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

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

BRIEF FOR FOREIGN AND INTERNATIONAL LAW EXPERTS LAWRENCE O. GOSTIN, ET AL., AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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ROMAN CATHOLIC ARCHBISHOP
OF WASHINGTON, et al.,

Petitioners,

v.

SYLVIA BURWELL, et al.

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EAST TEXAS BAPTIST UNIVERSITY, et al.,

Petitioners,

v.

SYLVIA BURWELL, et al.

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v.

SYLVIA BURWELL, et al.

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BRIEF FOR FOREIGN AND INTERNATIONAL LAW EXPERTS LAWRENCE O. GOSTIN, ET AL. AS *AMICI CURIAE* SUPPORTING RESPONDENTS IN NOS. 14-1418, 14-1453, 14-1505, 15-105, 15-119, 15-191, and 15-35

Professors Lawrence O. Gostin, Bernard M. Dickens, Erika R. George, Johanna E. Bond, Fionnuala Ní Aoláin, and Noah Novogrodsky respectfully submit this brief as *amici curiae* in support of respondents in Nos. 14-1418, 14-1453, 14-1505, 15-105, 15-119, 15-191, and 15-35.

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are leading experts in global health law and international and comparative law. Each has published and lectured widely in the field. Each has extensive knowledge of global judicial and legislative developments regarding women's access to reproductive healthcare.[2]

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[1] All parties consented in writing to the filing of *amicus curiae* briefs in support of either party. No party or party's counsel authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Institutional affiliations are listed solely for identification.

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Noah Novogrodsky is a professor of law and the co-director of the Center for International Human Rights Law & Advocacy at the University of Wyoming College of Law. He is also a 2015-16 Visiting Scholar at the Human Rights Center of the University of California Berkeley School of Law and the author of several foreign and comparative law *amicus* briefs before the Supreme Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

These consolidated cases present the question of whether a religiously-affiliated organization, which has already been granted an accommodation from a general healthcare-provision scheme, is entitled to a further exemption that would infringe the rights and well-being of others – in this case, women seeking to access lawful reproductive healthcare.

In *Burwell v. Hobby Lobby Stores, Inc.*, the Court embraced the "accommodation" policy (permitting objecting employers to opt out of providing insurance coverage for contraception, while ensuring that the insurer or third-party administrator would provide

that coverage directly to affected women) as a means of reconciling the competing claims of religious liberty and the government's interest in ensuring public health and gender equality. 134 S. Ct. 2751 (2014). In so doing, the Court emphasized that the accommodation assuaged religious-liberty concerns while simultaneously ensuring women's access to contraception: The "accommodation" would address Hobby Lobby's religious-liberty concerns, and at the same time, "[t]he effect of the HHS-created accommodation on the women employed by Hobby Lobby . . . would be precisely zero." *Id.* at 2760.

The petitioners in the consolidated cases are eligible for the accommodation but object to it precisely because it still guarantees employees seamless access to contraception, albeit through the insurance provider or third-party administrator, and not the employer. Instead, the petitioners seek to veto their employees' rights to contraceptive-insurance coverage, regardless of the fact that an entirely separate entity is providing it. Their sweeping claim – that the Religious Freedom Restoration Act entitles a religiously affiliated non-profit organization to a blanket exemption that infringes others' access to reproductive healthcare – would effectively impose the petitioners' religious beliefs – and the burden of their religious exercise – on their employees. In light of the novelty of this claim, as well as its potential dangers, the Court ought to look to the experience of other nations that have similarly sought to balance claims of conscientious objection with women's ability to access reproductive healthcare.

The Court has a long history of looking to foreign law and decisions of regional and global human-rights bodies in cases like these, which involve competing claims of liberty, dignity, and equality. This Court has found foreign law and global precedents particularly persuasive where, as here, the United States risks becoming an international outlier.

Although many nations permit conscientious objection in the field of healthcare, there is a broad consensus among democratic nations and at the international level: Ensuring contraceptive access is a compelling government interest, and religious exemptions should be limited to ensure that they do not infringe the rights of others, including women seeking to access reproductive healthcare. In light of this consensus, foreign and international authorities require that healthcare objectors take steps to ensure that their conscientious-objection claims do not disadvantage others, such as providing patients advance notice of any objection, referring those seeking care to a non-objecting provider, and even providing the objected-to service in exigent circumstances when alternative providers are not available.

The Court should not thrust the United States out of the mainstream in a matter so important to women's health and equality, and should thus reject the petitioners' claims. Doing so would accord not only with international practice but also with the Court's religious-freedom jurisprudence, including its recent decision in *Burwell v. Hobby Lobby Stores, Inc*.

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ARGUMENT

I. BECAUSE FUNDAMENTAL QUESTIONS OF LIBERTY, DIGNITY, AND EQUALITY ARE AT STAKE, FOREIGN LAW AND GLOBAL LEGAL DEVELOPMENTS SHOULD INFORM THE COURT'S ANALYSIS

The right being asserted in these consolidated cases – a religiously-affiliated organization's claim of an administrative exemption at the expense of a woman's right to access reproductive healthcare – has not been recognized by foreign legal authorities, even in countries that permit conscientious objections to the provision of reproductive healthcare. Given the importance of the rights and interests at stake in this case, and the novelty of the petitioners' argument, the Court should consider how countries throughout the world have balanced these rights.

A. The Court Routinely Consults Foreign Law and Global Precedents When Deciding Cases Involving Questions of Liberty, Dignity, and Equality

The Court has acknowledged that foreign law and global precedents can inform its analysis of previously unanswered questions, especially when deciding cases that frame challenging and novel questions of liberty, dignity, and equality. As the Court has noted, "the express affirmation of certain fundamental rights by other nations and peoples . . . underscores the centrality of those same rights within

our own heritage of freedom." *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (Kennedy, J.). *See also Washington v. Glucksberg*, 521 U.S. 702, 710 n.8, 718 n.16 (1997) (Rehnquist, C.J.) (looking to the legal status of assisted suicide in other "western democrac[ies]" as a means of elucidating "our Nation's history, legal traditions, and practices"). Indeed, "this Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances." *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting). *See also United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) ("These countries are our 'constitutional offspring' and how they have dealt with problems analogous to ours can be very useful to us when we face different constitutional issues. Wise parents do not hesitate to learn from their children.").[3]

