No. 14-392

IN THE

Supreme Court of the United States

UNIVERSITY OF NOTRE DAME,

Petitioner,

v.

SYLVIA MATHEWS BURWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents,

v.

JANE DOE 1, JANE DOE 2, AND JANE DOE 3,

Intervenors.

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

REPLY TO BRIEF IN OPPOSITION

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January 2015

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Notre Dame's petition explained how the decision below conflicts with *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), and *Wheaton College v. Burwell*, 134 S.Ct. 2806 (2014). The Government lost those cases but now claims they somehow *support* its position here. That is plainly wrong.

Hobby Lobby held that the Government substantially burdens religious exercise whenever it forces plaintiffs to "engage in conduct that seriously violates their religious beliefs" on pain of "substantial" penalties. 134 S.Ct. at 2775-76. The regulations here do precisely that, in two specific ways. First, they force Notre Dame to maintain an objectionable contractual relationship with third parties that will provide contraceptive coverage to its health-plan beneficiaries. Pet. 21-22. Second, they force Notre Dame to submit a "self-certification" or "notification" document, which Notre Dame believes makes it complicit in sin. Pet. 22-25.

The Government admits that the regulations require Notre Dame to take these actions; admits that the actions seriously violate Notre Dame's religion; and admits that the penalties of non-compliance would be substantial. By conceding these points, the Government has conceded that the regulations substantially burden Notre Dame's religious exercise under *Hobby Lobby*. There is thus more than a "reasonable probability" that a GVR would cause the lower court to reconsider its decision. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). The Government's other arguments cannot overcome this dispositive fact.

I. The Decision Below Conflicts With *Hobby Lobby* and *Wheaton*

The Government tries but fails to reconcile the decision below with *Hobby Lobby* and *Wheaton*.

A. The Government contends that forcing Notre Dame to maintain an objectionable contractual relationship cannot impose a substantial burden because it involves "the actions of third parties rather than any burden imposed on [Notre Dame] itself." Opp. 15 n.6. But *Hobby Lobby* already rejected that argument: the Government there argued that the provision of coverage by an employer's insurance company was "not attributable to the employer . . . and the connection is too indirect as a matter of law to impose a substantial burden" on the employer. Pet. Br. 14, *Burwell v. Hobby Lobby*, No. 13-354 (U.S. Jan. 2014). This Court disagreed, finding it substantially burdensome to force adherents to take actions that they believe would "enabl[e] or facilitat[e] the commission of an immoral act *by another*." 134 S.Ct. at 2778 (emphasis added).

Here, the Government does not dispute that Notre Dame has a sincere religious objection to both (1) maintaining a contractual relationship with a third party that will provide contraceptive coverage to its plan beneficiaries, and (2) signing the self-certification or notification, because Notre Dame believes that undertaking either action "enabl[es]" and "facilitat[es]" sin. These required actions plainly are not "the actions of third parties," Opp. 15 n.6—they are the actions of Notre Dame *itself*. Thus, because Notre Dame is forced to "engage in conduct that seriously violates [its] religious beliefs," its

religious exercise is substantially burdened. 134 S.Ct. at 2775.

B. The Government cherry-picks a quote from *Hobby Lobby* to give this Court's false imprimatur to the notion that *all* religious groups are "effectively exempt" under the accommodation. Opp. 13 (quoting *Hobby Lobby*, 134 S.Ct. at 2760). But in fact, the Court clearly indicated the accommodation was "effective[]" only for those who, like the plaintiffs in *Hobby Lobby*, did not express an objection to complying with the accommodation. The Court noted the accommodation "d[id] not impinge on *the plaintiffs'* religious belief[s]," but then expressly "d[id] not decide" whether the accommodation "complies with RFRA for purposes of all religious claims." *Hobby Lobby*, 134 S.Ct. at 2782 (emphasis added). Here, by contrast, Notre Dame *does* object to the actions required of it under the accommodation.

C. The Government asserts that the court below did not improperly parse Notre Dame's religious beliefs, but held only that Notre Dame may not "'prevent other institutions . . . from engaging in acts that merely offend'" it. Opp. 14 (quoting Pet.App. 62a-63a). That is incorrect.

