NO. 15-774

In the Supreme Court of the United States

SYLVIA MATHEWS BURWELL, et al.,
Petitioners,

v.

DORDT COLLEGE AND CORNERSTONE UNIVERSITY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

The text of the Affordable Care Act says nothing about contraceptive coverage, but it does require employers to "provide coverage" for certain "preventive services," including "preventive care" for women. The Department of Health and Human Services ("HHS") has interpreted that statutory mandate to require employers, through their healthcare plans, to provide at no cost the full range of FDA-approved contraceptives, including some that cause abortions. Despite the obvious implications for many employers of deep religious conviction, HHS decided to exempt only some non-profit religious employers from compliance. As to all other religious employers, HHS demanded compliance, either by the employers instructing their insurers to include coverage in their plans, or via a regulatory mechanism through which the employers must execute documents that authorize, obligate, and/or incentivize their insurers or plan administrators to use their plans to provide cost-free contraceptive coverage to their employees. In the government's view, either of those actions suffices to put these religious employers and their plans in compliance with the statutory "provide coverage" obligation.

This Court has already concluded that the threatened imposition of massive fines for failing to comply with this contraceptive mandate imposes a substantial burden on religious exercise, and that the original method of compliance violates the Religious Freedom Restoration Act ("RFRA"). And it is undisputed that this case involves the same mandate and the same fines, and that nonexempt religious employers such as Respondents hold

sincere religious objections to the use of their plans as well.

The questions presented are:

1. Does the availability of a regulatory method for non-profit religious employers to comply with HHS's contraceptive mandate eliminate either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)?

2. Has HHS proven both that forcing Respondents to comply with the mandate actually advances a sufficiently specific governmental interest that is compelling, and that no less restrictive means for furthering that interest is available?

CORPORATE DISCLOSURE STATEMENT

Respondents do not have parent corporations. No publicly held corporation owns any portion of Respondents, and Respondents are not subsidiaries or affiliates of any publicly owned corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Regulations:

Other Authorities:

PROCEEDINGS BELOW[1]

Respondents are non-profit religious institutions of higher education. *Dordt Coll. v. Burwell*, 801 F.3d 946, 947 (8th Cir. 2015). Both provide generous health benefits to their employees, and Dordt offers a student plan. Cornerstone's employee plan and Dordt's student plan are insured plans, while Dordt's employee plan is self-insured. *Id.* at 947. Both schools believe that human life begins at conception and is entitled to respect and protection. *Id.* at 949. The schools cannot, consistent with their religious beliefs, provide or facilitate access to abortion-inducing drugs or devices, such as ella, Plan B, and IUDs. *Id.* (They have no religious objection to including non-abortifacient contraceptives in their employee and student health plans. *Id.*) Even though they draw their workforces from among those who share their religious convictions, including their convictions about the sanctity of human life from the moment of conception, the schools are ineligible for the religious exemption from the mandate. The schools concluded that complying with the mandate through the alternative compliance mechanism would be inconsistent with their religious convictions. *Id.*

Dordt and Cornerstone filed suit in federal district court, claiming that application of the mandate to them violates the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* The

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[1] A full description of the government's contraception mandate and the means by which Dordt College and Cornerstone University may comply with that mandate is available in the merits briefs filed by petitioners in *Zubik v. Burwell*, S. Ct. Nos. 14-1418, 14-1453, 14-1505, 15-105, 15-119, 15-191, 15-35.

district court granted their motion for preliminary injunction. *Dordt Coll. v. Sebelius*, 22 F. Supp. 3d 93 (N.D. Iowa 2014).

The government lodged an interlocutory appeal, and the Eighth Circuit affirmed, pointing to the reasoning set forth in a companion case decided the same day. *See Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927 (8th Cir. 2015). The court of appeals observed that the government would impose substantial financial penalties upon the plaintiffs unless they committed acts contrary to their religious consciences. *Id.* at 937-38. Following the analysis dictated by this Court in *Hobby Lobby*, the court concluded that the government was substantially burdening the plaintiffs' religious exercise. *Id.* at 937-43. The court properly deferred to the plaintiffs' theological assessment of the morality of complying with the mandate, refusing to second-guess their religious conclusions about complicity in sinful acts. *Id.* at 938-39. The Eighth Circuit rightly rejected the government's false contention that the plaintiffs were merely objecting to the acts of third parties, observing that the plaintiffs could not, consistent with their consciences, do what they government was requiring *them* to do. *Id.* at 942.