The Court has found foreign law and international precedents to be especially useful when confronting novel cases requiring it to balance liberty, equality, and dignity. Accordingly, members of the Court have invoked foreign law and global precedents as helpful guidance when considering cases involving

[3] *See also Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (looking to the jurisprudence of "Anglo-American" nations).

myriad issues, including access to contraception,[4] the legal status of same-sex intimacy,[5] the death penalty,[6] and affirmative action.[7]

B. The Court has Found Foreign Law and Global Precedents to be Particularly Persuasive Where the United States Risks Being an Outlier Among Democratic Nations

The Court has often found foreign law and global precedents persuasive in cases where – as here – the United States risks becoming a global outlier among democratic nations.[8] Thus in *Lawrence v. Texas*, the Court emphasized that the state law at issue was at variance with a global consensus among democratic nations. *See* 539 U.S. 558, 573 (2003) (noting that similar laws banning same-sex intimacy "were invalid

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[4] *See Poe v. Ullman*, 367 U.S. 497, 545, 554-55 (1961) (Harlan, J., dissenting) (questioning an internationally unprecedented contraceptive-use ban).

[5] *See Lawrence v. Texas*, 539 U.S. 558, 572-73, 576-77 (2003) (looking to the European Court of Human Rights to inform the Court's decision to strike down bans on same-sex intimacy that demeaned individuals' dignity).

[6] *See Roper v. Simmons*, 543 U.S. 551, 578 (2005) (examining foreign law in the context of the juvenile death penalty).

[7] *See Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (examining the "international understanding of . . . affirmative action" by referring to two international human-rights treaties, one of which was ratified by the United States).

[8] *See* Section III, *infra*.

under the European Convention on Human Rights," which the Court explained is "[a]uthoritative in [the 45] countries that are members of the Council of Europe"). *See also Enmund v. Florida*, 458 U.S. 782, 796-97 n.22 (1982) (noting that the laws of England, India, Canada, a "number of other Commonwealth countries," and continental Europe had abolished the felony-murder doctrine); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (surveying the laws of sixty nations and noting that the United States was one of only three outliers that imposed the death penalty for rape); *see generally* Justice Stephen Breyer, The Court and the World (2015).

II. INTERNATIONAL AUTHORITIES AND OTHER DEMOCRATIC NATIONS HAVE DETERMINED THAT ENSURING ACCESS TO FAMILY PLANNING, INCLUDING CONTRACEPTION, CONSTITUTES A COMPELLING GOVERNMENT INTEREST

This Court has previously recognized the link between women's equality and access to family planning: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992) (plurality opinion). Likewise, in *Burwell v. Hobby Lobby Stores, Inc.*, the Court aptly assumed that the government had a compelling interest in ensuring contraceptive access. 134 S. Ct.

at 2780. This assumption is strongly supported by international precedent[9] and foreign law.

A. International Authorities Have Determined that Ensuring Access to Contraception is a Compelling Government Interest

International authorities have long noted the critical importance of access to contraception.[10] The United Nations Human Rights Committee, which oversees implementation of the International Covenant

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[9] The World Health Organization, the directing and coordinating authority for health within the United Nations, has echoed the Court's plurality opinion in *Casey*, noting that women's ability to control their fertility represents "a profound shift in the lives of women," and "an opportunity for enhanced participation in public life." *Family Planning: A Health and Development Issue, a Key Intervention for the Survival of Women and Children*, World Health Organization, 1-2 (2012), *available at* http://apps.-who.int/iris/bitstream/10665/75165/1/WHO_RHR_HRP_12.23_eng.pdf.

[10] The recent Zika outbreak has highlighted the importance of universal access to reproductive health services. On February 7, 2016, the United Nations High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, urged governments to increase access to reproductive-health services, including contraception, in light of the Zika outbreak. Lauretta Brown, *U.N. Human Rights Chief Urges Expanded Access to Contraception, Abortion in Light of Zika Virus*, CNS News, Feb. 7, 2016, *available at* http://www.cnsnews.com/news/article/lauretta-brown/un-rights-chief-urges-latin-america-expand-access-contraception-abortion.

on Civil and Political Rights (ICCPR)[11] – a human-rights convention the United States has ratified[12] – has recognized that a woman's ability to control her reproductive decision-making through the use of contraception is deeply rooted in fundamental rights, including the rights to equality and nondiscrimination.[13] As a ratified treaty, the ICCPR constitutes an

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[11] G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Mar. 23, 1976), *available at* http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf.

[12] The United States ratified the International Covenant on Civil and Political Rights in 1992. United States Department of State, Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2013, 399 (2013), *available at* http://www.state.gov/documents/organization/218912.pdf.

[13] Human Rights Committee, *Concluding Observations of the Human Rights Committee: Peru*, ¶ 14, U.N. Doc. CCPR/C/PER/CO/5 (Apr. 29, 2013), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/PER/CO/5&Lang=En (expressing concern about reproductive-rights violations, including the prohibition on the distribution of no-cost emergency contraception, as a violation of, among others, the right to equality); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Poland*, ¶ 9, U.N. Doc. CCPR/CO/82/POL (Dec. 2, 2004), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/450/09/PDF/G0445009.pdf?OpenElement (expressing concern about "[t]he high cost of contraception, the reduction in the number of refundable oral contraceptives, [and] the lack of free family planning services . . . "); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Albania*, ¶ 14, U.N. Doc. CCPR/CO/82/ALB (Dec. 2, 2004), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FCO%2F82%2FALB&Lang=en; Human Rights Committee, *Concluding Observations of the Human Rights Committee:*

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international commitment[14] that the United States is internationally obligated to implement in good faith under the international-law doctrine of *pacta sunt servanda*.[15]

The Human Rights Committee has also recommended the repeal of laws that restrict access to contraceptive access.[16] It has recognized that cost is a

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Mali, ¶ 14, U.N. Doc. CCPR/CO/77/ML (Apr. 16, 2003), *available at* http://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/413/09/pdf/G0341309.pdf?OpenElement; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Hungary*, ¶ 11, U.N. Doc. CCPR/CO/74/HUN (Apr. 19, 2002), *available at* http://documents-dds-ny.un.org/doc/UNDOC/GEN/G02/445/92/img/G0244592.pdf?OpenElement.

[14] The ICCPR "bind[s] the United States as a matter of international law" even though, as a non-self-executing treaty, it does "not itself create obligations enforceable in the federal courts." *Sosa v. Alvarez-Machain*, 542 U.S. 735 (2004); *see also Medellin v. Texas*, 552 U.S. 491, 504 (2008) (non-self-executing treaties constitute "international law commitments" even if they do not "function as binding federal law").

