No. 15-775

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

CNS INTERNATIONAL MINISTRIES, INC. AND HEARTLAND CHRISTIAN COLLEGE,

Respondents.

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

BRIEF FOR THE RESPONDENTS

DAVID R. MELTON
General Counsel for CNS International Ministries, Inc. and Heartland Christian College
500 E. Ninth Street
Kansas City, Missouri 64106
(816) 842-6300

TIMOTHY BELZ
Counsel of Record
J. MATTHEW BELZ
Ottsen, Leggat & Belz, L.C.
112 S. Hanley Road
Suite 200
St. Louis, Missouri 63105
(314) 726-2800
tbelz@olblaw.com
jmbelz@olblaw.com

Counsel for Respondents

QUESTIONS PRESENTED

1. Does it substantially burden the Respondents' exercise of religion when the Government forces Respondents, over their sincerely held religious objection, to play an integral role in the provision of health insurance coverage for abortifacient drugs and devices to Respondents' employees?

2. Has the Government met its burden of demonstrating that the so-called "accommodation" for religious nonprofit employers is the least restrictive means of satisfying a compelling governmental interest?

CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

MISCELLANEOUS

PROCEEDINGS BELOW

Respondents CNS International Ministries, Inc. (CNS) and Heartland Christian College (HCC) are nonprofit religious organizations that offer healthcare coverage to employees through a self-insured plan. *Sharpe Holdings, Inc. v. U.S. Dept. of Health & Human Services*, 801 F.3d 927, 932 (8th Cir. 2015). CNS, which has more than fifty employees, provides full-time residential services to men, women, and children with behavioral problems or who suffer from alcohol or drug dependencies. *Id.* CNS also operates a school that serves the children of individuals in its recovery program, as well as its employees' children. *Id*. at 933. HCC, which has fewer than fifty employees, provides post-secondary higher education to employees and residents of CNS and their dependents. *Id*. Respondents are located in northeast Missouri.

In accordance with their sincerely held religious beliefs, CNS and HCC oppose the use, funding, provision, or support of elective abortions, and they believe that certain contraceptives required under the contraceptive mandate—Plan B, ella, and copper IUDs—can and do provide elective abortions. *Id*. at 935-36. CNS and HCC brought suit alleging that the Government is coercing them to violate their religious beliefs by threatening to impose severe monetary penalties unless they either directly provide coverage for abortifacients through their group health plan or facilitate that objectionable coverage through the "accommodation" process. *Id*. at 936.

The district court for the Eastern District of Missouri granted injunctive relief in favor of CNS and HCC, citing the Religious Freedom Restoration Act of

1993 (RFRA), 42 U.S.C. 2000bb to 2000bb–4. 801 F.3d at 936. The Government appealed to the Eighth Circuit, but, after filing its notice of appeal, revised the "accommodation" that was in place to permit religious organizations to self-certify using a written instrument to HHS as an alternative to using Form 700. *Sharpe Holdings,* 801 F.3d at 936. The Government called this the "augmented accommodation." *East Tex. Baptist Univ. v. Burwell*, No. 15-35, Govt. Brief in Opposition (Sept. 2015), at 18. CNS and HCC argued that the new rule does "nothing more than coerce [them] into another avenue that violates their religion." *Sharpe Holdings,* 801 F.3d at 936.

The Court of Appeals observed that the Government would impose substantial financial penalties to pressure plaintiffs to commit acts contrary to their religious consciences. *Id.* at 937-38. Following the analysis dictated by this Court in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the court concluded that the Government was substantially burdening the plaintiffs' religious exercise. *Sharpe Holdings*, 801 F.3d at 937-43. The Court of Appeals deferred to the plaintiffs' theological assessment of the morality of complying with the mandate, refusing to second-guess their religious beliefs concerning complicity in sin. *Id*. at 938-39. The Court of Appeals 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 the Government was requiring *them* to do. *Id.* at 942.

The Court of Appeals also held that the Government failed to prove that imposing the mandate upon the

plaintiffs was the least restrictive means of advancing a compelling governmental interest. *Id*. 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.

