to the University of Dallas); *Sharpe Holdings, Inc.* v. *U.S. Dep't of Health & Human Servs.*, No. 12-cv-92 (E.D. Mo. Dec. 30, 2013) (granting relief to religious non-profit parties CNS International Ministries and Heartland Christian College); *E. Tex. Baptist Univ.* v. *Sebelius*, No. 12-cv-3009, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013); *Grace Schs.* v. *Sebelius,* No. 12-CV-459 (N.D. Ind. Dec. 27, 2013); *Diocese of Fort Wayne-S. Bend, Inc.* v. *Sebelius*, No. 12-cv-159 (N.D. Ind. Dec. 27, 2013); *Geneva Coll.* v. *Sebelius,* No. 12-cv-00207 (W.D. Pa. Dec. 23 2013); *S. Nazarene Univ.* v. *Sebelius,* No. 13-cv-1015, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); *Reaching Souls Int'l, Inc.* v. *Sebelius,* No. 13-cv-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Legatus* v. *Sebelius,* No. 12-cv-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of N.Y.* v. *Sebelius*, No. 12-cv-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Persico* v. *Sebelius*, No. 13-cv-00303, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *Zubik* v. *Sebelius*, No. 13-cv-01459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013).

Relief has been denied in five cases other than Wheaton's. See *Eternal Word Television Network* v. *Burwell*, No. 1:13-cv-521 (S.D. Ala. June 17, 2014), motion for injunction pending appeal filed June 18, 2014, No. 14-12696 (11th Cir.), application for injunction submitted to Justice Thomas, June 27, 2014, No. 13A1283; *Mich. Catholic Conference* v. *Burwell*, Nos. 13-2723, 13-6640, 2014 WL 2596753 (6th Cir. June 11, 2014) (order denying preliminary injunction in two consolidated appeals); *Univ. of Notre Dame* v. *Sebelius,* 743 F.3d 547 (7th Cir. 2014); *Diocese of Cheyenne* v. *Sebelius*, No. 14-cv-00021 (D. Wyo. May 13, 2014), motion for injunction pending appeal filed May 29, 2014, No. 14-8040 (10th Cir.), application for injunction submitted to Justice Sotomayor, June 27, 2014, No. 13A1277.

Justice Sotomayor, as Circuit Justice, granted a temporary injunction to protect the ministries from the fines long enough to permit a response and consideration of the application. *Little Sisters*, 134 S. Ct. 893. A little over three weeks later, the full Court entered the following order:

> If the employer applicants inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicants the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit. To meet the condition for injunction pending appeal, applicants need not use the form prescribed by the Government and need not send copies to third-party administrators. The Court issues this order based on all of the circumstances of the case, and this order should not be construed as an expression of the Court's views on the merits.

Little Sisters, 134 S. Ct. 1022.

Wheaton seeks the same relief. It has no objection to informing the Secretary of its religious objections to the Mandate—it has done so, repeatedly, including in the exact same form prescribed in the *Little Sisters* injunction. Dkt. 64-1 (Appendix at 203). What Wheaton objects to is executing the government's Form to designate, obligate, and incentivize its third-party administrator to provide religiously objectionable drugs on its behalf.[8] The relief this Court provided to the Little Sisters

[8] As set forth *supra* at 7-10, the Form is designed to have legal effects, which is presumably why the government insists on its execution. The Form would also force Wheaton to alter the terms of its existing contract with its TPA, under which the TPA is merely a "claims 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. Dkt. 41-4 at 3, Wheaton's Administrative Services Agreement (Appendix at 92). *Contra Notre Dame*, 743 F.3d at 555 ("Notre Dame has

would be consistent with Wheaton's religious beliefs, satisfy the government's desire for notice of Wheaton's objection, and stave off ruinous penalties long enough for the litigation to proceed. Indeed, the relief Wheaton needs is even narrower than the relief this Court granted to the Little Sisters, because Wheaton objects only to covering emergency contraception that can destroy a human embryo—not all forms of contraception. And since the government itself has already delayed the Mandate multiple times, and implements it on a rolling basis through the end of 2014, the government can have no real interest in preventing a brief delay while this case proceeds.[9]

Below, the government raised two objections to this request. First, it claimed that a TPA's legal obligations flow from independent regulations, not the employer's execution of the Form. But this contradicts the government's statements in the Federal Register, in open court, and to the district court and Seventh Circuit. See *supra* at 8-10, *infra* at 27-28. And if this claim is true, there is no reason to force Wheaton to execute the Form at all. Why force Wheaton to sign a meaningless form?