[15] Burns H. Weston et al., *International Law and World Order* 142 (3d ed. 1997) (noting that the principle of *pacta sunt servanda* ("agreements must be kept") is one of the foremost *jus cogens* principles).

[16] Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the Philippines*, ¶ 13, U.N. Doc. CCPR/C/PHL/CO/4 (Nov. 13, 2012), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/PHL/CO/4&Lang=En ("The State party should . . . ensure that reproductive health services are accessible for all women and adolescents. In this regard, the State party should lift [an] Executive Order . . . in so far as it prohibits the disbursement of funds for the purchase of materials and medicines for artificial birth control.").

key barrier to contraceptive access and has urged governments to make contraception widely available and affordable.[17] In fulfilling its reporting obligations under the ICCPR, the United States has cited the Affordable Care Act as evidence of its compliance with its treaty obligation to ensure equal access to healthcare to all segments of society, including women and racial and ethnic minorities.[18]

The United States has also pointed to the Affordable Care Act and other health laws as evidence of its compliance with the Convention on the Elimination of All Forms of Racial Discrimination (CERD),[19] which

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[17] Human Rights Committee, *Concluding Observations of the Human Rights Committee: Republic of Moldova*, ¶ 17, U.N. Doc. CCPR/C/MDA/CO/2 (Nov. 4, 2009), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/MDA/CO/2&Lang=En; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Poland*, ¶ 9, U.N. Doc. CCPR/CO/82/POL (Dec. 2, 2004); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Argentina*, ¶ 14, U.N. Doc. CCPR/CO/70/ARG (Nov. 15, 2000), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=CCPR/CO/70/ARG; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Poland*, ¶ 12, U.N. Doc. CCPR/C/POL/CO/6 (Oct. 27, 2010), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=CCPR/C/POL/CO/6.

[18] Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Fourth Periodic Report: United States of America*, ¶ 90, U.N. Doc. CCPR/C/USA/4 (May 22, 2012), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=CCPR/C/USA/4.

[19] International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195.

the United States ratified in 1994.[20] In October 2013, the United States cited the Affordable Care Act in its report to the U.N. Committee on the Elimination of Racial Discrimination – the treaty-monitoring body that oversees implementation of CERD – as one way that the country is complying with the Committee's 2008 recommendation that it take steps to "[f]acilitat[e] access to adequate contraceptive and family planning methods."[21]

Similarly, in the 2010 Universal Periodic Review of the United States by the United Nations Human Rights Council, the United States cited the Affordable Care Act as evidence of its compliance with international human rights duties to end discrimination against women in healthcare.[22] In its 2015 Universal Periodic Review, the United States reiterated its

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[20] Treaties in Force, *supra* note 12, at 464.

[21] Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination on the United States of America*, ¶ 33, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=CERD/C/USA/CO/6.

[22] Human Rights Council, *Working Group on the Universal Periodic Review: National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1*, ¶ 37, U.N. Doc. A/HRC/WG.6/9/USA/1 (Aug. 23, 2010), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/WG.6/9/USA/1 ("Our recent health care reform bill also lowers costs and offers greater choices for women, and ends insurance company discrimination against them.").

"commit[ment] to promoting women's health and eliminating barriers to healthcare services."[23]

As further evidence of a growing consensus favoring access to contraception, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), which the United States has signed but not ratified, directs States to "eliminate discrimination against women in the field of health care in order to ensure . . . access to health care services, including those related to family planning." G.A. Res. 34/180, art. 12(1), CEDAW (Dec. 18, 1979).[24]

International consensus statements similarly highlight that ensuring access to contraception is a compelling governmental interest.[25] In light of the

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[23] Human Rights Council, *Draft Report of the Working Group on the Universal Periodic Review: United States of America*, ¶ 168, U.N. Doc. A/HRC/WG.6/22/L.10 (May 21, 2015), *available at* http://www.ushrnetwork.org/sites/ushrnetwork.org/files/draft_report_of_the_upr_working_group_a_hrc_wg.6_22_1.10_may_21_15.pdf.

[24] CEDAW also requires that women have the same right to "decide freely and responsibly on the number and spacing of their children and to have access to the information, education, and means to enable them to exercise these rights." G.A. Res. 34/180, art. 16(1)(e), CEDAW (Dec. 18, 1979), *available at* http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm.

[25] Such international consensus statements constitute "soft law." While "soft law" does not represent a formally binding commitment, it does represent "a choice by the [state] parties to enter into a weaker form of commitment." Andrew T. Guzman, *The Design of International Agreements*, 16 Eur. J. Int'l L. 579, 611 (2005), http://www.ejil.org/pdfs/16/4/310.pdf; *see also* Kal Raustiala, *Form and Substance in International Agreements*, 99

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critical role of family planning, including contraception, in ensuring women's health and equality, it is not surprising that the 2030 Agenda for Sustainable Development – the blueprint for global development over the next fifteen years that was adopted by the United Nations General Assembly in late 2015 – emphasizes the importance of access to family planning. Goal 3.7, for example, under the rubric of ensuring healthy lives, commits nations to "ensure universal access to sexual and reproductive healthcare services, including for family planning, information and education, and the integration of reproductive health into national strategies and programmes."[26]

Access to reproductive-health services is also highlighted under the rubric of achieving gender equality and empowering women and girls: Nations commit to ensuring "universal access to sexual and reproductive health and reproductive rights as agreed in accordance with the Programme of Action of the International Conference on Population and Development and the Beijing Platform for action and the

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Am. J. Int'l L. 581, 582-83 (2005), *available at* http://www2.law.ucla.edu/raustiala/publications/Form%20and%20Substance%20in%20International%20Agreements.pdf (framing "soft law" as a "pledge" distinct from a "hard law" "contract").

