Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, & 15-191

In The Supreme Court of the United States

DAVID A. ZUBIK, ET AL.,

Petitioners,

v.

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

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Third, Fifth, Tenth, And District Of Columbia Circuits

BRIEF OF CNS INTERNATIONAL MINISTRIES, INC. AND HEARTLAND CHRISTIAN COLLEGE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Both CNS International Ministries, Inc. and Heartland Christian College are religious nonprofit corporations that have no parent corporations. Neither is subject to ownership of any kind by any other corporation.

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INTEREST OF THE *AMICI CURIAE*[1]

CNS International Ministries, Inc. (CNS Ministries) and Heartland Christian College (HCC) are nonprofit religious organizations that offer healthcare coverage to employees through a self-insured plan. CNS Ministries and HCC, in accordance with their sincerely held religious beliefs, oppose the use, funding, provision, or support of abortion on demand, and they believe that certain contraceptives required under the contraceptive mandate – Plan B, ella, and copper IUDs – can and do cause abortions on demand.

CNS Ministries and HCC challenged the mandate and the so-called "accommodation" for religious nonprofits in the District Court for the Eastern District of Missouri, and obtained an injunction against enforcement of the mandate against them. *Sharpe Holdings, Inc. v. U.S. Dept. of Health & Human Services*, 2:12 CV 92 DDN, 2013 WL 6858588, at *3 (E.D. Mo. Dec. 30, 2013), *aff'd*, 801 F.3d 927 (8th Cir. 2015). The Government appealed to the Eighth Circuit Court of Appeals, which affirmed the district court's decision, including ruling in favor of CNS Ministries and HCC as to the "accommodation"

[1] The parties consented to this filing. Their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amici* and their counsel, has contributed monetarily to the brief's preparation or submission.

as it had been augmented in 2014. *Id*. The Government filed a petition for a writ of certiorari in the Supreme Court, No. 15-775 (Dec. 15, 2014), and asked the Court to hold it pending the Court's decision in *Zubik v. Burwell* and the consolidated cases. The Government's delay in filing its petition until 89 days after the decision of the Court of Appeals made consolidation with the existing cases unlikely and effectively thwarted any possibility that CNS Ministries and HCC would be able to defend the Eighth Circuit's decision in their favor before this Court.

The interest of the *amici curiae* is in the preservation of their injunction as affirmed by the Court of Appeals.

SUMMARY OF THE ARGUMENT

The Religious Freedom Restoration Act (RFRA) requires the Government to show that the contraceptive mandate is "the least restrictive means of furthering [its] compelling governmental interest." 42 U.S.C. 2000bb-1(b)(2).

Since the Patient Protection and Affordable Care Act (ACA)[2] was enacted in March of 2010, the means by which the Government enforces its regulatory

[2] The ACA consists of the Patient Protection and Affordable Care Act, Public Law 111-148, and the Health Care and Education Reconciliation Act of 2010, Public Law 111-152.

contraceptive mandate has been altered at least eight times. Each time, prior to amendment, the Government had insisted that it was already employing the least restrictive means of furthering its interests.

At first, opposition from individual and corporate religious objectors forced the Government to back off. At each of the remaining stages of the Government's regulatory retreat, courts, high and low, have found the Government's least-restrictive-means iterations to come up short.

Each time the contraceptive mandate has been altered to address religious concerns, detailed *infra*, the Government's prior claim that it was employing the least restrictive means has been proven wrong. The Government has again and again backed off, but only as little as possible each time. The Government has not taken RFRA's *least* restrictive means requirement seriously but instead has repeatedly tried to use the *most* restrictive means it can get away with.

The Government now claims that, after eight stingy, parsimonius backward steps, it has again identified the absolutely irreducible least restrictive means of enforcing its regulatory contraceptive mandate. Given the panoply of alternative means still available to and untried by the Government, its current version is no more credible than those rejected in the past.

ARGUMENT

THE GOVERNMENT HAS EIGHT TIMES CLAIMED THAT ITS THEN-CURRENT VERSION OF THE MANDATE WAS THE LEAST RESTRICTIVE MEANS AND EACH TIME THEREAFTER ADMITTED THAT LESS RESTRICTIVE MEANS EXIST.

Since 2010, the Government has successively claimed, at least eight times, that the then-current version of the contraceptive mandate was the least restrictive means of furthering governmental interests. These claims have been followed by public outcries and court cases, which in turn have been followed by the Government successively admitting that less restrictive means indeed exist and would be utilized. This history, detailed *infra*, undermines any claim by the Government today that it has presented objecting religious claimants or the Court with the least restrictive means.