The Eighth Circuit also held that the government had failed to prove that imposing the mandate upon the plaintiffs was the least restrictive means of advancing a compelling governmental interest. 801 F.3d at 943-45. The court observed that the plaintiffs had identified various other, less restrictive ways the government might pursue its interests, and that the government had failed to

prove the inadequacy of these alternatives. *Id.* at 945.

ARGUMENT

Dordt College and Cornerstone University do not oppose the government's request that the Court dispose of its petition in accordance with the forthcoming decision in *Zubik v. Burwell*, 778 F.3d 422, *cert. granted*, No. 14-1418 (Nov. 6, 2015), and the six other consolidated cases. However, the persistent mischaracterizations in the government's petition—of how the alternative compliance mechanism works, of the schools' arguments, and of the Eighth Circuit's opinion—warrant a brief response.

First, the government mischaracterizes the schools' role in providing abortifacients to their employees and students. Most remarkably, it contends that the alternative compliance mechanism "relieves objecting organizations of *any* involvement in the provision of [abortifacient] coverage." Pet. at 10 (emphasis added). Judge Pryor's blunt but appropriate rejoinder—"[r]ubbish"—hits the mark. *Eternal Word Television Network v. Secretary*, 756 F.3d 1339, 1347 (11th Cir. 2014) (Pryor, J., concurring). The government's contention that the schools play no role in the provision of abortifacients is impossible to square with its concession that the "self-certification" form or notice the schools submit is "an instrument under which the plan is operated." 29 C.F.R. § 2510.3-16(b) (2013); Employee Benefits Security Administration Form 700, available at http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf (last visited Jan. 13, 2016).

The government's regulations clarify that there is no cognizable separation between the abortifacient coverage and the schools' health plans. During the rulemaking process, multiple commenters urged the government to create a truly separate mechanism for the delivery of objectionable coverage. 80 Fed. Reg. 41,318, 41,328 (Aug. 27, 2014). The government rejected those suggestions, on the unsupported ground that truly separate "alternatives raise obstacles to access to seamless coverage." *Id.* The government instead created a mechanism to deliver abortifacient coverage "*in* accommodated health plans," which are "better places to provide seamless coverage of the contraceptive services." *Id.* at 41,328–29 (emphasis added). It is impossible for the government to claim simultaneously that Dordt and Cornerstone play no role in providing abortifacient coverage, while insisting that such coverage is "seamless" with the schools' health plans. And, as the government recently conceded, the form or notice the schools must execute ensures that "the contraceptive coverage provided by its TPA is . . . *part of the same ERISA plan* as the coverage provided by the employer." No. 15-35 Br. in Opp. 19 (emphasis added).

Second, and relatedly, the government mischaracterizes the schools' substantial burden arguments. It claims that the schools assert that the alternative compliance mechanism substantially burdens their religious exercise "because the government will arrange for their insurers and TPAs to provide employees and students with separate coverage if respondents themselves opt out." Pet. at 9.

Setting aside the false contentions that the coverage is "separate" and that the alternative compliance mechanism is an "opt out," the government's claim is incomplete at best, downright deceptive at worst. The schools object to what *they* are required to do: bestow indispensable permission upon others to hijack the plans they legally must offer to provide morally objectionable drugs and devices. To be sure, others play a role in the chain of events that leads to the delivery of abortifacients—drug companies, prescribing physicians, pharmacies, insurers, and third-party administrators, to name but a few. But the participation of others does not obscure the undeniable reality that the schools play a necessary (and morally impermissible) role in the delivery of life-destroying drugs and devices. 78 Fed. Reg. 39,870, 39,880 (July 2, 2013) (EBSA Form 700 is what "ensures that there is a party with legal authority" to make payments to plan beneficiaries for abortifacients). It is this coerced role to which the schools object.

Third, the government mischaracterizes the Eighth Circuit's substantial burden analysis. It observes that the appellate court accepted the schools' conclusion that all the available methods of complying with the mandate violated their religious beliefs, failing to note that this Court's decision in *Hobby Lobby* requires such deference. Pet. at 10. The government then claims that the Eighth Circuit stated "that *nothing more* was necessary to establish that the accommodation substantially burdens respondents' exercise of religion." Pet. at 10, citing *Sharpe Holdings, Inc.*, 801 F.3d at 941-43 (emphasis added).