[26] *Transforming Our World: The 2030 Agenda for Sustainable Development*, U.N. Doc. A/RES/70/1 (2015), *available at* https://docs.google.com/gview?url=http://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf&embedded=true.

outcome documents of their review conferences."[27] The Programme of Action adopted at the International Conference on Population and Development in 1994 recognized that guaranteeing women's reproductive health and rights is critical for achieving gender equality and ensuring women's full participation in all aspects of society, and it called on states to effectuate these commitments by investing in family planning.[28] To emphasize the point, the Programme of Action urged states to "make available a full range of

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[27] *Id.* at Goal 5.6. The 1994 International Conference on Population and Development (ICPD) Programme of Action (the Cairo consensus), adopted by the United States and 178 other countries, explicitly affirmed that reproductive rights are human rights. The ICPD found that reproductive rights are grounded in fundamental freedoms that are already recognized in national laws and international human rights instruments, such as rights to life, non-discrimination, privacy, and the right to be free from inhumane and degrading treatment. International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, *Programme of Action of the International Conference on Population and Development*, ¶ 7.3, U.N. Doc. A/CONF.171/13/Rev.1 (1995), *available at* https://www.unfpa.org/sites/default/files/event-pdf/icpd_eng_2.pdf. Subsequent international consensus documents are in accord. For example, the Beijing Platform for Action, which elaborated on the commitments made in the ICPD Programme of Action, specifically acknowledged the role that sexual and reproductive health plays in women's equality. Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, *Beijing Declaration and Platform for Action*, ¶ 92, U.N. Doc. A/CONF.177/20/Rev.1 (1996), *available at* http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf.

[28] International Conference on Population and Development, *supra* note 27, at ¶¶ 7.2, 7.5(a), 7.12, 7.14(c).

safe and effective [contraceptive] methods."[29] The United States not only affirmed the Cairo consensus, but was also a leading voice at the conference[30] and has championed the framework ever since.[31]

B. Other Democratic Nations Have Determined that Ensuring Access to Contraception is a Compelling Government Interest

Other democratic nations have demonstrated that they consider ensuring affordable access to family planning, including contraception, to be a compelling state interest. The government of the United Kingdom, for example, has emphasized its commitment to "ensuring that people have access to

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[29] *Id.* at 7.12.

[30] *See, e.g.*, Albert Gore, U.S. Vice President, Statement at the International Conference on Population and Development (Sept. 5, 1994) ("[H]ere at Cairo, there is a new and very widely shared consensus . . . . The education and empowerment of women, high levels of literacy, the availability of contraception and quality health care: these factors are all crucial."), *quoted in* International Conference on Population and Development, *supra* note 27, at 176.

[31] *See, e.g.*, Hillary R. Clinton, U.S. Secretary of State, Remarks on the 15th Anniversary of the International Conference on Population and Development (Jan. 8, 2010), *available at* http://www.state.gov/secretary/20092013clinton/rm/2010/01/135001.htm ("[W]e are rededicating ourselves to the global efforts to improve reproductive health for women and girls. Under the leadership of this Administration, we are committed to meeting the Cairo goals.").

the full range of contraception, can obtain their chosen method quickly and easily and can take control to plan the number of and spacing between their children."[32] Similarly, Portugal's constitution explicitly guarantees the right to family planning and states that the government must make it possible for individuals to realize this right.[33] The Belgian Constitutional Court has also affirmed the importance of reproductive healthcare, holding that contraceptives must be made accessible to the public at an affordable price.[34] The Danish government considers family-planning services to be "an integral part of the national health service."[35]

Reflecting the fact that ensuring access to contraception is such an important governmental priority for other democratic nations, countries throughout the world have enacted programs to ensure its affordability, just as the Department of Health and

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[32] *A Framework for Sexual Health Improvement in England*, Department of Health 4 (Mar. 2013), *available at* https://www.gov.uk/government/publications/a-framework-for-sexual-health-improvement-in-england.

[33] *See* Constitution of the Portuguese Republic, Apr. 4, 1976, art. 67(2)(d).

[34] *Merck, Sharp and Dohme BV v. Belgium*, Constitutional Court, Case 150/2006, Oct. 11, 2006 (Belg.).

[35] *Abortion Policy, Denmark*, United Nations, Department of Economic and Social Affairs, 125, *available at* http://www.un.org/esa/population/publications/abortion/doc/denmar1.doc (last visited Jan. 24, 2016).

Human Services has done.[36] Many states in Europe (including the United Kingdom, France, Italy, Poland, and Portugal) as well as in Asia, Africa, and South America fully subsidize oral contraceptives.[37] Nearly all other European countries, as well as Canada and Australia, partially subsidize oral contraceptives.[38]

III. FOREIGN AND INTERNATIONAL AUTHORITIES REQUIRE THAT CONSCIENTIOUS OBJECTIONS BE LIMITED TO ENSURE THAT THEY DO NOT INFRINGE OTHERS' RIGHTS, INCLUDING THE RIGHTS OF WOMEN SEEKING TO ACCESS REPRODUCTIVE HEALTHCARE

The United States is not alone in recognizing conscientious objections to otherwise-applicable policies. Indeed, many other nations permit limited conscientious objections, including in the context of

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[36] The salient point is that other governments have acted to ensure affordable access to contraception. The fact that many of these governments have often used direct subsidization is simply a reflection of the fact that these governments tend to have government-sponsored healthcare coverage, in contrast to the United States, which has an employer-based health-coverage system.

[37] Chris Kirk et al., *Reproductive Rights Around the World*, Slate (May 30, 2013), *available at* http://www.slate.com/articles/news_and_politics/map_of_the_week/2013/05/abortion_and_birth_control_a_global_map.html (drawing on data from Harvard University's Center for Population and Development Studies).

[38] *Id.*

reproductive healthcare.[39] In other nations, disputes around conscientious objection generally arise in the context of pregnancy termination rather than contraception, because very few nations have enacted statutes extending conscientious objections to contraceptive care. However, the underlying principle – that conscientious objections are permitted only to the extent they do not infringe others' access to healthcare – is equally applicable regardless of the particular reproductive-health service in question.

Where a right to conscientious objection has been recognized in the context of reproductive healthcare, foreign and international authorities consistently ensure that women's access to reproductive health services is preserved without interruption, notwithstanding the exercise of an objection.[40] By rejecting

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[39] One significant difference, however, is that virtually all other countries that permit conscientious objections to reproductive healthcare limit the invocation of that right to healthcare providers directly involved in providing the healthcare service.

[40] Indeed, in December 2015, a United Nations delegation focusing on discrimination against women concluded its mission to the United States, and expressed concern that "an exemption on grounds of freedom of religion to opt out of contraceptive insurance for employees . . . will deprive some women of the possibility of accessing contraceptives. The [delegation] would like to recall that, under international human rights law, states must take all appropriate measures to ensure women's equal right to decide freely and responsibly on the number and spacing of their children which includes women's right to access contraceptives." Press Release, United Nations Working Group on the Issue of Discrimination Against Women in Law and Practice

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the "accommodation" policy that provides "seamless" contraceptive access to their employees, the petitioners in these consolidated cases seek to satisfy their religious concerns at the expense of their employees' access to health care.

