No. 13A1284

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.

REPLY IN SUPPORT OF 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
DANIEL BLOMBERG
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

JULY 2, 2014

INTRODUCTION

Monday night's temporary injunction protected Wheaton College from being forced to violate its religious beliefs and sign EBSA Form 700. Dkt. 41-9 (Appendix at 116). That injunction should remain in place to preserve this Court's jurisdiction, bring Wheaton's case in line with 29 out of 32 lower court cases, and protect Wheaton from irreparable harm and financial penalties while its case proceeds.

"[E]ligible organizations" should "be permitted to opt out of the contraceptive mandate by providing written notification of their objections to the Secretary of HHS, rather than to their insurance issuers or third-party administrators." *Burwell* v. *Hobby Lobby*, --- S.Ct. ----, No. 13-354, slip op. at 10, n.9 (2014) (citing *Little Sisters of the Poor Home for the Aged* v. *Sebelius,* 134 S. Ct. 1022 (2014)). That is precisely the relief Wheaton seeks, and it is barely addressed in the government's brief. Wheaton has no difficulty complying with—and indeed has already complied with—the terms prescribed by this Court in *Little Sisters*. See Dkt. 64-1, Wheaton's *Little Sisters* notification (Appendix at 189). If it is really true that the government can make its accommodation system work through "independent legal obligations" then it should just go ahead and do so, without Wheaton's coerced involvement.

Like the Little Sisters of the Poor, Wheaton cannot sign EBSA Form 700 because it believes, as a religious matter, that signing the Form would be impermissibly facilitating abortions and is therefore forbidden. To this the government offers just a recycled version of the "stroke of the pen" argument this Court rejected in *Little Sisters*: EBSA Form 700 is not *really* doing the work, so sign it. That argument should

fail, both because the Form actually is central to the government's system (why else would the government fight to the Supreme Court to make the Little Sisters and Wheaton sign it?) and because it is undisputed that Wheaton sincerely objects to signing the Form. It is for Wheaton—not HHS—to judge the religious limits on Wheaton's own conduct. *Hobby Lobby*, slip op. at 35-38 (rejecting the government's "attenuation" argument as "dodg[ing] the question that RFRA presents").

The government has no prospect of surviving strict scrutiny because it has *already conceded* that an exemption for religious organizations like Wheaton—which limits its hiring to co-religionists—"*does not undermine the governmental interests furthered by the contraceptive coverage requirement*." 78 Fed. Reg. 39870, 39874 (July 2, 2013) (emphasis supplied). That concession makes sense, and it forecloses any argument that the government can carry its burden of proving that application of the Mandate to Wheaton (whose students and employees sign a Community Covenant) serves a compelling interest. Having exempted "religious employers" precisely because they hire like Wheaton, and having exempted grandfathered plans for the foreseeable future, the government can establish no compelling interest in crushing Wheaton with fines for not signing and delivering the Form. *Hobby Lobby*, slip op. at 44, n.41 ("[T]he Government itself apparently believes that when it 'provides an exception to a general rule for secular reasons (or for only certain religious reasons) [it] must explain why extending a comparable exception to a specific plaintiff for religious reasons would undermine its compelling interests.'") (quoting Brief for the United States as

Amicus Curiae in *Holt* v. *Hobbs*, No. 13-6827, p. 10). The government has no answer to this concession.

The government's proposed course—lifting the injunction and allowing the government to punish Wheaton for its religious exercise—makes no sense. Given our system's "special solicitude" for the free exercise rights of religious organizations, that approach would be wrong even if the government claimed its Form really mattered. But here—where the government insists that its Form is unnecessary and that it lacks any interest in applying the contraceptive mandate to Wheaton—that outcome is indefensible. This Court should grant an injunction pending appeal.

ARGUMENT

I. Wheaton faces critical and exigent circumstances.

The government does not deny that Wheaton faces critical and exigent circumstances. See Appl. at 14-17. Instead, the government suggests that the situation is not truly urgent, because Wheaton can just sign the Form. Opp. at 2 ("need only self-certify"). But ignoring Wheaton's religious beliefs does not make them go away. Absent an injunction, Wheaton must either violate its deeply held religious beliefs or pay massive fines. That was true on Monday, true of the Little Sisters, and true of every other party now protected by an injunction. That situation is critical and exigent, and the injunction should remain in place.[1]

[1] The government notes that Wheaton made its motion for preliminary injunction on June 9, Opp. at 12, but omits (1) Wheaton's earlier efforts to seek relief by briefing summary judgment on an expedited schedule (Dkts. 40, 41), (2) the district court's prediction that no preliminary injunction motion was needed because the court could likely decide the cross-motions for summary judgment by June 1 (See Dkt. 40); and

II. Wheaton has an indisputably clear right to relief.

A. Wheaton seeks the same relief this Court has granted to others.

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 freed the Sisters from using the Form and allowed them to merely inform *the government* (not their TPA) of their religious objection. Wheaton has provided already provided such notice. Dkt. 64-1.