I. The Religious Employer (Church) Exemption and Its Revisions

Presumably, the contraceptive mandate, as originally promulgated in 2010, was considered by the Government to be the least restrictive means of achieving its interests. RFRA and its least restrictive means test, "appl[y] to all Federal law, and the implementation of that law, whether statutory or otherwise . . . " 42 U.S.C. 2000bb-3. Accordingly, the Government was obligated to employ the least restrictive means in its enforcement of the contraceptive

mandate from the beginning, and citizens have had a right since the interim final rules establishing the mandate were published, in July 2010 (75 Fed. Reg. 41726), to expect the Government to do so.

In August 2011, however, the Government acknowledged that the contraceptive mandate burdens religious exercise, and it announced a narrow exemption for houses of worship. This appears to be the result of "considerable feedback" from commenters, including from "religious employers." 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011). "In the Departments' view, it is appropriate that HRSA [Health Resources and Services Administration], in issuing these Guidelines, takes into account the effect on the religious beliefs of certain religious employers if coverage of contraceptive services were required in the group health plans in which employees in certain religious positions participate." *Id*.

The amended interim final regulations specified that, for purposes of this exemption, a religious employer is one that: (1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a nonprofit organization described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the U.S. Code. Section 6033(a)(3)(A)(i) and (iii) of the Code refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any

religious order. 26 U.S.C. 6033(a)(3)(A)(i), (iii); 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012).

The Government specifically stated that RFRA and the least restrictive means test were satisfied by the religious employer exemption:

> Likewise, this approach complies with the Religious Freedom Restoration Act, which generally requires a federal law to not substantially burden religious exercise, or, if it does substantially burden religious exercise, to be the least restrictive means to further a compelling government interest.

Id. at 8729. The Government assumed the religious exemption would take care of any religious concerns. The Government claimed, after its false start in 2010, to have determined the least restrictive means for furthering its interests.

But the exemption was soon shown to be far too narrow. As the head of Catholic Charities USA observed, "the ministry of Jesus Christ himself" would not qualify for the exemption given that he did not confine his ministry to co-religionists.[3]

In response to complaints such as these, the Government found in July 2013 that *it did* have a less restrictive means for accomplishing its interest,

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[3] Edward Whelan, *The HHS Contraception Mandate vs. The Religious Freedom Restoration Act*, 87 Notre Dame L. Rev. 2179, 2180 (2012).

and it broadened the religious exemption to include, essentially, just the fourth prong of the original test: "a 'religious employer' is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. 147.131. This means the exemption applied to churches and their integrated auxiliaries, without further inquiry.

Previously, churches that ran schools and soup kitchens would not have qualified for the exemption, as their charity was not limited to serving people of their own faith. "Specifically," the Government states in the Federal Registry, "[these changes] were intended to ensure that an otherwise exempt plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer hires or serves people of different religious faiths." 78 Fed. Reg. 39870, 39874 (July 2, 2013).

II. The Temporary Enforcement Safe Harbor

The religious exemption, even as broadened, left the vast majority of religious nonprofits unprotected against the mandate. A religiously-oriented food bank, for instance, was not a church and therefore was subject to the mandate unless another exemption applied.

Before broadening the religious employer (church) exemption in 2013 (*see* Section I *supra*), the Government had altered its course another way and

instituted a "temporary enforcement safe harbor" for certain religious nonprofits. 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012). With the "temporary safe harbor," the Government promised not to enforce the mandate against religious nonprofits for at least 18 months. The safe harbor was made available to entities that satisfied all of the following criteria:

1. The organization is organized and operates as a nonprofit entity.

2. From February 10, 2012 onward, contraceptive coverage has not been provided at any point by the group health plan established or maintained by the organization, consistent with any applicable State law, because of the religious beliefs of the organization.

3. The group health plan established or maintained by the organization (or another entity on behalf of the plan, such as a health insurance issuer or third-party administrator) must provide to participants a notice which states that contraceptive coverage will not be provided under the plan for the first plan year beginning on or after August 1, 2012.