A. Foreign and International Authorities that Recognize Conscientious Objections Ensure that They Do Not Infringe Others' Access to Healthcare – Including Reproductive Healthcare

Many – though not all[41] – nations' healthcare regimes offer protections to individuals for whom directly providing a particular health service would violate a deeply held religious belief. But these systems also recognize that a right of conscientious objection must not interfere with another person's access to reproductive-healthcare services.[42]

(Dec. 11, 2015), *available at* http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16872&LangID=E.

[41] Legal recognition of conscientious objection for healthcare providers is far from universal. For example, in Bulgaria, the Czech Republic, Finland, Iceland, and Sweden, concern for patient well-being has led to policies that prohibit healthcare providers from conscientiously objecting to providing abortion services. Heino et al., *Conscientious Objection and Induced Abortion in Europe*, 18 Euro. J. Contracept. Reprod. Health Care 231-33 (2013).

[42] *See* Christina Zampas & Ximena Andion-Ibanez, *Conscientious Objection to Sexual and Reproductive Health Services: International Human Rights Standards and European Law and*

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To that end, in many countries, objecting healthcare providers – notwithstanding their religious convictions – are required to take steps that will guarantee women's access to legal reproductive-health services. Those required steps, which are reflected in domestic and international court decisions, statutes, and medical regulatory and ethics rules, often include notifying the hospital of the objection, informing the patient of the objection, referring the patient to, and consulting with, a non-objecting healthcare provider.[43] The principle of preventing harm to third parties is so fundamental that many healthcare systems require conscientious objectors to provide the objected-to services in emergencies that threaten the patient's life or health.[44]

Practice, 19 Eur. J. of Health Law 231, 246 (2012). The U.N. Committee on the Elimination of Discrimination Against Women, which oversees implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (ratified by 189 nations), has similarly noted that under the Convention's health-equality provision, "if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers." *See also* Report of the Committee on the Elimination of Discrimination against Women, 20th & 21st Sess., Jan. 19-Feb. 5, June 7-25, 1999, ch. I, ¶ 11, U.N. Doc. A/54/38/Rev.1 (1999).

[43] *See* Christina Zampas & Ximena Andion-Ibanez, *supra* note 42, at 252 (the duty to refer "is reflected in most laws and ethical codes across Europe and in international human rights standards," and "[a]lmost all countries in Europe require this").

[44] *See id.* at 254-55 (noting that most countries require healthcare providers to provide care in emergency situations,

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i. International and Foreign Courts Ensure that Conscientious Objections Do Not Infringe Others' Access to Healthcare

To the extent that international courts have had occasion to address conscientious objection in the context of reproductive healthcare, they have repeatedly held that religious objections may not interfere with women's access to healthcare. The European Court of Human Rights has specifically addressed conscientious objection to the provision of contraception, and unequivocally guaranteed women's access to birth control. *Amici* have identified no precedent from any international courts that contradicts this decision.

In *Pichon and Sajous v. France*, 2001-X Eur. Ct. H.R. 381, the European Court of Human Rights ruled that pharmacists did not have a right to conscientiously object to providing contraceptive pills to customers with valid prescriptions.[45] The pharmacists invoked Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides "the right to freedom of thought, conscience and religion." *Id.* at 387. However, the court reasoned that Article 9 "does not always guarantee the right to

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and that "eleven European countries expressly prohibit the invocation of conscientious objection in the case of emergency or risk of death as well as danger to [a] patient's health").

[45] *Available at* http://www.echr.coe.int/Documents/Reports_Recueil_2001-X.pdf.

behave in public in a matter governed" by one's religious beliefs. *Id*. at 388. The court concluded that conscientious objection by pharmacists could not disrupt the regulated sale of contraceptives under French law. "[A]s long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy," the pharmacists "cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products. . . ." *Id*.

International court decisions addressing conscientious objection in the context of pregnancy termination have likewise ensured women's access to health services. The European Court of Human Rights has held that if a state permits conscientious objection by health professionals, it has a corresponding obligation to protect the rights of patients:

> For the Court, States are obliged to organise their health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.

R.R. v. Poland, 2001-III Eur. Ct. H.R. 209.[46] The court ruled that a woman's right to respect for her private

[46] *Available at* http://www.echr.coe.int/Documents/Reports_Recueil_2011-III.pdf.

life – which encompasses "the right to personal autonomy and personal development" – was violated because Polish law did not provide an effective mechanism for her to obtain diagnostic tests to determine fetal abnormality following her doctors' refusal to conduct such tests on grounds of conscience. *Id*. at 245-46, 253-54; *see also P. & S. v. Poland*, App. No. 57375/08 (Eur. Ct. H.R. 2012), *available at* http://hudoc.echr.coe.int/eng?i=001-114098 (reaffirming that states must ensure that conscientious objections do not interfere with patients' rights to obtain services).

Colombia, which is a predominantly Catholic country, also took steps to protect women's access to health services in the face of conscientious objections. The Constitutional Court of Colombia held that "since the conscientious objection is not an absolute right, its exercise is limited by the Constitution itself; that is, it cannot violate the fundamental rights of women." Corte Constitucional [C.C.] [Constitutional Court], noviembre 27, 2009, Sentencia T-209/08, ¶ 4.6 (Colom.). In order to protect women's rights, the court held that "if a doctor alleges a conscientious objection, he must immediately send the woman . . . to another doctor" who can provide the treatment. *Id*. at ¶ 4.3; *see id*. at Conclusion ¶ 11. The court reiterated that "although health professionals are entitled to express their conscientious objection, they cannot abuse this right . . . by not immediately referring the pregnant woman to another physician that is willing to perform the procedure." *Id*. at ¶ 5.13. In another decision issued the same year, the Colombian Constitutional

Court similarly noted that "[t]he right to conscientious objection may . . . unleash consequences for third persons. It is therefore impossible to characterize conscientious objection as a right that affects solely those who exercise it . . . . The question then becomes what are the limits of conscientious objection . . . given the negative impact it can have on the rights of third persons."[47]

Citing the decisions from the European Court of Human Rights and the Colombian Constitutional Court discussed *supra*, the Inter-American Commission on Human Rights determined that "States must guarantee that women are not prevented from accessing information and reproductive health services [including contraception], and that in situations involving conscientious objectors in the health arena, the States should establish referral procedures, as well as appropriate sanctions for failure to comply with their obligation." *Access to Information on Reproductive Health from a Human Rights Perspective*, IACHR, ¶¶ 94-95, 99 (2011).[48]

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[47] Corte Constitucional [C.C.] [Constitutional Court], mayo 28, 2009, Sentencia T-388/09, ¶ 5.1 (Colom.) (unofficial translation), *available at* http://www.law.georgetown.edu/oneillinstitute/research/documents/WLWT-388-09English-FINAL.pdf. The Court also limited the categories of healthcare providers who could interpose objections to "personnel that [sic] are directly involved in performing the medical procedure" and not administrative or ancillary medical personnel. *See id.* at ¶ 5.1.