Second, the government claims that the Little Sisters were using a church plan under ERISA, while Wheaton is not, and that the government claims it cannot (at

---

presented no evidence that its contract with Meritain forbids the latter to be a plan fiduciary.").

[9] Dkt. 1 at ¶ 85 (quoting Respondent HHS's January 20, 2012 statement that, because of "the important concerns some have raised about religious liberty," religious objectors would be "provided an additional year * * * to comply with the new law."); ¶ 86 (HHS's creation of a "safe harbor" preventing enforcement of the Mandate before August 1, 2013); ¶¶ 87, 116-17 (noting that 78 Fed. Reg. at 39875 extended the "safe harbor," so the Mandate is implemented on a rolling basis with the start of a religious objector's insurance plan year in 2014).

least for now) force the administrators of church plans to provide the objectionable drugs and devices. But this is irrelevant. The burden on Wheaton's religious exercise is no different than the burden on the Little Sisters—each has made a religious determination that it cannot sign EBSA Form 700, and each faces crushing fines for that religious exercise. And the government's interest in enforcing the mandate against Wheaton is no different than it was in *Little Sisters*.

Beyond that, it is undisputed that Wheaton—unlike the Little Sisters—hires only employees who share Wheaton's religious beliefs. Dkt. 41-1 at ¶ 14-16; see Dkt. 47 at ¶¶ 5-7, Govt Resp. to Wheaton's Facts (Appendix at 187). But that is precisely why the government gave a complete exemption to churches. Specifically, the government reasoned that churches can be exempt because they "are *more likely* than other employers to employ people of the same faith who share the same objection"; thus, an exemption for churches "*does not undermine the governmental interests furthered by the contraceptive coverage requirement*." 78 Fed. Reg. at 39874 (emphasis added). Wheaton presents the same circumstance: it has submitted undisputed evidence that its employees are not just likely to share its faith—they *do* share its faith. Dkt. 41-1 at ¶ 14-16. Therefore, the government's own statements confirm that extending the same exemption for Wheaton "does not undermine the governmental interests" supposedly furthered by the Mandate.

The government's argument also fails because it obviously harms Wheaton's employees for Wheaton to be fined out of existence or suddenly drop its health insurance. In the former case, Wheaton's employees would have no employment or

health insurance; in the latter, they would be forced to seek replacement policies on the government's exchange. The best option—for Wheaton, for the students and employees who depend upon it, for the government's interest in promoting affordable health care—is to protect Wheaton from this Mandate and maintain the *status quo* while the litigation proceeds. Wheaton should be afforded the same relief given to the Little Sisters of the Poor.

B. Wheaton has clearly established a substantial burden on a religious exercise.

The government does not dispute the existence, religiosity, or sincerity of Wheaton's religious beliefs. Accordingly, RFRA's substantial burden test involves a simple, two-part inquiry: a court must (1) identify the religious exercise at issue, and (2) determine whether the government has placed substantial pressure—*i.e.*, a substantial burden—on the plaintiff to abstain from that religious exercise. Cf. *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006) ("prima facie case under RFRA" exists where a law "(1) substantially burden[s] (2) a sincere (3) religious exercise").

As discussed above, it is undisputed that Wheaton is engaging in a specific religious exercise: refusal to sign and submit the Form which authorizes and obligates Wheaton's plan administrator to provide emergency contraceptives to Wheaton's students and employees in Wheaton's place. See Dkt. 41-1 at ¶¶ 44, 56-57, 63; 42 U.S.C. 2000bb-2(4), *as amended by* 42 U.S.C. 2000cc-5(7)(A); see also *Emp't Div.* v. *Smith*, 494 U.S. 872, 877 (1990) (explaining "the 'exercise of religion often involves

not only belief and profession but the performance (or abstention from) physical acts"). That refusal is required by Wheaton's religious beliefs.

In turn, the government has imposed a substantial burden on Wheaton's exercise of religion: enormous government penalties. If Wheaton fails cease its religious exercise, it will face penalties of either $100 a day per affected beneficiary, or an annual fine of $2,000 per full-time employee. See 26 U.S.C. 4980D(b) & (e)(1); 26 U.S.C. 4980H(a), (c)(1)). It could also face the ruinous practical consequences of its inability to offer healthcare benefits to employees at all. As described above, these penalties, which involve millions of dollars in fines, impose severe pressure on Wheaton's religious exercise. Indeed, it is surely *the point* of such massive fines to impose severe pressure on employers to comply with the government's will.