4. The organization self-certifies that it satisfies criteria 1-3 above, and documents

> its self-certification in accordance with the procedures detailed herein.[4]

During this safe harbor period, on March 21, 2012, the Government proposed a permanent "accommodation" for certain religious nonprofits.[5] The proposed accommodation would require health insurance issuers of objecting nonprofits to provide contraceptive coverage directly to the participants and beneficiaries covered under the organization's plan with no cost sharing.[6]

On August 15, 2012, the Government admitted, in response to lawsuits, that the safe harbor was too narrow, and so it again found less restrictive means for achieving its interests and broadened the safe harbor to include additional organizations. The Government "clarified" three points:

1. That the "safe harbor is also available to nonprofit organizations with religious objections to some but not all contraceptive coverage . . . "
2. That "group health plans that took some action to try to exclude or limit

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[4] Guidance on the Temporary Enforcement Safe Harbor, Feb. 10, 2012, http://www.nacua.org/documents/HHS_HealthInsurance_Guidance.pdf (last visited Jan. 3, 2016).

[5] Advance Notice Of Proposed Rulemaking (Anprm) (March 21, 2012), https://www.federalregister.gov/articles/2012/03/21/2012-6689/certain-preventive-services-under-the-affordable-care-act (last visited Jan. 4, 2016).

[6] *Id*.

> contraceptive coverage that was not successful as of February 10, 2012, are not for that reason precluded from eligibility for the safe harbor . . . "

3. That the "safe harbor may be invoked without prejudice by nonprofit organizations that are uncertain whether they qualify for the religious employer [church] exemption . . . "[7]

Although billed as a clarification, the changes were significant. The first bullet point expanded the safe harbor to entities that did not object to *all* "contraceptives," such as the many Protestant organizations that do not religiously oppose birth control pills but do oppose the morning after pill. The change offered in the second bullet point is also important, as the clarification to which it refers reads as follows:

> With respect to the second criterion above, the following exception applies. A group health plan will be considered not to have provided all or the same subset of the contraceptive coverage otherwise required if it took some action to try to exclude or limit such coverage that was not successful as of February 10, 2012. Accordingly, such coverage will not disqualify an employer, a group

[7] Alden J. Bianchi, "HHS/CCIIO Revises Temporary Enforcement Safe Harbor on Contraceptive Coverage Offered by Religiously Affiliated Tax-Exempt Entities," https://www.mintz.com/newsletter/2012/Advisories/2194-0812-NAT-ELB/index.html (last visited Jan. 3, 2015).

> health plan, or a group health insurance issuer from eligibility for the safe harbor."[8]

On June 28, 2013, with the safe harbor about to expire, the Government admitted that the mandate was still burdening nonprofit religious organizations, so it extended the safe harbor for another six months (now totaling two years).[9]

III. The "Accommodation"

The same rules that extended the temporary enforcement safe harbor also created the "accommodation" for religious nonprofits, first officially proposed in March 2012 (discussed *supra*).[10] Under the "accommodation," an insurance issuer was required to exclude contraceptive coverage from the employer's plan and provide plan participants with coverage for contraceptive services separately without imposing any cost-sharing requirements on the employer, its insurance plan, or its employee beneficiaries. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2755 (2014).

To take advantage of the accommodation, the religious nonprofit would have to self-certify, using a

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[8] *Id.*

[9] Guidance on the Temporary Enforcement Safe Harbor, June 28, 2013, https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventive-services-guidance-6-28-2013.pdf (last visited Jan. 3, 2015); 78 Fed. Reg. 39870 (July 2, 2013).

[10] *Id*.

form provided by the Government, that it was eligible for the accommodation and inform its insurance issuers and third-party administrator (TPA) about the objection. 45 C.F.R. 147.131(b); *see* 29 C.F.R. 2590.715-2713A(a); 26 C.F.R. 54.9815-2713A(a); 78 Fed. Reg. at 39874-75. According to the Government, "the accommodations for eligible organizations under these final regulations do not violate RFRA because they do not substantially burden religious exercise, and they serve compelling government interests and moreover are the least restrictive means to achieve those interests." 78 Fed. Reg. at 39886-87.

Nonprofits who opposed the mandate found no comfort in the "accommodation":

> [T]he 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. . . . [B]ecause 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."

Wheaton v. Burwell, Emergency Application for Injunction, 13A1284 (U.S. June 29, 2014) at 31.

The Government responded that the accommodation, as effected by using the self-certification form and providing it to the insurance issuer or third-party administrator, was the least restrictive means of serving its interests. *Wheaton v. Burwell*, Memorandum in Opposition, 13A1284 (U.S. July 2, 2014) at 31.

On July 3, 2014, the Supreme Court entered its order regarding Wheaton College's application for an emergency injunction against enforcement of the mandate, including the accommodation. *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014). "The Circuit Courts," the Court said, "have divided on whether to enjoin the requirement that religious nonprofit organizations use EBSA Form 700." The Court ruled that Wheaton College *did not* have to use the form, but could merely "inform[ ] the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services" and it would be entitled to an injunction against enforcement of the mandate, pending appeal. *Id*. at 2807.