[48] *Available at* http://www.oas.org/en/iachr/women/docs/pdf/womenaccessinformationreproductivehealth.pdf.

Recently, the Supreme Court of the United Kingdom interpreted the conscientious-objection provision in the Abortion Act 1967 in *Greater Glasgow & Clyde Health Board v. Doogan* [2014] UKSC 68 (U.K.). In that case, the Supreme Court rejected midwives' invocation of a conscientious objection to providing a "detailed handover" to the next shift and communicating with other medical professionals about the termination – even though such acts "may be said in some way to be facilitating the carrying out of the treatment involved." *Id*. at ¶¶ 38-39. Instead, the court limited its recognition of conscientious-objection claims to situations where the midwives were required to "be[ ] present to support and assist if medical intervention is required." *Id.* at ¶ 39. The upshot – consistent with earlier precedent from the U.K. House of Lords, *Janaway v. Salford*, [1989] AC 537 (Eng.) (declining to extend conscientious objector status to a doctor's secretary who objected to typing a referral letter) – is that a requirement to ensure continuity of care does not give rise to a cognizable conscientious-objection claim.

ii. Other Nations' Laws Ensure that Conscientious Objections Do Not Infringe Others' Access to Healthcare

The laws of other nations also recognize that one person's exercise of conscientious objection may not infringe another person's access to healthcare. *See*, *e.g.*, Zakon o Liječništvu [Law on Medical Practice], Official Journal, No. 121/03, 117/08, art. 20 (Croat.)

(the provider must promptly inform the patient of the objection and refer the patient to another physician, and conscientious objection cannot be invoked if it will threaten the patient's life or health);[49] Code de Déontologie Médicale [Code of Medical Ethics], art. R4127-47 (Fr.) (the physician must inform the patient and ensure continuity of care, must provide information to a subsequent doctor, and cannot object to care in case of emergency);[50] Zakon za Zdravstvena Zaštita [Health Care Law], Official Gazette, No. 10/2013, art. 155 (Maced.) (objecting healthcare professionals must inform their employers of the objection so that the employer can secure the services from another provider, and an objection cannot be invoked in medical emergencies); Ustawa o Wykonywaniu Zawodu Lekarza i Dentysty [Act on the Physician Profession] (2008 Dz.U.nr 136, poz. 857), (Dec. 5, 1996) (Pol.) (physicians must inform their supervisors in advance and in writing of their conscientious objections).[51]

In addition to statutes that address conscientious objections in healthcare generally, a growing number of countries have also enacted laws and regulations

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[49] *Available at* http://www.zakon.hr/z/405/Zakon-o-lije%C4%8Dni%C5%A1tvu.

[50] *Available at* http://www.legifrance.gouv.fr/affichCode.do?idSectionTA=LEGISCTA000006196409&cidTexte=LEGITEXT000006072665&dateTexte=20160121.

[51] *Available at* http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970280152.

governing conscientious objection in the more specific context of reproductive health services.[52] For example, Argentine law permits conscientious objection to both contraception and pregnancy termination, but requires that both healthcare professionals and institutional healthcare providers take steps to protect women's access to these services. Reglamentacion de la Ley 25673 Sobre Salud Sexual y Procreacion Responsible [Regulation of Law No. 25673 on Sexual Health and Responsible Reproduction], Decree No. 1282/2003, May 23, 2003, 157 B.O. 1 (Arg.) (conscientious objectors must ensure that women can access contraception, including by notifying local health authorities of their objection and referring patients to non-objecting healthcare centers);[53] Ministerio de Salud, Guía Técnicapara la Atención Integral de los Abortos No Punibles [Ministry of Health, Technical Guide for Comprehensive Care for Legal Abortions] (2010) (Arg.) (healthcare professionals who conscientiously object to providing termination services must declare their objection upon commencing employment at a facility so that replacements can be immediately found when necessary, and conscientious objection may not be invoked when a termination procedure is

[52] As noted *supra*, these laws generally relate to the termination of pregnancy, and very few other nations have extended statutory protection for conscientious-objection claims in the context of contraception.

[53] *Available at* http://www.infojus.gob.ar/1282-nacional-reglamentacion-ley-25673-sobre-salud-sexual-procreacion-responsable-dn20030001282-2003-05-23/123456789-0abc-282-1000-3002soterced.

urgent and no non-objecting professional is available).[54]

Similarly, France's Abortion and Contraception Law requires conscientious objectors to inform patients of the objection and refer them to other doctors. Code de la Santé Publique [Public Health Code], art. L2212-8 (Fr.).[55] Italian law permits conscientious objection to pregnancy termination, but provides that physicians must declare their objections in advance to their hospital's health director or to a local health official. Italian law also requires hospitals to ensure that the termination is performed. Moreover, "[c]onscientious objection may not be invoked by health personnel or allied health personnel if, under the particular circumstances, their personal intervention is essential in order to save the life of a woman in imminent danger." Legge 22 maggio 1978, n.194, G.U. May 22, 1978, n.140, art. 9 (It.).[56]

In the United Kingdom, the Abortion Act 1967, c. 87, § 4.2 (U.K.) permits conscientious objection, except when providing care "is necessary to save the

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[54] *Available at* http://www.msal.gob.ar/images/stories/bes/graficos/0000000667cnt-Guia-tecnica-web.pdf.

[55] *Available at* http://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=70629FEFC4BC6E52BD1F81C5BD6CFD21.tpdila21v_2?cidTexte=LEGITEXT000006072665&idArticle=LEGIARTI000021939947&dateTexte=20160113&categorieLien=id%20-%20LEGIARTI000021939948.