Such burdens on religious practice easily qualify as "substantial." See, *e.g.*, *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963) (deprivation of unemployment benefits puts "unmistakable" "pressure upon [applicant] to forego [her religious] practice" resulting in "the same kind of burden upon the free exercise of religion" as a "fine imposed against appellant for her Saturday worship."); *Thomas*, 450 U.S. at 717-18 (*"*Where the state * * * put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."). Imposing monetary penalties on people who refuse to violate their faith is a paradigmatic substantial burden. *Sherbert*, 374 U.S. at 404. This Court has deemed a modest fine of *five dollars* for believers' refusal to violate their faith a substantial burden. *Wisconsin* v. *Yoder*, 406 U.S. 205, 208, 218 (1972) (fine "not only severe, but

inescapable"). This formulation of "substantial burden" is widely shared among Courts of Appeals under RFRA and its companion statute, RLUIPA.[10] As this Court

[10] See, *e.g.*, *Abdulhaseeb* v. *Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010) (substantial burden exists where government imposes "substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief * * * , such as where the government presents the plaintiff with a Hobson's choice—an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief."); *Westchester Day Sch.* v. *Vill. of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007) ("a substantial burden on religious exercise exists when an individual is required to 'choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion * * * on the other hand.'") (quoting *Sherbert*, 374 U.S. at 404); *Washington* v. *Klem*, 497 F.3d 272, 280 (3d Cir. 2007) (a substantial burden exists, among other situations, where "the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs."); *Lovelace* v. *Lee*, 472 F.3d 174, 187 (4th Cir. 2006) ("a 'substantial burden' is one that 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs,'") (citing *Thomas*, 450 U.S. at 718); *Adkins* v. *Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) ("a government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs"); *Living Water Church of God* v. *Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007) ("the Supreme Court generally has found that a government's action constituted a substantial burden on an individual's free exercise of religion when that action forced an individual to choose between 'following the precepts of her religion and forfeiting benefits' or when the action in question placed 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,'"); *Navajo Nation* v. *U.S. Forest Ser*v., 535 F.3d 1058, 1069-70 (9th Cir. 2008) (en banc) ("Under RFRA, a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)."); *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.").

is well aware, in the for-profit Mandate challenges, every circuit to address the question has held that such financial penalties constitute a substantial burden.[11]

The burden on Wheaton is nothing less than substantial. The government cannot be blind to this fact, since even its first rulemaking, the interim final rule, contained an exemption for religious organizations. 76 Fed. Reg. 46621 (Aug. 3, 2011). It then engaged in a lengthy rulemaking process to respond to the public outcry from religious organizations, like Wheaton, that did not qualify for the narrow exemption and would soon face heavy fines. Dkt. 1 at ¶¶ 85-117 (describing rulemaking process). This chain of events demonstrates that the government is well aware that its mandate burdens religious organizations.

---

[11] See, *e.g.*, *Hobby Lobby*, 723 F.3d at 1137 (rejecting "an understanding of 'substantial burden' that presumes 'substantial' requires an inquiry into the theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs") (emphasis in original); *Gilardi* v. *U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1216 (D.C. Cir. 2013) ("A 'substantial burden' is 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'"); *Korte* v. *Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) ("[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.").

Both of the circuits to rule against the for-profit mandate plaintiffs have done so without reaching the substantial burden inquiry. See *Conestoga*, 724 F.3d at 389, *cert. granted,* 134 S. Ct. 678 ("We simply conclude that the law has long recognized the distinction between the owners of a corporation and the corporation itself."); *Autocam Corp.* v. *Sebelius*, 730 F.3d 618, 626 (6th Cir. 2013) ("[W]e do not reach the . . . arguments that the mandate fails to impose a substantial burden on Autocam.").

C. The lower courts ignored this Court's precedent by replacing their judgment for Wheaton's religious beliefs.

In the face of a clear substantial burden on religious exercise, the government has made two erroneous arguments. Both arguments were adopted by the Seventh Circuit in *Notre Dame*, and followed by the district court in this case