After the Supreme Court order in *Wheaton College*, as well as those in *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014) and *Hobby Lobby*, 134 S. Ct. 2751 (2014), the Government admitted that the then-current accommodation needed to be

changed, and that it would issue new regulations to "augment" it.[11]

IV. The Augmented "Accommodation"

Under the augmented rules, published August 27, 2014, a religious objector whom the Government has chosen not to exempt need not notify its health insurer or TPA of its objection to the mandate; instead, if it does not follow that procedure, it "must" submit to the Government a form or notice identifying its religious objection, the name and type of its health plan, and – for the first time – "the name and contact information for any of the plan's [TPAs]." 79 Fed. Reg. 51092, 51094-95 (Aug. 27, 2014). The rules dictate that then the Government "will send a separate notification to" the religious organization's TPA creating the TPA's obligation to deliver emergency contraceptives to participants in the religious organization's health plan. *Id.* at 51095, 51098; *see* 26 C.F.R. 54.9815-2713A(b)(1)(ii)(B).

So Form 700, the centerpiece of the Government's previous attempt at satisfying the least restrictive means test, was now paired with an alternative – instead of sending the form to a health insurer or TPA and knowing that it would initiate contraceptive coverage, an objector could identify its insurer or TPA

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[11] *Little Sisters of the Poor v. Burwell*, Supplemental Gov't Brief, Nos. 13-1540, 14-6026, 14-6028 (10th Cir. July 22, 2014) at 11.

to the Government knowing that the insurer or TPA would then be directed to initiate contraceptive coverage. The Government calls this an "additional notification option."[12]

This augmented accommodation is the latest offering by the Government to convince objectors and the courts that it is satisfying its obligations under the least restrictive means test.

V. The "Accommodation" for For-Profit Entities

The augmented accommodation has also been made available to closely-held for-profit entities that object to the mandate on religious grounds. 79 Fed. Reg. 51118, 51121 (Aug. 27, 2014). This accommodation was offered in the wake of the Supreme Court holding that the mandate did not pass the least restrictive means test. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780-83 (2014). The Government had argued for two years that the mandate as originally applied to for-profit entities was the least restrictive means of furthering governmental interests. *See, e.g.*, *Sharpe Holdings v. U.S. Dept. of Health & Human Services*, Gov't brief, Doc. 14 at 24-25 (E.D. Mo. Dec. 28, 2012); *Burwell v. Hobby Lobby*

[12] Women's Preventive Services Coverage and Non-Profit Religious Organizations, https://www.cms.gov/cciio/resources/fact-sheets-and-faqs/womens-preven-02012013.html (last visited Jan. 6, 2015).

Stores, Inc., Govt. Cert. Pet. at 17 (U.S. Sept. 2013); *Burwell v. Hobby Lobby Stores, Inc.*, 13-354, Govt. Brief at 57-58 (U.S. Sept. 2013); *Conestoga Wood Specialties v. Burwell*, Petitioners' Brief, No. 13-356, at 55-57 (U.S. Feb. 2014).

CONCLUSION

The Government continues its retreat from the original means by which it sought to further its interests. After at least eight modifications, it now claims that the least restrictive means is the augmented accommodation. This results from the Government's clinging to language in *Hobby Lobby* that the accommodation was a *less* restrictive means than the mandate in effect at the time against for-profit businesses. But "less" is not "least." Indeed, the Court found that the "most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014).

This "most straightforward way" could easily be implemented by using the "established framework" (*Id.* at 2786 (Kennedy, J., concurring)) of ACA health insurance exchanges. This would not impose a "whole new program" on the Government. *Id.* The Government has assured the Nation's young adults that using the

exchanges "can be easy and fast" and "[doesn't] take much time at all."[13]

The Government has eschewed this option,[14] without any explanation, establishing instead a stubborn and persistent record of avoiding the least restrictive means and instead employing the *most* restrictive means it can get away with.

The decisions of the courts below in favor of the Government should be reversed.

Respectfully submitted.

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[13] Healthcare.gov, "Why bother with health insurance?" https://www.healthcare.gov/young-adults/ready-to-apply/ (last visited Jan. 6, 2015).

[14] Other options that would not require the Government to go outside an "established framework" or start a "whole new program" (134 S. Ct. at 2786 (Kennedy, J., concurring)) include, for instance, expansion of Title X, Medicaid or tax incentives.

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