In the wake of *Hobby Lobby*, courts of appeals have issued similar relief. Thus, on Monday afternoon, "[i]n light of" *Little Sisters*, the Tenth Circuit granted identical relief to five Catholic ministries. *Diocese of Cheyenne* v. *Burwell*, No. 14-8040, slip op. at 2-3 (10th Cir. June 30, 2014); accord *Eternal Word Television Network* v. *Burwell*, No. 14-12696, slip op. at 26 (11th Cir. June 30, 2014) (Pryor, J., concurring).

Indeed, 29 of 32 cases have granted injunctive relief to non-profit ministries.[2] Only two courts have denied relief, and neither squarely addressed an objector like Wheaton, which hires only co-religionists, and therefore does not harm the government's interests *at all*.[3]

---

(3) the district court's June 9 request that Wheaton file a preliminary injunction motion, Dkt. 57, which Wheaton did the next day. Dkt. 58.

[2] When this application was filed on Monday, injunctions had been granted to non-profit plaintiffs in 26 cases. See Appl. at 18 n.7. Since then, three more injunctions have been granted, which, not counting Wheaton, leads to a current split of 29 to 3. See *Eternal Word*, No. 14-12696 (granting injunction pending appeal); *Diocese of Cheyenne*, No. 14-8040 (same); *Archdiocese of St. Louis* v. *Burwell*, No. 13-cv- 2300 (E.D. Mo. June 30, 2014) (granting preliminary injunction). The split goes to 30 to 3 if one counts emergency relief granted yesterday in *Catholic Benefits Ass'n* v. *Burwell*, No. 14-cv-685 (W.D. Okla. July 1, 2014), a parallel action to another case.

[3] The three cases in which relief has currently been denied are one consolidated appeal in the Sixth Circuit involving two cases, and one appeal in the Seventh Circuit.

This Court has not yet determined whether the government can enforce the accommodation against nonprofits who object to signing Form 700, and it need not do so now as a final matter. An injunction would allow Wheaton the space to litigate its claim without being crushed by fines, and would restore Wheaton's case to equal footing with at least 29 others that are proceeding through the courts.

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

"[T]he question that RFRA presents" is "whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*." *Hobby Lobby*, slip op. at 36. The *Hobby Lobby* analysis controls here. Wheaton is religiously opposed to emergency contraceptives because they may act by killing a human embryo. *Hobby Lobby*, slip op. at 36; Ryken Decl., Dkt. 41-1 at ¶ 41 (Appendix at 75). Wheaton wishes to exclude these drugs from its health plans. *Hobby Lobby*, slip op. at 36; Dkt. 41-1 at ¶¶ 41, 56. Wheaton believes that if it takes the action coerced by the government—signing the Form—it "will be facilitating abortions," and if it does not comply, Wheaton "will pay a heavy price." *Hobby Lobby*, slip op. 2; Dkt. 41-1 ¶ 56 (describing Wheaton's view on moral complicity). To be sure, free citizens in a diverse Nation will have different views about whether signing the Form makes someone complicit. But that is a question of "religion and moral philosophy" for Wheaton, not HHS. *Hobby Lobby*, slip op. at 36-38.

See *Mich. Catholic Conference* v. *Burwell*, Nos. 13-2723, 13-6640, 2014 WL 2596753 (6th Cir. June 11, 2014); *Univ. of Notre Dame* v. *Sebelius,* 743 F.3d 547 (7th Cir. 2014).