[56] *Available at* http://www.columbia.edu/itc/history/degrazia/courseworks/legge_194.pdf.

life or to prevent grave permanent injury to the physical or mental health of a pregnant woman."[57] The General Medical Council Guidelines explain that whenever the right to conscientious objection is invoked, objecting doctors must inform patients of their right to see another doctor and make sure they have enough information to exercise that right. *Good Medical Practice*, General Medical Council, ¶ 52 (2013) (U.K.).[58]

Similar statutes are in place in a number of other countries. *See, e.g.*, Wet afbreking zwangerschap [Termination of Pregnancy Act], Wet van 1 mei 1981, Stb. 1981, 356, art. 20 (Neth.) (physicians must immediately inform women of their objection and provide information to another doctor concerning the patient's condition);[59] Decree No. 21012-0632, Medical Ethics Code, art. 32 (Madag.) (if a doctor conscientiously objects to providing a patient with information on reproduction and contraception, the doctor must invite the patient to seek the opinion of other physicians);[60] Sexual and Reproductive Health and Abortion Law, art. 19 (B.O.E. 2010, 2) (Spain) (physicians

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[57] *Available at* http://www.legislation.gov.uk/ukpga/1967/87/section/4.

[58] *Available at* http://www.gmc-uk.org/static/documents/content/GMP_.pdf.

[59] *Available at* http://wetten.overheid.nl/BWBR0003396/Artikel20/geldigheidsdatum_08-02-2016/afdrukken/redirect_BWBR0003396%252FArtikel20.

[60] *Available at* http://fmcmada.info/AVRIL2012/codedeonto.pdf.

must register their objection in advance, and in writing).[61]

iii. Medical Ethical and Regulatory Bodies Ensure that Conscientious Objections Do Not Infringe Others' Access to Healthcare

Mirroring the American Medical Association's Code of Medical Ethics, which states that "[i]n general, physicians should refer a patient to another physician or institution to provide treatment the physician declines to offer . . . ,"[62] other national bodies that regulate the medical profession have consistently limited conscientious-objection rights to ensure healthcare beneficiaries' access to care.

For example, the Belgian Code of Physicians' Ethics provides that doctors must clearly inform patients of any objection to providing information about sexuality and contraception, offer the option of seeking a non-objecting colleague's advice, ensure continuity of treatment, and communicate all pertinent

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[61] *Available at* https://www.boe.es/buscar/doc.php?id=BOE-A-2010-3514.

[62] American Medical Association, Code of Medical Ethics, Opinion 10.06 – Physician Exercise of Conscience, June 2015, *available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion1006.page?. The physician is also required to offer "impartial guidance" to patients about how to inform themselves regarding access to desired services in situations where the physician does not refer a patient. *Id.*

information to the new physician. Code de Déontologie Médicale [Code of Physicians' Ethics], arts. 28, 85 (Belg.).[63] The Ethics Handbook of the Finnish Medical Association states that the right of conscientious objection must not jeopardize the patient's right to receive the treatment she seeks, whether contraception or abortion. Finnish Medical Association, Lääkärin etiikka [Ethics Handbook] 82 (2013) (Fin.).[64] Italy's Code of Medical Ethics requires objecting doctors to provide all information needed to allow patients to receive treatment, including information regarding reproduction and contraception. Federazzione Nazionale degli Ordini dei Medici Chirurghi e degli Odontoiatri, Codice di Deontologia Medica [Code of Medical Ethics], arts. 22, 42 (2014) (It.).[65] Norway's Ministry of Health has clarified that doctors cannot invoke conscientious objection to providing care or advice regarding contraception or abortion if the exercise of the objection will significantly disadvantage the patient. Helse- og omsorgsdepartementet [Ministry of Health and Care Services], Rundskriv [Circular] I-4/2011, Om reservasjon for leger i den kommunale helse- og omsorgstjenesten [About Reservation for Doctors in the Municipal Health and Care

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[63] Art. 28, *available at* http://ordomedic.be/fr/code/chapitre/relations-avec-le-patient; art. 85, *available at* http://ordomedic.be/fr/code/chapitre/probl%E8mes-concernant-la-reproduction.

[64] *Available at* https://www.laakariliitto.fi/site/assets/files/1273/laakarin_etiikka_2013.pdf .

[65] *Available at* http://www.unipd.it/node/21865.

Services] (2011) (Nor.).[66] Portugal's Ministry of Health requires healthcare institutions to ensure women's access to abortion services when the procedure is otherwise unobtainable because of the conscientious objections of healthcare professionals. Interrupção Voluntária Da Gravidez/Serviços Obtertricía [Voluntary Termination of Pregnancy and Obstetric Services], Portaria No. 189/98, de 21 marco 1998, art. 5 (Port.).[67] The Slovenian Medical Code provides that physicians who object to carrying out an abortion or sterilization must refer the patient to another doctor or inform the hospital of their refusal to ensure that the services are provided. Kodeks medicinske deontologije Slovenije [Code of Medical Ethics], art. 42 (1992) (Slovn.).[68] Uruguay's Medical Association provides that a doctor who objects to performing an abortion must refer the patient to another doctor. Código de Ética Médica [Code of Medical Ethics], Law No. 19286, Sept. 25, 2014, art. 40 (Uru.).[69]

In the United Kingdom, the British Medical Association guidelines state that doctors should have a right to object to medical procedures such as abortion

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[66] *Available at* https://www.regjeringen.no/no/dokumenter/i-42011-adgang-for-leger-i-den-kommunale/id661801/.

[67] *Available at* http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=228&tabela=leis.

[68] *Available at* http://www.zdravniskazbornica.si/zzs.asp?FolderId=386.

[69] *Available at* http://www.parlamento.gub.uy/leyes/AccesoTextoLey.asp?Ley=19286&Anchor.

only "where there is another doctor willing to take over the patient's care." British Medical Association, *Conscientious Objection Guidance for Doctors and Medical Students, Expressions of Doctors' Beliefs*.[70] Similarly, in its guidance for doctors working with children and young people, the United Kingdom's General Medical Council states that doctors who object to providing contraception or abortion services must ensure that "information about alternative services is readily available to all patients" and "must make sure that arrangements are made for another suitably qualified colleague to take over your role as quickly as possible." General Medical Council, 0-18 Years: Guidance for All Doctors, ¶ 72 (2007) (U.K.).[71]

International medical associations impose similar requirements, based on the principle that a patient's well-being must be ensured. The World Medical Association (WMA), a global organization representing physician groups from more than 100 countries,[72] including the American Medical Association, British Medical Association, and Canadian Medical Association, mandates that a "physician may not discontinue treatment of a patient . . . without giving the patient reasonable assistance and sufficient

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[70] *Available at* http://www.bma.org.uk/support-at work/ethics/expressions-of-doctors-beliefs.