First, the government claims that the Form means nothing, and that Wheaton's plan administrator has an independent legal obligation to provide contraceptives, sterilization, and abortion-causing drugs with or without Wheaton's consent. See, *e.g.*, Dkt. 26 at 11, Gov't Memo. re Mot. to Dismiss ("[F]ederal law independently requires [Wheaton's] insurer or TPA to provide coverage.") (incorporated by reference in Dkt. 59 at 2, Gov't P.I. Opp.). But the record is clear that the Form not only means something, but is essential to the government's entire scheme. As demonstrated above, the government has admitted in the Federal Register and represented in open court that the Form is necessary to trigger, obligate, empower, and incentivize the plan administrator to provide this coverage. The government has even conceded that point in this case, telling the district court that, if Wheaton is not compelled to sign the form, its employees will not get contraceptive coverage. Dkt. 59 at 5 (not signing would "deny plaintiff's employees, thousands of students, and their dependents the benefits of the preventive services coverage regulations"). Indeed, the government listed a litany of harms that would occur if Wheaton refused to sign.[12] That argument

[12] In opposing Wheaton's preliminary injunction motion, the government told the trial court the following harms would occur if Wheaton does not sign the Form: it would (1) "undermine the government's ability to achieve Congress's goal[] of improving the health of women and newborn children"; (2) deny Wheaton's employees

would make no sense if administrators provide coverage as a result of "independent legal obligations" rather than as a result of the Form. Accordingly, the small fraction of lower courts holding that the Form is meaningless are incorrect. See *Notre Dame*, 743 F.3d 547; *Mich. Catholic Conference*, 2014 WL 2596753.[13]

Second, the government claims that Wheaton's religious exercise is not protected by RFRA because it is based on religious beliefs about participation in and facilitation of the actions of third parties. Dkt. 26 at 16 ("[P]laintiff's claimed burden is too attenuated to be 'substantial' under RFRA."). But this argument impermissibly seeks to replace Wheaton's religious beliefs with the government's own theory of moral complicity. This Court's precedent is clear that it is for Wheaton, not the government, to decide whether a particular action violates its religious beliefs. If Wheaton interprets the "creeds" of its faith to prohibit compliance with the Mandate, as it does, "[i]t is not within the judicial ken to question" "the validity of [Wheaton's] interpretation[]." *Hernandez* v. *C.I.R.*, 490 U.S. 680, 699 (1989). As in *Thomas*, Wheaton "drew a line" about what actions would make it complicit in grave moral evil, and "it [wa]s not for [the court] to say [the line was] unreasonable." 450 U.S. at

---

(and their families) and Wheaton's students "the benefits of the preventive coverage regulations"; (3) prolong a situation in which "both women and developing fetuses suffered negative health consequences"; (4) "inflict a very real harm on the public"; and (5) "inflict a very real harm on * * * a readily identifiable group of individuals." Dkt. 59 at 5-6. If all of these negative consequences would be triggered by *not* signing the Form, then it is clear that the Government's system *depends* on signing the Form.

[13] The *Notre Dame* majority emphasized the fact that "the evidentiary record [was] virtually a blank," and cautioned that "this opinion * * * should not be considered a forecast of the ultimate resolution of this still so young litigation." *Notre Dame,* 743 F.3d at 552. Here, by contrast, both sides presented evidence and moved for summary judgment on the RFRA claims.

715, 718. *Thomas* recognized that some beliefs might be "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection," *id*. at 715, but that is not the case here. See generally, Dkt. 41-1 at ¶¶ 5-19 (explaining Wheaton's background and beliefs). Thus, *Hernandez* and *Thomas* establish that, while the civil courts may examine the sincerity of a religious exercise, and the pressure brought to bear upon it, they may not assess the *validity* of the plaintiff's religious beliefs about moral complicity.

All of this distinguishes Wheaton from the plaintiff in *Bowen* v. *Roy*, 476 U.S. 693, 700 (1986). In *Bowen*, the plaintiffs' religious claim was based on their desire to control *the government's* own "internal procedures."[14] Wheaton's case presents the exact opposite of *Bowen*: here we have the *government* seeking to control *private* conduct by compelling Wheaton to either offer religiously-objectionable services or authorize someone else to do it in Wheaton's place.[15]

---

[14] In *Bowen*, the Court rejected the plaintiff's challenge to the Social Security Administration's practice of assigning a social security number to his daughter. 476 U.S. at 700. The Court splintered on a second, more analogous, issue: the requirement that plaintiff "*shall furnish* to the State agency his social security account number" in order to apply for benefits. *Bowen*, 476 U.S. at 701 (emphasis in original). On that issue, "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 of this case * * *." *Id.* at 731 (O'Connor, J., concurring in part and dissenting in part).