The decision of the Court of Appeals in favor of CNS and HCC created a split among the federal circuits, which had previously only ruled in favor of the Government in similar cases. *See Michigan Catholic Conference & Catholic Family Servs. v. Burwell*, 807 F.3d 738 (6th Cir. 2015); *Grace Schools v. Burwell*, 801 F.3d 788 (7th Cir. 2015); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207 (2d Cir. 2015); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir.), *cert. granted*, Nos. 15-105 and 15-119 (Nov. 6, 2015); *East Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir.), *cert. granted*, No. 15-35 (Nov. 6, 2015); *Wheaton College v. Burwell*, 791 F.3d 792 (7th Cir. 2015); *University of Notre Dame v. Burwell*, 786 F.3d 606 (7th Cir. 2015); *Zubik v. Burwell*, 778 F.3d 422 (3d Cir.), *cert. granted*, Nos. 14-1418 and 15-191 (Nov. 6, 2015); *Priests for Life v. HHS*, 772 F.3d 229 (D.C. Cir. 2014), *cert. granted*, Nos. 14-1453 and 14-1505 (Nov. 6, 2015).

ARGUMENT

CNS International Ministries, Inc. and Heartland Christian College do not oppose the Government's request that the Court dispose of their 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 consolidated cases.[1] However, the persistent mischaracterizations in the Government's petition—of how the alternative compliance mechanism works and of the Respondents' arguments—warrant a brief response.

The Government repeatedly and incorrectly characterizes the accommodation as an "opt-out" and describes the objections of CNS and HCC as bearing on the actions of "third parties" and not their own. These characterizations must be nipped in the bud: "A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas." *Tiller v. Atl. Coast Line R. Co.*, 318 U.S. 54, 68 (1943). "Metaphors in law are to be narrowly watched," Justice Cardozo warned in *Berkey v. Third Ave. Ry. Co.*, 244 N.Y. 84, 94 (1926), and "[a] rule of law should not be drawn from a figure of speech." *McCollum v. Board of Education*, 333 U.S. 203, 247 (1948) (Reed, J., dissenting).

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[1] The Eighth Circuit Court of Appeals issued its opinion on September 17, 2015. This Court granted certiorari in the cases from the other circuits on November 6, 2015. The Government then waited until the 89th day (December 15, 2015) after the Eighth Circuit's decision in this case to file its petition for a writ of certiorari, making consolidation with the existing cases unlikely and effectively thwarting any possibility that CNS and HCC would be able to defend the Court of Appeals decision in their favor before this Court.

I. The so-called accommodation is not an "opt-out."

The Government, over and over, characterizes the accommodation as an "opt-out." Pet. for Cert., pp. I, 5, 7, 8, 9, 10. This is not by convenience but as a form of argument: how can the Respondents object to merely saying they object?

The accommodation is not an opt-out, however, and neither the district court nor the Eighth Circuit Court of Appeals ever characterized it that way. *Sharpe Holdings, Inc. v. U.S. Dept. of Health & Human Services*, 2:12 CV 92 DDN, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013), *aff'd,* 801 F.3d 927 (8th Cir. 2015). The Government's sleight of hand results in confounding rather than enlightening the issues presented.

The accommodation's true nature is revealed when it is analyzed next to the Government's offer of exemption for objecting churches. The church exemption requires nothing—objecting churches and their integrated auxiliaries simply do not have to comply with the contraceptive mandate. 45 C.F.R. 147.131(a). This is an opt-out.

The accommodation requires much more, in at least three related ways. First, to invoke the accommodation, HCC and CNS must inform either their Third-Party Administrator (TPA) or the Government that they are availing themselves of the accommodation. 79 Fed. Reg. 51092, 51094-95 (Aug. 27, 2014). Second, if HCC and CNS are availing themselves of the supposedly less restrictive written instrument that goes straight to the Government, they must identify their TPA therein. *Id*. Third, tying everything together, the Government then

requires that the TPA provide or arrange for abortifacient coverage to employees of HCC and CNS. 29 C.F.R. 2590.715–2713A(b)(2); *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2814 n.6 (2014) (Sotomayor, J., dissenting) ("Wheaton's third-party administrator bears the legal obligation to provide contraceptive coverage only upon receipt of a valid self-certification."). This is all of one package despite the Government's attempt to claim otherwise.

This scheme creates a mirage of attenuation from the immoral act, but in the end the evildoing remains entirely dependent upon the actions of HCC and CNS.[2] The moment HCC or CNS hires an employee, abortifacient coverage is guaranteed for that person whether the accommodation is utilized or not. And when the employment ends, the abortifacient coverage terminates with the rest of the insurance coverage.

The abortifacient coverage thus attaches as a parasite to the plan offered by CNS and HCC. Part of the employee compensation package—intended as a beneficence for the well-being of employees—is

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[2] *Hobby Lobby* forecloses the attenuation argument entirely. As the Court explained, this argument "implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." 134 S. Ct. at 2778. After a plaintiff draws a line between religiously permissible and impermissible conduct, "'it is not for [courts] to say that the line [is] an unreasonable one.'" *Id.* (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981)); *see also Sharpe Holdings,* 801 F.3d at 942 (rejecting attenuation argument).

appropriated by the Government and turned into an act the Respondents believe is *malum in se*. The objectionable abortifacient coverage is actuated when individual employees are hired and is coterminous with their employment. The health plan of HCC and CNS is thus the integral *sine qua non* foundation of the Government's mandate. This is exactly the facilitation of evil that the Respondents object to as a matter of sincerely held religious belief.