First, Notre Dame is not seeking to prevent "other institutions" from providing contraceptive coverage but is asking only that *it* not be forced to facilitate the coverage in a manner contrary to its religious beliefs. If Notre Dame were granted the same exemption that the Government has *already granted* to numerous other "religious employers," the Government would still have many alternative ways to provide contraceptive coverage to Notre Dame's students and employees independently of Notre

Dame's health plans. Notre Dame's lawsuit does not challenge *any* of those alternatives.

Second, the court below plainly *did* improperly parse Notre Dame's religious beliefs. The court found no substantial burden because "[s]igning the [required] form and mailing it" would "take[] no more than five minutes," and because it believed Notre Dame could "wash[] [its] hands of any involvement in contraceptive coverage" by complying with the accommodation. Pet App. 66a, 72a. This cannot be read as anything other than disputing the veracity of Notre Dame's religious belief that taking the actions required under the accommodation would make it complicit in sin. This reasoning flatly contradicts *Hobby Lobby*'s admonition that whether an act constitutes immoral complicity in the wrongdoing of another is "a difficult and important question of religion and moral philosophy" that must be left to religious believers. 134 S.Ct. at 2778.

D. There is no merit to the Government's claim that the injunction issued in *Wheaton* somehow "undermines" Notre Dame's position here. Opp. 17. Indeed, the Government there *conceded* that Wheaton was "similarly situated" to Notre Dame, calling *Notre Dame* "an analogous suit." Gov't Br. 13, 17, *Wheaton College v. Burwell*, No. 13-A1284 (U.S. July 2014). The fact that the Court granted relief for Wheaton under the All Writs Act is therefore telling, since the "standard" for a GVR is "more liberal than [under] the All Writs Act." *Lawrence*, 516 U.S. at 168. It follows that Notre Dame is entitled to the lesser relief of a GVR here.

The Government claims that the revised regulations are just like the injunctive relief granted

in *Wheaton*, because they allow Notre Dame to "opt out" through a written notice informing HHS of its religious objections. Opp. 17. That is both wrong and irrelevant.

First, unlike exempt "religious employers," Notre Dame is *not* allowed to "opt out" because it is still forced to maintain an objectionable contractual relationship with a third party that will provide contraceptive coverage to its plan beneficiaries.

Second, unlike the Government's new "notification" option, the notice provided under the *Wheaton* injunction did not trigger any obligation, authority, or incentives for the plaintiff's TPA to provide the objectionable coverage. Rather, upon filing the *Wheaton*-injunction notice, the plaintiff there became fully exempt.

Third, unlike the *Wheaton*-injunction notice, the Government's new regulatory notice requires objectors to include information such as "the name and contact information for [their TPAs] and health insurance issuers," 79 Fed. Reg. 51,092, 51,095 (Aug. 27, 2014). The sole purpose of this information is to assist the Government in facilitating objectionable coverage—precisely what Notre Dame objects to. The Government claims that this is "the minimum information necessary" for an opt out, Opp. 18 n.9, but that is false: neither Wheaton College, the Little Sisters, nor groups eligible for the full "religious employer" exemption were required to provide this information.

Fourth, the Government emphasizes the statement in *Wheaton* that the Government could "rely" on the plaintiff's notice "to facilitate the provision of full contraceptive coverage," and that Wheaton's plan

beneficiaries could still "obtain, without cost, the full range of FDA approved contraceptives." Opp. 17 (quoting 134 S.Ct. at 2807). But that statement is consistent with the Government's providing contraceptives independently of Wheaton's health plan. Even if the Court contemplated that Wheaton would have no objection to maintaining a relationship with its insurers while they delivered the coverage, that is irrelevant here: Notre Dame *does* object, and under *Hobby Lobby* it is entitled to make that determination for itself. 134 S.Ct. at 2778.

E. The Government argues that the decision below rested on the independent ground that Notre Dame failed to show it would suffer irreparable harm in the absence of an injunction. Opp. 18. In fact, the lower court's irreparable-harm analysis logically depended on its flawed conclusion that the regulations did not substantially burden Notre Dame's religious exercise. *Hobby Lobby* shows that the regulations *do* impose a substantial burden, and *Wheaton* teaches that such a substantial burden *does* constitute irreparable harm. There is thus a reasonable probability that the lower court would now find irreparable harm and grant an injunction in light of *Wheaton* and *Hobby Lobby*.