[15] The *Notre Dame* court's *Kaemmerling* comparison, 743 F.3d at 559, fails for similar reasons. There, the plaintiff could not "identify any 'exercise' which is the subject of the burden to which he objects." *Kaemmerling* v. *Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008). But here, Wheaton objects to a specific required action: signing the Form that authorizes the flow of objectionable drugs.

This Court has long recognized religious objections based upon the desire to abstain from facilitating or participating in other people's actions. In *Yoder*, the Amish parents objected to sending their children to school precisely because of the anticipated effect of allowing their children to be exposed to high school. 406 U.S. at 210-11 (The Amish "view secondary school education as an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students."). In *Thomas*, a Jehovah's Witness objected to making tank turrets—not because he himself would use the turrets in battle, but because it would facilitate other people in waging war. 450 U.S. at 715. Similarly, a religious opponent of the death penalty might object to signing an execution warrant on similar grounds, namely that someone else would be legally authorized by the warrant to do what the believer understands to be wrong.[16]

This understanding is incorporated into RFRA. See 42 U.S.C. 2000bb (b)(1) (incorporating *Yoder*). RFRA broadly protects "any" exercise of religion. 42 U.S.C. 2000cc-5. It is undisputed here that Wheaton's religious beliefs prohibit it from signing EBSA Form 700. Dkt. 41-1 at ¶¶ 44, 56-57, 63; see Dkt. 47 at ¶¶ 13, 14, 17. That Wheaton's religious objection is premised, in part, upon its desire not to facilitate the actions of third parties does not change the analysis. Wheaton is no different in this regard from the Amish parent in *Yoder*, the Jehovah's Witness

[16] Likewise, driving a friend to the bank may be permissible as a general matter, but would become immoral (and criminal) if one knows the friend plans to rob the bank.

plaintiff in *Thomas*, or a religious opponent of the death penalty. It was not the province of the trial court to second-guess Wheaton's line-drawing, but only to determine whether this religious exercise was substantially burdened by the pressure imposed by the government.

D. Over eighty percent of courts to have considered the issue have granted preliminary injunctions.

The vast majority of lower court cases to consider this same question in non-profit cases—twenty-six out of thirty-two—have found that the requirement to sign the Form or pay massive fines is a substantial burden on the exercise of religion. See *supra* at n.7. As these courts have explained, the government has fundamentally misconstrued the plaintiffs' religious objections: "Plaintiffs' religious objection is not only to the use of contraceptives, but also being required to actively participate in a scheme to provide such services." *Roman Catholic Archdiocese of N.Y.*, 2013 WL 6579764, at *14. The accommodation requires objectors themselves to sign a form that is, "in effect, a permission slip." *S. Nazarene Univ.*, 2013 WL 6804265, at *8. The question is "not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity.'" *Reaching Souls*, 2013 WL 6804259, at *7 (quoting *Hobby Lobby*, 723 F.3d at 1137). And because Wheaton views completing the self-certification itself as forbidden complicity with the government's scheme, "regardless of the effect of plaintiffs' TPAs, the regulations still require plaintiffs to take actions they believe are contrary to their religion." *Roman Catholic Archdiocese of N.Y.*, 2013 WL 6579764, at *7; *E. Tex. Baptist Univ.*, 2013 WL 6838893, at *20 (Rosenthal, J.)

("The plaintiffs have demonstrated that the mandate and accommodation will compel them to engage in an affirmative act and that they find this act—their own act—to be religiously offensive. That act is completing and providing to their issuer or TPA the self-certification forms.").

In contrast, the handful of courts that have denied injunctions have committed the same errors that the lower court committed here: (1) they have substituted their own theory of moral complicity for that of the plaintiffs, and (2) they have misconstrued the legal effect of the Form. See, *e.g.*, *Mich. Catholic Conference*, 2014 WL 2596753 at *11 (construing EBSA Form 700 to act solely as a notice, not as a trigger of changes to legal relations). These conclusions are irreconcilable with RFRA's text, which protects "any" exercise of religion; they are irreconcilable with the text of the Form and the government's own representations about its legal effect, which confirm that the Form triggers the flow of objectionable drugs; and they are irreconcilable with common sense, which suggests that the government would not impose multi-million dollar fines on religious non-profits for refusing to sign an unnecessary Form.

E. The Mandate cannot survive strict scrutiny.

Because the government has placed a substantial burden on Wheaton's religious exercise, it must satisfy strict scrutiny. That is, the government bears the burden of demonstrating that the imposition of the burden on Wheaton "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1. No court to reach strict scrutiny—the "most demanding test known to constitutional law," *City of*

Boerne v. *Flores*, 521 U.S. 507, 534 (1997)—has held that the Mandate can withstand it. This case is no different.