[71] *Available at* http://www.gmc-uk.org/static/documents/content/0-18_years_-_English_1015.pdf.

[72] *See* World Medical Association, Members List, http://www.wma.net/en/60about/10members/21memberlist/index.html.

opportunity to make alternative arrangements for care." World Medical Association, Declaration on the Rights of the Patient (1981).[73]

The International Federation of Gynecology and Obstetrics (FIGO), which represents 125 national associations of gynecologists and obstetricians, recognizes that "physicians have an ethical obligation, at all times, to provide benefit and prevent harm for every patient for whom they care." FIGO, Resolution on "Conscientious Objection" (2006). FIGO's "Resolution on 'Conscientious Objection'" requires that objecting physicians "provide public notice" of the services they decline to perform, and refer their patients to another physician who will provide the service. *Id*. When referral is not possible and delay would jeopardize patient health, such as in the case of emergency, the objecting physician must provide the service notwithstanding the objection. *Id*. In addition, FIGO's Committee for the Study of Ethical Aspects of Human Reproduction and Women's Health has issued ethical guidelines on conscientious objection.[74] Those guidelines reaffirm that conscientious objection is

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[73] *Available at* http://www.wma.net/en/30publications/10policies/14/.

[74] FIGO, Ethical Guidelines on Conscientious Objection (2005), *reprinted in* FIGO Committee for the Study of Ethical Aspects of Human Reproduction and Women's Health, Ethical Issues in Obstetrics and Gynecology 27 (2015), *available at* http://www.figo.org/figo-committee-and-working-group-publications (follow "Ethical Issues in Obstetrics and Gynecology (2012)" hyperlink).

"secondary" to the duty of treating a patient and that patients "are entitled to be referred" to a non-objecting physician.[75] Moreover, they explicitly state that "[r]eferral for services does not constitute participation in any procedures agreed upon between patients and the practitioners to whom they are referred."[76]

In the same vein, the World Health Organization has stated that while healthcare professionals may interpose a conscientious objection, "that right does not entitle them to impede or deny access to lawful . . . services."[77] It has also emphasized the duty of objecting physicians to refer patients to another provider and provide care in an emergency situation.[78]

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[75] *Id.*

[76] *Id.*

[77] World Health Organization, Safe Abortion: Technical and Policy Guidance for Health Systems 69 (2012), *available at* http://extranet.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf?ua=1.

[78] *Id.*

B. The Limitations on Conscientious Objection Reflected in Foreign and International Authorities Comport with this Court's Religious-Freedom Jurisprudence, Including its Decision in *Burwell v. Hobby Lobby Stores, Inc.*

The limits imposed by foreign and international law on conscientious objection in healthcare are consistent with how this Court has balanced the interests at stake in evaluating religious freedom claims before and after the passage of the Religious Freedom Restoration Act (RFRA)[79] and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[80] As the Court has stressed, "[o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government." *Gillette v. United States*, 401 U.S. 437, 461 (1971). Rather, "[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good." *United States v. Lee*, 455 U.S. 252, 259 (1982). Otherwise, "the professed doctrines of religious belief [would become] superior to the law of the land, and in effect [ ] permit every citizen to become a law unto himself." *Reynolds v. United States*, 98 U.S. 145, 166-67 (1978).

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[79] 42 U.S.C. § 2000bb *et seq.*

[80] 42 U.S.C. § 2000cc *et seq.*

Thus in evaluating claims for religious-based exemptions to general laws, this Court has consistently considered whether the claimed exemption would burden others. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality opinion). When the Court has upheld an exemption, it has usually emphasized the narrowness of its ruling, noting that the exemption was only appropriate because the religious freedom asserted by plaintiffs did "not bring them into collision with rights asserted by any other individual." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630, 633 (1943); *see also Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972) ("This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (distinguishing petitioner's claims for unemployment benefits after being fired for refusing to work on her Sabbath day from cases rejecting free exercise challenges to government regulation of conduct that "posed some substantial threat" to others).

When such a collision of interests exists, the Court has generally refused to grant an exemption to the law. For instance, in *Lee*, the Court explained that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in

that activity." 455 U.S. at 261. The Court thus rejected the challenge to social security taxes, observing that "[g]ranting an exemption from social security taxes to an employer *operates to impose the employer's religious faith on the employees*." *Id*. (emphasis added); *see also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708-09 (1985) (invalidating a state statute providing employees with "an absolute and unqualified right not to work on . . . their Sabbath" because the accommodation applied "no matter what burden or inconvenience this imposes on the employer or fellow workers"); *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., concurring in the judgment) ("My own view may be shortly put: I think the limits [on religious freedom] begin to operate whenever activities begin to affect or collide with liberties of others or of the public.").

As the decision in *Hobby Lobby* confirms, the analysis under RFRA and RLUIPA is no different: Under both statutes, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)). The right to free exercise may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Hobby Lobby*, 134 S. Ct. at 2787 (Kennedy, J., concurring). Indeed, "[n]o tradition, and no prior decision under RFRA, allows a religion-based exemption when

the accommodation would be harmful to others." *Id*. at 2801 (Ginsburg, J., dissenting).

Thus in *Hobby Lobby*, this Court held that the "least restrictive means" standard was not satisfied because "HHS has already devised and implemented" an accommodation for employers with religious objections – *i.e.*, the accommodation at issue here – and "[t]he effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases *would be precisely zero*." 134 S. Ct. at 2759-60 (emphasis added). And the Court has subsequently upheld a religious accommodation that "would not detrimentally affect others who do not share petitioner's belief." *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring). In sharp contrast, accepting the petitioners' claims in these cases would countenance a religious exemption for one at the expense of another.

CONCLUSION

For the foregoing reasons, the Court should affirm the decisions of the Courts of Appeals for the Third, Fifth, Tenth and District of Columbia Circuits.

Respectfully submitted,

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