Contrary to the Government's claim, Notre Dame clearly did request an injunction against the regulations. *See* TRO Mem. at 49, *Notre Dame v. Sebelius*, No. 3:13-cv-01276 (N.D. Ind. Dec. 11, 2013) (requesting an order "enjoining Defendants from any application or enforcement of the Mandate [45 C.F.R. § 147.130(a)(1)(iv)] against Notre Dame, its health plans, participants in its health plans, or its third party administrators or insurers."). Granting that injunction now would allow Notre Dame to exercise

its religion by refusing to comply with the accommodation, rescinding its self-certification, and contracting with third parties to provide health coverage in a manner consistent with its beliefs.

II. Respondents' Other Attempts to Salvage the Decision Below Lack Merit

A. The Government and Intervenors argue that a GVR would be pointless because *Hobby Lobby* is "materially identical" to the Seventh Circuit's previous decision in *Korte*, which the panel below was (theoretically) bound to follow. But even if *Hobby Lobby* and *Korte* were identical, that would not support the Government's position: the fact that the panel below flouted its own circuit precedent obviously does not give it license to flout *this Court's* binding decisions. In any event, the Government is wrong to claim that *Hobby Lobby* is "materially identical" to *Korte*, for two reasons.

First, the decision below rested on the theory that Notre Dame faces no substantial burden because "Notre Dame would be off the hook" if it "ceased to do business with" its insurance providers, thus leaving "[s]tudents and employees [to] make their own health insurance arrangements." Pet.App. 69a. While *Korte* did not address this argument, *Hobby Lobby* specifically *rejected* it, squarely holding that being forced to drop health coverage to avoid violating one's religious beliefs is itself a substantial burden. *See* 134 S.Ct. at 2776-77.

Second, the decision below was premised on the notion that Notre Dame's insurance providers have an "independent obligation" to provide contraceptive coverage. *See* Pet.App. 71a. But *Hobby Lobby* confirmed that it is only "[*w*]*hen* [an] issuer receives"

the required form that "the issuer *must then* . . . provide separate payments" for FDA-approved contraception. 134 S.Ct. at 2763 (emphases added). *Wheaton* further clarified the same point, with even the dissenters acknowledging that a TPA "bears the legal obligation to provide contraceptive coverage *only* upon receipt of a valid self-certification," *Wheaton*, 134 S.Ct. at 2814 n.6 (2014) (Sotomayor, J., dissenting) (emphasis added).

These two points—neither of which were addressed in *Korte*—thus easily create a "reasonable probability" that the lower court would reconsider its holding in light of a GVR. *Lawrence*, 516 U.S. at 167.

B. Intervenors argue that a GVR is unnecessary because of *Wheaton*, where the Seventh Circuit already refused to grant a preliminary injunction in light of *Hobby Lobby*. *See* Int.Opp. 12; Order, *Wheaton College v. Burwell*, No. 14-2396 (7th Cir. June 30, 2014). The Government omits this argument for good reason: after the Seventh Circuit refused an injunction in *Wheaton*, this Court *granted* one. *Wheaton* thus proves the opposite of what Intervenors claim: it establishes that the Seventh Circuit was wrong to adhere to its decision in *Notre Dame* and shrug off *Hobby Lobby* without further analysis.

C. The Government and Intervenors argue that no GVR is necessary because the Seventh Circuit can consider whether *Hobby Lobby* abrogated *Notre Dame*'s reasoning in other pending cases, and if those plaintiffs succeed then Notre Dame might "renew[] its request for a preliminary injunction." *See* Opp. 20, Int.Opp. 13-14. But Notre Dame should be allowed to renew its request for a preliminary injunction on a

clean slate *now*. It is *always* true that circuit courts can consider whether their previous reasoning has been abrogated by subsequent Supreme Court decisions; that possibility has *never* been a basis for denying a GVR where, as here, it is otherwise warranted.

Contrary to the Government's claim, the decision below very well "'may determine the ultimate outcome of th[is] litigation'" unless it is vacated. Opp. 19 (quoting *Lawrence*, 516 U.S. at 167). Without a GVR, the court will almost certainly adhere to its flawed decision, just as it did in *Wheaton* by failing to reconsider *Notre Dame* in light of *Hobby Lobby*. A GVR would preclude that mistake by requiring a fresh look. Indeed the only reason the Government is resisting a GVR is because it *wants* to continue citing the flawed and outdated decision below.

D. The Government and Intervenors claim the equities weigh against a GVR because Notre Dame has not litigated this case rapidly enough. Opp. 20-21, Int.Opp. 15-18. But at each step, Notre Dame has engaged in painstaking deliberations seeking to find some way to comply without violating its religious beliefs, and has moved forward with litigation only as a last resort. Notre Dame should not be penalized for moving at a thoughtful and deliberate pace, resorting to litigation only when all other avenues failed.