Wheaton believes signing the Form is forbidden and thus must either violate its conscience or "pay an enormous sum of money." *Id.* at 38. Under RFRA, this is a substantial burden. *Ibid.* The government cannot answer this straightforward application of *Hobby Lobby*'s substantial burden analysis. So it makes three moves. First, it mischaracterizes Wheaton's religious exercise, pretending that Wheaton objects to the conduct of others, rather than its own forced conduct.[4] But Wheaton objects only to what the government is trying to make Wheaton do; it seeks simply to be left alone and offer health insurance consistent with its community's shared religious beliefs.[5]

Second, the government oddly suggests that Wheaton does not in fact object to signing the Form: "Applicant does not have a religious objection to anything that it is required to do to exempt itself from the obligation to furnish contraceptive coverage." Opp. at 26. But that is plainly false—if anything is clear from this case (and the many

---

[4] *E.g.*, Opp. at 21 ("[A]pplicant's objection is that, after it opts out, federal law will require third parties—Bluecross and Companion—to make or arrange separate payments for contraceptive services"); Opp. at 3 (falsely claiming that Wheaton seeks "to prevent the government from * * * ensuring that others provide or arrange the coverage instead"); Opp. at 34 ("Applicant appears to object to any scheme in which its claim of an exemption leads another party to provide coverage it finds objectionable."). But Wheaton has never objected to *all* efforts to provide Plan B and ella—it has only objected to its *own coerced involvement* in that process. Dkt. 41-1 at ¶¶ 44, 56-57, 63.

[5] Wheaton's situation is thus nothing like the exemption for military conscientious objectors (COs), Opp. at 27. COs fill out and deliver a form *to the government* in which they request CO status. See, *e.g.*, Dept. of Defense Instruction 1300.06 (May 31, 2007). The CO exemption is more like the Mandate's exemption for churches, who need not execute Form 700, even if the government ultimately provides contraceptives to their employees through Title X or other existing programs. Cf. *Hobby Lobby*, slip op. at 3 (Kennedy, J., concurring) ("RFRA is inconsistent with the insistence of an agency such as HHS in distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both the same accommodation.").

pending lawsuits in the courts below) it is that many religious non-profits—including Wheaton—*do* object to signing and delivering the Form. That objection is why Wheaton is seeking relief, something the government conceded below. Dkt. 47 at ¶¶ 13, 14, 17.

Third, the government says Wheaton just has a "misunderstanding" about the Form, Opp. at 13, and *shouldn't* object to signing it. The government roots this argument in the two lower court decisions that told religious plaintiffs that they were mistaken about whether they were facilitating abortion. *See Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547, 555 (7th Cir. 2014) (rejecting Notre Dame's view that signing and delivering the Form makes it "complicit in the provision of contraceptives" as "unconvincing"); *Michigan Catholic Conf. v. Sebelius*, Nos. 13-2723, 13-6640, 2014 WL 2596753, at *10 (6th Cir. June 11, 2014) (rejecting claim that signing the Form counts as "facilitating access to contraceptive coverage"). Yet this Court's decision in *Hobby Lobby* makes clear that it is not for the governemnt to tell religious believers which actions constitute impermissible facilitation of abortion and which do not. *Hobby Lobby*, slip op. at 35-38 (rejecting government's "attenuation" argument). Wheaton, like over 100 other non-profit plaintiffs, has decided that executing and delivering Form 700 makes it complicit in a religiously forbidden act, "and it is not for [courts] to say that their religious beliefs are mistaken or insubstantial." *Id.* at 37. Like the Hahns and the Greens, if these parties do as the government demands "they believe they will be facilitating abortions, and if they do not comply they will pay a very heavy price." *Id.* at 2. "If these consequences do not amount to a substantial

burden, it is hard to see what would." *Ibid.* In arguing otherwise, the government (and the two courts in the extreme minority) "in effect tell the plaintiffs that their beliefs are flawed," "mistaken or insubstantial." *Id.* at 37. But government officials cannot reach that conclusion.

Indeed, the government's claim that Wheaton "misunderstands" that the Form acts as a but-for trigger of the coverage contradicts the position the government took in the courts below and even in its latest brief. The government made a regulatory finding that the Form is necessary to designate the TPA as the "*plan administrator* * * * for the purpose of providing payments for contraceptive services for participants and beneficiaries." Form 700 itself states that "[t]his certification is an *instrument* under which the plan is operated."[6] 78 Fed. Reg. at 39879 (emphasis added); 26 C.F.R. 54.9815–2713A (emphasis added); 29 C.F.R. § 2510.3–16 (b); Dkt. 41-9. And the government says that "an injunction pending appeal would deprive" employees

