No. 15-812

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,

and

JANE DOE 3,
Intervenor-Respondent.

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

BRIEF IN RESPONSE OF INTERVENOR-RESPONDENT

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QUESTION PRESENTED

Under the Affordable Care Act, health insurers and group health plans must cover a variety of preventive care, including FDA-approved contraceptives. Petitioner, the University of Notre Dame, provides group health insurance to its employees and students but objects on religious grounds to offering a plan that covers contraceptives. The university therefore received an accommodation allowing it to refrain from providing that coverage, which the government then arranged to be supplied by a third party.

The university, through its president, has stated that the accommodation protects the university's religious freedom. Yet in this lawsuit, the university claims that the accommodation violates the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.*

The question presented is whether RFRA entitles petitioner not only to opt out of providing certain types of health coverage, but also to bar the government from arranging for third parties to provide that coverage to petitioner's students, faculty, and staff at no cost to petitioner.

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BRIEF IN RESPONSE OF INTERVENOR-RESPONDENT

Intervenor-respondent Jane Doe 3 is a student at the University of Notre Dame who receives health insurance under the university's group plan. If the university is successful here, it will be able to deny to her the coverage for the full range of contraceptive services that she is guaranteed by law. Because *Zubik* v. *Burwell*, No. 14-1418, and its six companion cases present essentially the same legal question as does the petition here, Doe agrees that it is appropriate for the Court to hold this petition pending disposition of those other cases.

But the facts and circumstances of this case nonetheless warrant special attention because they underscore why the claims of the university, and the parallel claims of the petitioners in the *Zubik* cases, should fail on the merits.

First, the university's initial embrace of the accommodation and its leadership's continuing declarations confirm that the accommodation does not substantially burden the religious exercise of the university or anyone else. Indeed, when the accommodation was first announced, the university's president called it a "welcome step toward recognizing the freedom of religious institutions." Irin Carmon, *This is the Next Hobby Lobby*, MSNBC (July 30, 2014), http://tinyurl.com/nextHobbyLobby. That acknowledgement makes clear that the accommodation does not burden religious exercise.

Second, this case is unique among the legal challenges to the contraceptive-coverage accommodation: It alone includes as a party someone who risks denial

of her statutory right to covered health services. Because of this direct interest, Doe is singularly positioned among the parties in these cases to evince both (i) the importance of contraception to women generally and students in particular, and (ii) the serious obstacles to contraceptive access that she and similarly situated women nationwide would confront if the objectors to the accommodation are successful. This case thus offers special insight into why the government has a compelling interest in implementing the existing accommodation and why the alternatives proposed by the university would undermine achievement of that compelling interest.

This case is also the only one in which a party has directly and consistently raised the defense that recognizing a statutory right of religiously affiliated entities to block the government's efforts to provide contraceptive coverage would violate the Establishment Clause—an argument that the government has declined to make. The university and the other objectors seek to exercise a religious veto over the government's provision of benefits and thereby to strip tens of thousands of students and employees of access to coverage for critical preventive care. And they seek to do so even though the accommodation that the government has established ensures that these entities neither play a role in the provision of contraceptive coverage nor pay a penny for it. This Court has never before recognized a free-exercise right, under RFRA or otherwise, to so thoroughly burden the rights of third parties. It should not do so now.

STATEMENT

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, requires health-

insurance plans to cover a variety of medical treatments and services, including preventive care. See 42 U.S.C. § 300gg-13(a). Plans must cover, among other preventive care, all FDA-approved contraceptives. See *ibid.*; 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012). This requirement does not apply to houses of worship. See 78 Fed. Reg. 39,870, 39,873–39,874 (July 2, 2013). Other religiously affiliated nonprofit organizations may opt out of providing the coverage by completing and submitting a form to their insurance provider or their plan administrator, or by sending written notice of their objection to the government. See generally 80 Fed. Reg. 41,318 (July 14, 2015) (to be codified at 45 C.F.R. Pt. 147). Once an entity has requested this accommodation, the insurance provider or plan administrator arranges for contraceptive coverage to be provided to insureds under a separate policy, without cost to or involvement of the objecting entity. See 45 C.F.R. § 147.131(c); 78 Fed. Reg. at 39,875.

In 2012, Notre Dame's president stated that this accommodation would ensure that the university would not be violating its religious commitments, calling the accommodation a "welcome step toward recognizing the freedom of religious institutions." Carmon, *supra*. The university's 2014 benefits summary, published in fall 2013, explained: "New: Contraceptive Coverage—Our third party administrator, Meritain Health, will be offering coverage for these services." Univ. of Notre Dame, *Open Enrollment Decision Guide* 14 (2014 ed.), http://tinyurl.com/NDbrochure.