Finally, Intervenors allege that Notre Dame is seeking to avoid review because it does not want this Court to hear a case where a few of its students have been allowed to intervene, and where "access to contraceptives" will thus receive some attention. Int.Opp. 18. Nothing could be further from the truth, as that issue will be at the forefront regardless. To

the extent Intervenors suggest that their presence somehow makes Notre Dame uncomfortable with the equities of the case, quite the opposite is true: they are the ones who chose to enroll in a private Catholic university that never before offered health plans with "seamless" access to contraceptive coverage, and they now seek to force the University to do exactly that in violation of its religion. Notre Dame believes the equities speak for themselves.

III. The Regulations Cannot Satisfy Strict Scrutiny

The Government concedes that strict scrutiny does not bar a GVR and should be decided (if at all) by the court below in the first instance. Opp. 22-24. The Government nonetheless presents arguments on this issue that demand response.

A. As Notre Dame has explained, the regulations already exempt tens of millions of individuals and countless employers from the Mandate. Pet. 28-29. The Government ignores this gaping hole and instead asserts that it somehow retains a compelling interest in "seamlessly filling . . . gaps" in contraceptive coverage. Opp. 22. Its position is incoherent. "[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (citation omitted).

The Government also claims that "five Justices" in *Hobby Lobby* "recognized" that providing free contraceptive coverage is a compelling interest. Opp. 22. But Justice Kennedy's concurrence stated only that "[i]t is important to confirm that *a premise of the Court's opinion* is its *assumption* that the HHS

regulation here at issue furthers a legitimate and compelling interest." 134 S.Ct. at 2786 (emphases added). Justice Kennedy joined the majority, which spent several paragraphs eviscerating the Government's compelling-interest arguments, but ultimately decided that it "need not rely" on that analysis because it was even *more* obvious that the Government failed the least-restrictive-means test. *Id.* at 2781-82.

B. The Government makes two arguments as to why it must commandeer Notre Dame's health plans as a conduit to deliver contraceptive coverage. First, it claims that Notre Dame's "suggested alternatives are not legally viable," Opp. 23, apparently on the theory that an alternative means is not "viable" unless Congress has *already* enacted it. The Government fails to cite any precedent to support that radical limitation on the least-restrictive means test, because there is none. Quite the contrary, the entire point of strict scrutiny is that some laws must be struck down because the Government *could* enact other laws that would serve its interests in less-restrictive ways. *E.g.*, *McCutcheon v. FEC*, 134 S.Ct. 1434, 1458 (2014).

Second, the Government claims that providing contraceptive coverage independently of Notre Dame's health plans would be unworkable because it would "impos[e] 'financial, logistical, informational, and administrative burdens' on women seeking contraceptive coverage." Opp. 23 (quoting *Priests for Life v. HHS*, 772 F.3d 229, 265 (D.C. Cir. 2014)). In other words, the Government claims that it can force Notre Dame to violate its religious beliefs simply to ensure that women do not have to take what the D.C.

Circuit described as "minor added steps" to receive *free* contraceptive coverage. *Priests for Life*, 772 F.3d at 265. This is a stunning view of religious accommodation, especially given the Government's failure to provide *any* evidence of these supposed "burdens."

IV. *Holt v. Hobbs* Confirms That a GVR Is Warranted

Finally, this Court's decision in *Holt v. Hobbs*, No. 13-6827, 2015 WL 232143 (U.S. Jan. 20, 2015), provides another reason to GVR. *Holt* makes clear that there was nothing idiosyncratic about *Hobby Lobby*'s substantial-burden analysis. It makes no difference whether the religious exercise at issue is refraining from shaving one's beard (*Holt*), refraining from paying for contraceptive coverage (*Hobby Lobby*), or refraining from maintaining an objectionable contractual relationship and submitting an objectionable form (here). The dispositive inquiry is whether the religious exercise is "sincere," and whether the believer "will face serious disciplinary action" unless he forgoes the exercise. *Id.* at *6. When the Government "puts [the plaintiff] to this choice, it substantially burdens his religious exercise." *Id.* at *7.

This analysis confirms that the lower court erred by failing to recognize a substantial burden on Notre Dame's religious exercise.

Respectfully submitted,

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