[6] Nor are the government's statements in the Federal Register and on its Form idle words. Under ERISA, the "term 'administrator' means * * * the person specifically so designated by the terms of the instrument under which the plan is operated." 29 U.S.C. 1002(16)(A)(i). The government only has the authority to designate a plan administrator by regulation when the plan instruments are silent and no plan sponsor can be identified. See 29 U.S.C. 1002(16)(A)(iii). But the "instruments" that govern Wheaton's plan expressly exclude Wheaton's TPA from serving as a plan administrator, and by statute, Wheaton is the plan sponsor. Dkt. 41-4 at 3, Wheaton's Administrative Services Agreement (Appendix at 92) ("[BCBS] is not the plan administrator of the Employer's separate employee welfare benefit plan as defined under ERISA"); 29 U.S.C. 1002(16)(B). Thus the government must compel Wheaton itself to sign and deliver the Form, which purports to be "an instrument under which [Wheaton's] plan is operated," in order to override Wheaton's existing contractual arrangements.

and students of contraceptive coverage. Opp. at 36. The government has thus conceded that the Form does act as a trigger. And unlike Schrödinger's cat, the Form cannot possibly be both a trigger and not a trigger at the same time.

Whatever the right answer—trigger or no trigger, facilitating or not facilitating—the undisputed fact is that Wheaton has a sincere religious objection to executing the Form. Crushing Wheaton with fines until it yields on that religious objection is a substantial burden on Wheaton's religious exercise.

C. The Mandate cannot meet strict scrutiny.

1. The government has admitted that it has no interest in enforcing the Mandate against Wheaton.

On strict scrutiny, the government invokes the same broad interest it did in *Hobby Lobby*—namely, protecting the health of female employees. Opp. at 28-29. But RFRA requires a "'more focused' inquiry: It 'requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.'" *Hobby Lobby*, slip op. at 39 (quoting *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006)). The government cannot satisfy that burden here, because it has admitted that it has no interest in enforcing the Mandate against Wheaton.

Specifically, the government has *made a regulatory finding* that a complete exemption for houses of worship "does not undermine the governmental interests furthered by the contraceptive coverage requirement" because "[h]ouses of worship * * * are more likely than other employers to employ people of the same faith who share

the same objection." 78 Fed. Reg. at 39874. But here, it is undisputed that Wheaton does just that: Every employee and student agrees to Wheaton's Community Covenant, which embodies its beliefs about the sanctity of human life, and all of Wheaton's employees annually reaffirm their agreement with Wheaton's statement of faith. Dkt. 41-1 ¶¶ 14-16; see also Appl. at 1, 22, 33-34. Thus, by the government's own admission, it has *no interest* in enforcing the Mandate against Wheaton. The government—which bears the burden on this point—simply ignores this inconvenient fact.[7]

The government also fails to explain why it has a compelling interest in enforcing the Mandate against Wheaton *immediately*—before any court has had an opportunity to fully consider the merits of Wheaton's claims. In fact, the government has repeatedly delayed the Mandate on its own initiative, and it has used those delays to evade timely judicial review. First, the government created a "safe harbor" for nonprofit religious organizations, promising not to enforce the Mandate against them for eighteen months. Dkt. 1, Compl. at ¶¶ 85-87 (Appendix at 27). Then it extended the "safe harbor" until January 1, 2014—bringing the total delay to almost two years. It used those delays, along with a promise to alter the Mandate, to obtain a dismissal or stay in dozens of nonprofit challenges, thus insulating the Mandate from timely judicial review. See, *e.g.*, *Wheaton Coll.* v. *Sebelius*, 703 F.3d 551 (D.C. Cir. 2012). Even now, it is not enforcing the Mandate against all non-profits immediately—only those that are not grandfathered and happen to have plan years starting in early 2014 rather

[7] See *Hobby Lobby*, slip op. at 3 (Kennedy, J., concurring) (an agency should not "distinguish[] between different religious believers—burdening one while accommodating the other—when it may treat both equally * * * .").

than late 2014. Thus, having prevented the courts from ruling on the Mandate in non-profit cases for several years, and having delayed the Mandate for several years on its own initiative, there is no reason why the government cannot tolerate another short delay to allow full consideration of Wheaton's claims.

2. The government has many less-restrictive ways of accomplishing its objectives.

Nor can the government satisfy the "exceptionally demanding" least restrictive means test. *Hobby Lobby*, slip op. at 40 (citing *City of Boerne* v. *Flores*, 521 U.S. 507, 532 (1997)); 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.").

To make this showing, the government must *introduce evidence* into the record. *United States* v. *Playboy Ent'mt Grp., Inc.*, 529 U.S. 803, 816, 826 (2000)—such as "the average cost per employee of providing access to contraceptives," or "the number of employees who might be affected" at Wheaton should they not receive abortifacient coverage. *Hobby Lobby*, slip op. at 41. It failed to do so.