Later that fall, an alumni group wrote to the university, urging it to challenge the accommodation—citing, among other considerations, "the symbolic importance of Notre Dame" to the broader campaign of

litigation challenging the contraceptive-coverage regulations. E-mail from William Dempsey, Chairman, Sycamore Trust, to Rev. John I. Jenkins, President, Univ. of Notre Dame (Oct. 26, 2013, 15:46 EDT), http://tinyurl.com/sycamorecomm; see also *What Won't They Fight For?*, Sycamore Trust (Nov. 20, 2013), http://tinyurl.com/sycamoretrust (publicizing alumni group's efforts). Following this criticism, the university filed suit in December 2013 to challenge the accommodation. Pet. App. 9a. Three Notre Dame students—Jane Does 1 through 3—promptly moved to intervene in the district court. The district court denied the university's motion for a preliminary injunction, Pet. App. 47a, and then stayed the proceedings without ruling on the intervention motion, Pet. App. 11a n.1.

The students therefore renewed their motion in the Seventh Circuit, C.A. Mot. to Intervene, which granted the motion over the university's objection, see C.A. Opp. to Mot. to Intervene; 1/14/14 C.A. Order. The Seventh Circuit then affirmed the district court's decision on the merits. Pet. App. 85a. Does 1 and 2 have since left the University and hence are no longer parties to the case. C.A. Mot. to Withdraw; 4/9/15 C.A. Order.

In March 2015, this Court granted the university's petition to vacate the Seventh Circuit's judgment and remanded for reconsideration in light of *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). See Pet. App. 111a. After supplemental briefing and oral argument, *ibid.*, the Seventh Circuit again upheld the denial of a preliminary injunction, Pet. App. 128a.

Unlike other plaintiffs challenging the accommodation, the university never sought interim relief from

this Court after both the district court and the Seventh Circuit denied its requests for an injunction pending appeal, Pet. App. 50a, 52a. Rather, on December 31, 2013, the university formally requested the accommodation exempting it from the contraceptive-coverage regulations. Pet. App. 110a. Accordingly, the government arranged for university employees to receive contraceptive coverage from the plan administrator beginning the next day, and for students to receive the coverage in time for the start of fall term 2014. Pet. App. 109a–110a. After the university requested and received the accommodation—and with this lawsuit still pending—the university president acknowledged, "I don't see this as a scandal, because we are not giving out contraceptives." Matthew Archbold, *Notre Dame Alumni: Fr. Jenkins Comments on HHS Mandate "Startling,"* Catholic Educ. Daily (Apr. 14, 2014), http://tinyurl.com/UnivPrez.

DISCUSSION

Doe agrees with the university that the Court should hold the petition until *Zubik* and its companion cases are decided. That said, this case's unique facts and circumstances underscore why the Seventh Circuit's decision is correct, and why none of the plaintiffs in these cases have a free-exercise right to stop the government's provision of health coverage through third parties.

A. The university's words and deeds confirm that the accommodation does not substantially burden religious exercise.

When the government announced, in February 2012, that religious objectors would be entitled to an opt-out accommodation from the contraceptive-coverage regulations, the president of the university called

it a "welcome step toward recognizing the freedom of religious institutions." Carmon, *supra*. By completing a short form to request the accommodation, the university has been able to ensure and declare that the contraceptive coverage received by students and employees "is separate from Notre Dame." Univ. of Notre Dame, *Insurance FAQs*, http://tinyurl.com/NDcontraceptives (last visited Jan. 20, 2016). For example, the university explains to students:

> To comply with federal law, Aetna Student Health provides coverage for additional women's health products or procedures that the University objects to based on its religious beliefs. *This coverage is separate from Notre Dame.*

Ibid. (emphasis added).

In keeping with this determination that its religious exercise was not burdened by requesting an exemption from the contraceptive-coverage regulations, the university initially decided to take advantage of the accommodation voluntarily; it filed this lawsuit only after a powerful alumni group pressured it to litigate because of "the symbolic importance of Notre Dame" to the ongoing legal challenges to the contraceptive-coverage regulations. See E-mail from Dempsey to Jenkins, *supra*; *What Won't They Fight For?*, *supra*; see also Intervenor-Resp. C.A. Br. 7–8. And even after filing suit, the university acknowledged that the accommodation does not implicate it in the provision of contraceptives: At a town-hall event in April 2014, the university's president, the Reverend John Jenkins, stated "[T]he University's complicity is not an evil so grave that we would compromise our conscience by going along" with the accommodation

procedure. Archbold, *supra*. "I don't see this as a scandal," he added, "because we are not giving out contraceptives." *Ibid.*