Compelling Interest. Respondents did not demonstrate that applying the requirement to Wheaton furthers any compelling interest. Indeed, although they addressed strict scrutiny in their briefing in order to preserve the issue for appeal, Dkt. 26 at 18, they conceded that they could not satisfy strict scrutiny under controlling Seventh Circuit precedent, *Korte*, 735 F.3d at 682-87. To satisfy strict scrutiny, the government must do more than assert "broadly formulated interests"; it must demonstrate specific harms that would flow from granting "specific exemptions to particular religious claimants." *O Centro*, 546 U.S. at 431 (citing *Yoder*, 406 U.S. at 236). Yet below, Respondents articulated only the same "broadly formulated interests" in public health and gender equality that they have offered in all of their Mandate-related litigation. See Dkt. 26. at 19-20 (claiming interests in "public health" and "gender equality"). Simply put, Respondents failed to show with *any* "particularity" how its interests would be "adversely affected" by granting an exemption ***to Wheaton***. *Yoder*, 406 U.S. at 236. That lack of specificity dooms a compelling interest claim under RFRA. See, *e.g.*, *O Centro*, 546 U.S. at 430-31.

That failure is particularly glaring here, because the government has asserted only one justification for treating houses of worship differently than religious non-profits like Wheaton—namely, the government believes that "[h]ouses of worship . . . 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." 78 Fed.

Reg. at 39874. Accordingly, the government believes that an exemption for churches "*does not undermine the governmental interests furthered by the contraceptive coverage requirement*." *Ibid.* (emphasis added). Here, it is undisputed that Wheaton is not just "more likely" to hire co-religionists who share its religious objections, but actually does so. Every employee and student signs the Community Covenant declaring Wheaton's commitment to the sanctity of life. Dkt. 41-1 ¶¶ 14, 16. And every employee and staff member "annually reaffirm[s] the College's doctrinal statement." *Id.* at ¶ 15. Thus, by the government's own admission, an exemption for Wheaton "does not undermine the governmental interests furthered by the contraceptive coverage requirement." 78 Fed. Reg. at 39874.[17]

Worse still, the government exempts countless secular employers based on nothing more than its interests in administrative convenience and appropriate "transition" rules. As several courts of appeals, including the *en banc* Tenth Circuit, properly concluded, the government's interests "cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 723 F.3d at 1143; *Korte*, 735 F.3d at 686; *Gilardi*, 733 F.3d at 1222. Given these enormous gaps, the government cannot plausibly maintain its interests are compelling. See, *e.g.*, *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 547 (1993) ("a law cannot be regarded as protecting an interest

[17] In parallel litigation, the government has admitted that it had "no evidence" to support its assumption that houses of worship are "more likely" than religious organizations like Wheaton to employ co-religionists. Dkt. 41-10 at 34, Cohen Deposition, No. 12-cv-2542 (E.D.N.Y. filed Dec. 16, 2013) (Appendix at 119).

of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited") (internal citation omitted).

Narrow Tailoring. The Mandate also fails strict scrutiny because Respondents did not prove it is the least restrictive means of furthering their interests. *United States* v. *Playboy Ent'mt Grp., Inc.*, 529 U.S. 803, 813 (2000) (if a less restrictive alternative would serve the government's purpose, "the legislature *must* use that alternative." (emphasis added)); compare *McCullen* v. *Coakley*, No. 12-1168, 2014 WL 2882079, at *20 (U.S. June 26, 2014) ("To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier[;] * * * the prime objective of the First Amendment is not efficiency."). Wheaton proposed multiple less restrictive means in the trial court. Respondents failed to even seriously address, let alone rebut, them. Dkt. 41 at 27-29.

Most obviously, Respondents could grant Wheaton the same exemption it already grants to tens of thousands of churches, associations of churches, and integrated auxiliaries that share Wheaton's religious beliefs. Alternatively, the government already spends hundreds of millions a 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).[18] Respondents did

[18] See also, *e.g.*, RTI International, *Title X Family Planning Annual Report: 2011 National Summary* 1 (2013), http://www.hhs.gov/opa/pdfs/fpar-2011-national-summary.pdf ("In fiscal year 2011, the [Title X] program received approximately $299.4 million in funding.").

not explain why they could not use a pre-existing program like this to redress genuine economic barriers to contraceptive access. See, *e.g.,* 42 C.F.R. 59.5(a)(7) (providing family-planning services for "persons from a low-income family"). The government could also offer subsidies to employees who wish to purchase contraceptive coverage on the government-run exchanges. See Dkt. 41 at 27-29 (proposing such measures). Indeed, 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; see also, *e.g.*, *Newland* v. *Sebelius*, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012) (noting programs like Title X and the government's lack of proof that providing contraceptives would "entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women"), *aff'd*, 542 F. App'x 706 (10th Cir. 2013).