As in *Hobby Lobby*, the government already has a less restrictive alternative that "respect[s] the religious liberty of [Wheaton]" while "ensuring that the employees of [Wheaton] have precisely the same access to all FDA-approved contraceptives," slip op. at 3—namely, it can make the same accommodation for Wheaton that this Court made for the Little Sisters of the Poor. This accommodation fully respects Wheaton's

religious liberty. And according to the government, it (a) does not undermine the government's interest to exempt a religious organization like Wheaton, and (b) it can make its system work using independent obligations, not based on Wheaton's Form. Opp. at 21-22.

The government claims that the circumstances in *Little Sisters* were "quite different from the facts of this case," because the Little Sisters had a "self-insured church plan"—meaning that the government could not compel the Little Sisters' third-party administrator "to assume responsibility for contraceptive coverage." Opp. at 35. But that argument actually cuts *strongly against* the government here. It means that the Court-imposed accommodation in *Little Sisters* actually thwarted the government's alleged interest, because the government couldn't compel the Little Sisters' third-party administrator to provide coverage. Here, by contrast, the very same Court-imposed accommodation would *not* thwart the government's alleged interest, because the government claims that its system works even without Wheaton's participation, Opp. at 21-22, and the government says it has no interest for employers like Wheaton.

Rather than address these arguments, the government merely assumes that *Hobby Lobby* blessed the accommodation. But that is wrong. This Court was clear that it did not "decide today whether [the accommodation] complies with RFRA for purposes of all religious claims," and it disclaimed even being "permitted to address" the accommodation's viability. *Hobby Lobby*, slip op. at 44 & n.40. There, "the plaintiffs ha[d] not criticized [the accommodation] with a specific objection that has been

considered in detail by the courts in this litigation." *Hobby Lobby*, slip op. at 3 (Kennedy, J., concurring). The opposite is true here. And if this Court were ruling otherwise, then it surely would have called into question—instead of reaffirming—its ruling in *Little Sisters*. *Hobby Lobby*, slip op. at 10 n.9 (citing *Little Sisters*, 134 S. Ct. 1022).

Finally, the government fails to prove why Wheaton's employees cannot be served by "the modification of an existing program." *Hobby Lobby*, slip op. at 41. The government does not dispute that it can allow Wheaton's employees to use subsidies to purchase health insurance on the exchanges. See Opp. at 32-33. It argues only that it cannot offer *contraceptive-only* policies. *Ibid*. But this is not its only alternative. Surely the government does not mean to suggest that subsidized, comprehensive policies offered on its own exchanges are an ineffective means of achieving its goals.

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

Absent an injunction, this Court will lose the ability to protect Wheaton from a forced violation of its free exercise rights. A denial means Wheaton must either sign the Form under duress in violation of its religion, or face massive fines as high as $95,000 every day—nearly $35 million annually. Dkt. 41-1 at ¶ 60. That others may have succumbed to that illegal pressure, to save their ministries, Opp. at 17, does not change the fact that Wheaton needs protection right now, and if Wheaton is forced to violate its religion, a future decision cannot undo that harm.

This Court recently granted similar relief for a religious believer in another context in *Holt* v. *Hobbs*, 134 S. Ct. 635 (2013). If the Court had not issued relief and the

government had shaved Holt's beard, the believer could have grown a beard back later. But he would have irretrievably lost the protection to which his religious exercise was entitled. As in *Holt*, the injunctive relief being sought in Wheaton's application is in aid of this Court's jurisdiction to rule on a specific religious exercise—protection against a forced choice in violation of Wheaton's religious beliefs. And if Wheaton does not yield to the pressure and sign the Form, it must face fines that are obviously overwhelming for a small liberal arts college: approximately $95,000 per day or $35 million per year. Because this Court's ability to protect Wheaton's religious exercise thus "might otherwise be defeated," immediate injunctive relief is "in aid of [the Court's] appellate jurisdiction" and should be granted. *McClellan* v. *Carland*, 217 U.S. 268, 280 (1910).

CONCLUSION

Wheaton is a "community made up of believers in the same religion," *Hobby Lobby*, slip op. at 17 (Ginsburg, J., dissenting), for which "free exercise is essential in preserving [its] own dignity and in striving for a self-definition shaped by [its] own religious precepts." *Hobby Lobby*, slip op. at 2 (Kennedy, J., concurring). Given the government's stated lack of interest, and its belief that the Form is unnecessary, there is no valid reason for the government to be permitted to crush Wheaton with fines, or to force it to violate the shared faith of its community. Wheaton respectfully requests that the temporary injunction remain in place.

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
DANIEL BLOMBERG
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

JULY 2, 2014