The Government has previously admitted in a similar challenge that the objectionable coverage is part of the objector's health plan. *See* Transcript of Motions Hearing at 18, Dkt. 54, *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441 (D.D.C. Nov. 22, 2013) (admitting that "technically, the [coverage] is part of [the religious objector's] plan"); *see also Id*. at 16-17 (admitting that "services become available to the employees by virtue of their participation in the religious [objector's] plan"); *Sharpe Holdings,* 801 F.3d at 942 ("Here, the third parties are TPAs, who will provide the objectionable coverage to CNS and HCC's employees *through the group health plan*.") (emphasis added).

The Government's characterization of the accommodation as an opt-out is an attempt to frame this case as HCC and CNS taking an unreasonable position despite conciliatory efforts by the Government. This is not what has happened. Religious objectors like Respondents have asked to be left out of the provision of contraceptives (here, abortifacients) to their employees, and the Government's only response has been to add another link in the causal chain between

religious entities and the provision of contraceptives to employees.

II. HCC and CNS ask not to prevent "third parties" from providing contraceptive coverage to employees, but that they themselves be left out of the Government's scheme.

CNS and HCC have never sought "to prevent the government from arranging for third parties to provide separate coverage to [employees]." Pet. for Cert., pp. I, 10. But they do ask the courts to recognize that RFRA provides refuge from laws that dragoon them into participating, collaborating, and serving as an integral mechanism in the provision of coverage to their employees for abortifacient products, against religious conscience.

CNS and HCC have pointed often to the Government's "most straightforward" way of achieving its goals—just providing contraceptives itself through such mechanisms as Title X or tax incentives. *Hobby Lobby*, at 2780. Alternatively, CNS and HCC have argued that the Government could allow employees of religious objectors to obtain subsidized coverage from *true* third-parties on the Government's own exchanges. The Government has assured the Nation's young adults that using the exchanges "can be easy and fast" and "[doesn't] take much time at all." Healthcare.gov, "Why bother with health insurance?" https://www.healthcare.gov/young-adults/ready-to-apply/ (last visited Jan. 21, 2016).

Instead of these approaches, the Government continues to insist that the only way the United States

can satisfactorily distribute abortifacients is with the forced participation of CNS and HCC, their employee health insurance plan, and their TPA. The Government seeks to coerce CNS and HCC to participate by providing information about their plan and TPA, which the Government then exploits to coerce Respondents' TPA to take action contrary to the terms of the plan and religious beliefs of CNS and HCC.

These TPAs are the "third parties" the Government refers to, as if they were autonomous from their relationship with Respondents and the health plans they, the TPAs, administer. In reality, the TPAs are agents of those that pay for the health plans, and entities such as CNS and HCC have established contractual relationships with their TPAs. *Sharpe Holdings,* 801 F.3d at 942 ("Here, the third parties are TPAs, who will provide the objectionable coverage to CNS and HCC's employees *through the group health plan*.") (emphasis added).

The objection of CNS and HCC is not to "third parties" or even the Government itself providing abortifacient coverage to affected women. Their objection is rather that, even under the augmented accommodation, any health plan of CNS and HCC must serve as a conduit or platform for the delivery of objectionable products and services to their plan beneficiaries. The TPA for CNS and HCC will provide the objectionable coverage to CNS and HCC employees only by virtue of their enrollment in the CNS and HCC plan and only so long as they are enrolled in that plan.

This is the facilitation, participation and complicity that Respondents object to as a matter of sincerely held religious beliefs, and those beliefs cannot be gainsaid

by civil officials. *Hobby Lobby*, 134 S. Ct. at 2778 (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981)).

CONCLUSION

This Court should hold the petition for a writ of certiorari in this case pending the 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.

TIMOTHY BELZ
Counsel of Record
J. MATTHEW BELZ
Ottsen, Leggat & Belz, L.C.
112 S. Hanley Road, Suite 200
St. Louis, Missouri 63105
(314) 726-2800
tbelz@olblaw.com
jmbelz@olblaw.com

DAVID R. MELTON
General Counsel for CNS
International Ministries, Inc. and
Heartland Christian College
500 E. Ninth Street
Kansas City, Missouri 64106
(816) 842-6300

Counsel for Respondents

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