Further reflecting its recognition that the accommodation does not burden its religious exercise, the university has dawdled in its prosecution of this case. With the regulatory deadline looming at the end of 2013, it chose to request the accommodation rather than seek emergency relief from this Court (as did plaintiffs in other cases that had not received interim relief from the lower courts). The university then sought, unsuccessfully, to dismiss its own appeal to the Seventh Circuit. Pet. App. 83a–84a. Next, when the district court's denial of a preliminary injunction was affirmed for the first time, the university waited the maximum period before seeking rehearing en banc. See Pet. App. 54a (case decided February 21, 2014); Pet. App. 101a (petition for rehearing filed April 4, 2014). When that petition was denied, the university sought and received a 60-day extension of the time to file its first petition for certiorari. See 14-392 6/16/14 Order. Then, when it finally filed the petition—eight months after the Seventh Circuit's decision—it sought not plenary review but merely a remand for yet more proceedings in the Seventh Circuit. 14-392 Pet. i.

The university introduced the same delays after the Seventh Circuit's most recent decision: It sought rehearing with only one day to spare, see Pet. App. 102a (case decided on May 19, 2015); Pet. App. 156a (rehearing petition filed July 2, 2015), and it again sought and received a 60-day extension of time to seek certiorari, see 10/22/15 Order. It did so even though (i) the university's petition here in substance repeats its first petition; (ii) the university's counsel was also

counsel for the petitioner in *Michigan Catholic Conference* v. *Burwell*, No. 14-701; (iii) the question presented and the petitioner's arguments in *Michigan Catholic Conference* are nearly identical to those here; and (iv) the petition here could have easily been filed in sufficient time to present this case along with the seven on which review was granted.

The district court recognized that the university's initial delay in filing suit "raises a question of Notre Dame's own view of the injury it faces under the accommodation." Pet. App. 10a. So too do these additional delays—even as the government continues to implement the university's accommodation and as students, faculty, and staff continue to receive coverage at no cost to the university. And the university's foot-dragging here, as the other cases have proceeded apace, also suggests its awareness that the presentation to the Court of the facts and circumstances of this lawsuit would highlight the weaknesses of the objectors' claims in all the cases.

B. Doe's participation as a party to this case underscores the harms that women would suffer if the university and other objectors were to prevail.

This case also offers special insight into the proper disposition of all the pending challenges to the accommodation, because the presence of an affected woman as a party has resulted in the presentation of information and arguments that have not been offered by the government. Our legal system presumes that rights are defended with the "necessary zeal" only by those whose own interests are directly threatened. *Kowalski* v. *Tesmer*, 543 U.S. 125, 129 (2004). Doe is directly affected by the university's lawsuit, and here she seeks to protect her own "legal rights[,] * * * which

are entitled to no less respect than the rights asserted by [the] plaintiffs." *Indep. Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 765 (1989).

Doe's participation brings two sets of issues into sharper focus. First, the application of RFRA's compelling-interest and least-restrictive-means requirements must be informed by the rights and interests of the persons that the government is seeking to protect. Second, unlike the government, Doe has argued that the application of RFRA sought by the university and the objectors in the other cases would violate the Establishment Clause, both by depriving tens of thousands of women of contraceptive coverage and by allowing a religious entity to veto the flow of governmental benefits.

1. As a student whose access to contraceptive coverage is imperiled by the university's lawsuit, Doe has provided detailed evidence about the importance of contraceptive access for students and about how the alternative accommodations proposed by the university would impede that access. This case thus specially illuminates both why the government has a compelling interest in ensuring that women like Doe will receive contraceptive coverage and why the proffered alternatives to the accommodation would fail to achieve that compelling interest.

Doe has presented evidence and argument, otherwise missing from the parties' litigation of these cases, that the government's interest in making contraceptive coverage available to women is especially strong when it comes to students. Notre Dame's student population alone includes more than 5,000 women, most of them undergraduates ages 18 to 22. See Univ. of Notre Dame, *This Is Notre Dame: 2015–2016* 11, http://tinyurl.com/NDstatistics. Moral or religious

views about premarital sex notwithstanding, most people in this demographic are sexually active: 80% of college students have had sex, and 62% of them have done so within the last three months. M. Lynn Cooper, *Alcohol Use and Risky Sexual Behavior Among College Students and Youth: Evaluating the Evidence*, 14 J. Stud. Alcohol 101, 104 (Supp. 2002), http://tinyurl.com/StudentSexualActivity; *Moral Theology 000,* Sycamore Trust (Sept. 5, 2013), http://tinyurl.com/NDstudentsex ("It is a commonplace that there is a good deal of alcohol abuse and illicit sex at Notre Dame."). Women ages 18–24 also have the highest rate of unintended pregnancies in the United States. See Lawrence B. Finer & Mia R. Zolna, *Shifts in Intended and Unintended Pregnancies in the United States, 2001–2008*, 104 Am. J. Pub. Health S43, S44–S45 (2014), http://tinyurl.com/USpregnancies. And students who become pregnant and carry a child to term are likely to struggle for the rest of their lives to participate fully in society. See U.S. Dep't of Educ., Nat'l Ctr. for Educ. Stat., *Short-Term Enrollment in Postsecondary Education: Student Background and Institutional Differences in Reasons for Early Departure, 1996–98*, NCES 2003-153 (2002), http://tinyurl.com/dropoutstats; *Earnings and Unemployment Rates by Educational Attainment*, Bureau of Labor Statistics, http://tinyurl.com/EducEarnings (last modified Dec. 8, 2015).