III. Injunctive relief would aid this Court's jurisdiction.

A. Temporary injunctive relief will preserve the Court's ability to hear this case after a Seventh Circuit appeal has been completed.

An injunction under the All Writs Act would be "in aid of" this Court's certiorari jurisdiction. See 28 U.S.C. 1651(a). The Court's authority under the All Writs Act "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *F.T.C* v. *Dean Foods Co.,* 384 U.S. 597, 603 (1966). The Court may issue a writ to maintain the status quo and take action "in aid of the appellate jurisdiction which might otherwise be defeated." *McClellan* v. *Carland*, 217 U.S. 268, 280 (1910).

The Court should exercise that authority here because the fines for non-

compliance with the Mandate—which begin at midnight Monday evening—threaten the continued existence of Wheaton's ministry. See Part I *supra*. Wheaton faces exposure to potentially massive daily fines and therefore will suffer palpable and rapidly mounting burdens on its religious exercise. And it is precisely because those burdens will increase during the appellate process—inflicting greater and greater harm on Wheaton's ministry, until Wheaton either abandons its religious exercise or collapses—that Wheaton needs temporary injunctive relief from this Court. Otherwise, the Mandate's punitive fines risk scuttling the process of review before Wheaton can complete the process of appellate review, including any further review by this Court.

B. Temporary injunctive relief will allow the Court to consider a petition for certiorari before judgment.

In addition, injunctive relief would also be in aid of this Court's jurisdiction to review Wheaton's anticipated petition for certiorari before judgment. See *N.Y. Natural Res. Def. Council* v. *Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers) ("Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals would be to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals.").

In this case, Wheaton anticipates—subject to the effect on this litigation of the Court's impending decision in *Hobby Lobby*—submitting a petition for certiorari before judgment. Although certiorari before judgment is uncommon, there are several reasons we believe the Court will want to consider such a petition carefully, and

should therefore act now to preserve its ability to consider such a petition.

First, the Court is likely to decide one of the non-profit Mandate cases next Term. As the Court is already aware, Respondents' rulemaking staggered Mandate litigation into two waves—first the for-profit cases, and then the non-profit cases. The government's creation of a one-year "safe harbor" ensured that the for-profit Mandate cases would reach this Court about a year before the non-profit Mandate cases. See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services, 77 Fed. Reg. 8725, 8728 (February 15, 2012). Therefore the Court can expect to receive a number of petitions for certiorari during the summer and fall.

The Sixth and Seventh Circuits have already ruled on three non-profit appeals. *Notre Dame*, 743 F.3d 547; *Michigan Catholic Conf.*, 2014 WL 2596753. The D.C. Circuit has heard argument but not yet ruled in three consolidated non-profit Mandate appeals.[19] The Tenth Circuit has three fully-briefed non-profit appeals that have not yet been set for argument.[20]

Pending before the Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits are twenty non-profit Mandate appeals that have not been fully briefed, including this one.[21] And there are at least fifteen other non-profit Mandate

---

[19] See *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, No. 13-5368 (D.C. Cir, argued May 8, 2014); *Roman Catholic Archbishop* v. *Burwell*, Nos. 13-5371, 14-5021 (D.C. Cir, argued May 8, 2014).

[20] See *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, No. 13-1540 (10th Cir., briefing completed Apr. 17, 2014); *S. Nazarene Univ.* v. *Burwell*, No. 14-6026 (10th Cir., briefing completed June 13, 2014); *Reaching Souls Int'l, Inc.* v. *Burwell*, No. 14-6028 (10th Cir., briefing completed June 24, 2014).