This is simply wrong. The Eighth Circuit repeatedly declared that the alternative compliance mechanism substantially burdens religious exercise not only because participation would violate Respondents' religious beliefs, but also because enormous financial penalties would follow non-compliance. *See, e.g., id.* at 937 ("the substantial burden imposed by the government on [the plaintiffs'] exercise of religion is the imposition of significant monetary penalties should [plaintiffs] adhere to their religious beliefs and refuse to comply"); *id.* at 938 (discussing the "substantial monetary penalties" for non-compliance); *id.* ("we must . . . determine whether the government has placed substantial pressure, *i.e.*, a substantial burden, on the religious objector to engage in conduct that violates the religious belief"); *id.* at 941 (the alternative compliance mechanism compels the plaintiffs "to act in a manner that they sincerely believe would make them complicit in a grave moral wrong *as the price of avoiding a ruinous financial penalty*") (emphasis added); *id.* at 942 ("we conclude that compelling [plaintiffs'] participation in the accommodation process *by threat of severe monetary penalty* is a substantial burden on their exercise of religion").

The Eighth Circuit faithfully followed what this Court did in *Hobby Lobby*: deferred to the plaintiffs' religious conclusion that compliance would be immoral, and assessed the magnitude of the pressure to comply. 134 S. Ct. 2751, 2775-79 (2014). The government's implication that the appellate court "over-deferred" to the schools is thus nothing

more than a not very subtle attack on this Court's rationale and decision in *Hobby Lobby*.[2]

In accordance with RFRA, the Eighth Circuit rightly declined the government's invitation to second-guess the schools' religious conclusion that obeying the mandate through the alternative compliance mechanism was morally impermissible. The court was unpersuaded by the government's misguided effort to resurrect the "attenuation" argument so thoroughly rejected by this Court in *Hobby Lobby*. 134 S. Ct. at 2777-79. And it rightly found that the government failed to prove that imposing the mandate on the schools—whose employees and students share their pro-life religious beliefs—was the least restrictive means of furthering any compelling governmental interest.

Essentially identical RFRA challenges to the alternative compliance mechanism are now pending before this Court in *Zubik v. Burwell*, No. 14-1418, and six consolidated cases. *See Priests for Life v. HHS*, 772 F.3d 229 (D.C. Cir. 2014), *cert. granted*, No. 14-1453 (Nov. 6, 2015); *Roman Catholic Archbishop of Washington v. Burwell*, 772 F.3d 229 (D.C. Cir. 2014), *cert. granted*, No. 14-1505 (Nov. 6, 2015); *East Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir.), *cert. granted*, No. 15-35 (Nov. 6, 2015);

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[2] Tellingly, the government does not even *attempt* to criticize the court's least restrictive means analysis and holding. Pet. at 10-11. As to whether the mandate will actually further the government's stated interest in reducing unintended pregnancies, the available evidence indicates that it does not. *See* Brief for Amicus Curiae Michael J. New, filed in *Zubik*, No. 14-1418, pp. 6-16; Brief of Amicus Curiae Women Speak for Themselves, filed in *Zubik*, No. 14-1418, pp. 14-40.

Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151 (10th Cir.), *cert. granted*, No. 15-105 (Nov. 6, 2015); *Southern Nazarene Univ. v. Burwell*, 794 F.3d 1151 (10th Cir.) *cert. granted*, No. 15-119 (Nov. 6, 2015); and *Geneva Coll. v. Burwell*, 778 F.3d 422 (3d Cir.), *cert. granted*, No. 15-191 (Nov. 6, 2015).

Respondents therefore respectfully request that the Court hold the government's petition for a writ of certiorari pending the Court's decision in *Zubik* and the consolidated cases, and then dispose of the petition as appropriate in light of the Court's decision in those cases.

CONCLUSION

This Court should hold the petition for a writ of certiorari in this case pending the Court's decision in *Zubik v. Burwell*, No. 14-1418, and the consolidated cases, and then dispose of the petition as appropriate in light of the Court's decision in those cases.

Respectfully submitted,

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