The evidence offered by Doe also highlights that the university's and the other objectors' purportedly less-restrictive alternatives would place students' access to contraception in jeopardy. See generally Intervenor-Resp. C.A. Br. 36–41. In the court of appeals, for example, the university argued that the government could facilitate women's access to contraceptives by providing either contraceptives or contraceptive-only coverage to women directly; by supplying grants

to other entities, such as health centers, that provide contraceptives; or by offering tax credits or deductions to women who pay out-of-pocket for contraceptives. Pet. App. 125a. But Doe has shown that these alternatives would subject women who need contraceptive access to material financial and logistical obstacles.

Indeed, even minor costs and barriers impede efforts to obtain contraception. See, *e.g.*, Deborah Cohen et al., *Cost as a Barrier to Condom Use: The Evidence for Condom Subsidies in the United States*, 89 Am. J. Pub. Health 567, 568 (1999), http://tinyurl.com/condomsubsidies (when condom-distribution program raised price from free to 25-cents per condom, result was "a marked reduction in the number of participating sites and condoms distributed and a decrease in reported condom use among persons with 2 or more sex partners"); Diana Greene Foster et al., *Number of Oral Contraceptive Pill Packages Dispensed and Subsequent Unintended Pregnancies*, 117 Obstetrics & Gynecology 566, 570–571 (2011), http://tinyurl.com/BirthControlDist ("Dispensing a 1-year supply [of oral contraceptives] is associated with significant reduction in the odds of conceiving an unplanned pregnancy compared with [repeatedly] dispensing just one or three packs."). Again, these barriers are especially likely to affect students, whose planning skills are still developing and whose access to money and transit is often limited. See, *e.g.*, Sara B. Johnson et. al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. Adolesc. Health 216, 216 (2009). Based on this and other evidence presented by Doe, the Seventh Circuit concluded that "[a]ll of Notre Dame's suggested alternatives would impose significant financial, administrative, and logistical obstacles by requiring women to sign up for separate coverage either

with a government agency or with another private insurer." Pet. App. 128a.

2. Doe has also raised the issue, not presented by the government in any of these cases, that the additional exemption sought by the university and the other objectors would, if granted, violate the Establishment Clause. This Court has made clear that a religious exemption "must be measured so that it does not override other significant interests." *Cutter* v. *Wilkinson*, 544 U.S. 709, 722 (2005). A religious exemption therefore demands "careful scrutiny" in order "to ensure that it does not so burden nonadherents * * * as to become an establishment." *Bd. of Educ.* v. *Grumet*, 512 U.S. 687, 722 (1994) (Kennedy, J., concurring in the judgment).

Here, the burdens on women would be both substantial and widespread: the university's health plans cover 4,600 employees and their dependents (11,000 people total), and 2,600 students and their dependents (2,700 people total). Pet. App. 164a. Like Doe, many of these nearly 14,000 people undoubtedly rely on the availability of the third-party contraceptive coverage that the university now seeks to block.

Allowing the university to prevent third parties from offering contraceptive coverage to students, faculty, and staff—coverage that the university does not administer or pay for—would also grant the university an impermissible religious veto over the operation of a government program. In *Larkin* v. *Grendel's Den*, 459 U.S. 116 (1982), this Court invalidated a law that gave religious organizations the authority to veto the liquor-license applications of nearby businesses. *Id.* at 125. Here, the university asks for a similar privilege—to block students, faculty, and staff from receiving in-

surance coverage from third parties, at the government's behest, for preventive-care services that the government has deemed essential but that the university disfavors on religious grounds. Whatever its views about contraception, the university may not use RFRA to "unduly restrict other persons * * * in protecting their own interests, interests the law deems compelling." *Hobby Lobby*, 134 S. Ct. at 2787 (Kennedy, J., concurring).

CONCLUSION

The Court should hold the petition pending resolution of *Zubik* v. *Burwell* and its companion cases, but should bear in mind the special features of this case that shed light on why the claims of the objectors in all the cases should fail.

Respectfully submitted.

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