[21] *Roman Catholic Archdiocese of N.Y.* v. *Burwell*, No. 14-427 (2d Cir., Government's

cases now pending in the district courts.[22]

Given the great number of appeals and the nature of the dispute, it is highly likely that the Court will see many petitions for certiorari over the next half-year. And although the circuit split at this early stage is limited to the question of whether to grant a preliminary injunction pending appeal,[23] it appears that a number of Courts of Appeals are waiting on the outcome of *Hobby Lobby* to proceed. Once *Hobby Lobby* is decided, the appeals will likely accelerate, and the circuit split will likely deepen,

---

opening brief filed May 27, 2014); *Geneva Coll.* v. *U.S. Dep't of Health & Human Servs.*, Nos. 13-3536, 14-1374 (3d Cir., Government's opening brief filed June 10, 2014); *Persico* v. *Sec'y, U.S. Dep't of Health & Human Servs.*, No. 14-1376 (3d Cir., Government's opening brief filed June 10, 2014); *Zubik* v. *Sec'y, U.S. Dep't of Health & Human Servs.*, No. 14-1377 (3d Cir., Government's opening brief filed June 10, 2014); *Catholic Charities, Archdiocese of Philadelphia* v. *Sec'y, Dep't of Health & Human Servs.*, No. 14-3120 (3d Cir., court of appeals granted temporary injunction June 27, 2014); *Univ. of Dallas* v. *Burwell*, No. 14-10241 (5th Cir.); *E. Tex. Baptist Univ.* v. *Sebelius*, No. 14-20112 (5th Cir.); *Catholic Diocese of Beaumont* v. *Sebelius,* No. 14-40212 (5th Cir.); *Roman Catholic Diocese of Ft. Worth* v. *Burwell*, No. 14-10661 (5th Cir.); *Weingartz Supply Co.* v. *Burwell*, No. 14-1183 (6th Cir.) (combined for-profit and non-profit case); *Ave Maria Found.* v. *Burwell*, No. 14-1310 (6th Cir.); *Grace Schs.* v. *Burwell*, No. 14-1430 (7th Cir., Government's reply brief due July 10, 2014); *Diocese of Fort Wayne-South Bend* v. *Burwell*, No. 14-1431 (7th Cir., Government's reply brief due July 10, 2014); *Wheaton Coll.* v. *Burwell*, No. 14-2396 (7th Cir., docketed June 26, 2014); *Sharpe Holdings, Inc.* v. *U.S. Dep't of Health & Human Servs.*, No. 14-1507 (8th Cir., plaintiffs-appellees' brief due July 21, 2014) (combined for-profit and non-profit case); *Diocese of Cheyenne* v. *Burwell*, No. 14-8040 (10th Cir., briefing on injunction pending appeal completed June 13, 2014); *Dobson* v. *Burwell*, No. 14-1233 (10th Cir., Government's opening brief due Aug. 5, 2014); *Roman Catholic Archdiocese of Atlanta* v. *Burwell*, No. 12-cv-3489 (N.D. Ga.) (notice of appeal filed May 23, 2014, not yet docketed).

[22] See Becket Fund for Religious Liberty, HHS Mandate Information Central, http://www.becketfund.org/hhsinformationcentral (updated as new decisions arrive).

[23] *Priests for Life* and *Roman Catholic Bishop*, Nos. 13-5368, 13-5371 (D.C. Cir. Dec. 31, 2013) (per curiam order granting preliminary injunction pending appeal, in conflict with Sixth and Seventh Circuit decisions denying a preliminary injunction pending appeal).

necessitating this Court's review.

CONCLUSION

Wheaton respectfully asks the Court to enter an injunction against Respondents under the All Writs Act during the pendency of this appeal enjoining them, their agents, officers, and employees, and others working in concert with them from any application or enforcement of the requirements imposed in 42 U.S.C. 300gg-13(a)(4), Pub. L. 111-148, sec. 1563(e)-(f), the application of the penalties found in 26 U.S.C. 4980D and 4980H and 29 U.S.C. 1132, and any other requirement that Wheaton or those acting in concert with them (including specifically Wheaton's third party administrator and insurer) provide, facilitate, contract for, or otherwise enable access to the objectionable drugs or devices.

At a minimum, Wheaton respectfully seeks a temporary injunction to allow for orderly briefing and disposition of this Application.

Respectfully submitted.

CHRISTIAN POLAND
BRYAN CAVE LLP
161 N. Clark St., Suite 4300
Chicago, IL 60601-3315
(312) 602-5085

MARK L. RIENZI
Counsel of Record
LUKE GOODRICH
HANNAH C. SMITH
ADÈLE AUXIER KEIM
DIANA M. VERM
THE BECKET FUND
FOR RELIGIOUS LIBERTY
3000 K Street, N.W.,
Suite 220
Washington, D.C. 20007
(202) 955-0095
mrienzi@becketfund.org

Counsel for Applicant

JUNE 29, 2014