IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GRACE SCHOOLS and BIOLA UNIVERSITY, INC.,

Plaintiffs-Appellees,

and

DIOCESE OF FORT WAYNE-SOUTH BEND, INC.; CATHOLIC CHARITIES OF THE DIOCESE OF FORT WAYNE-SOUTH BEND, INC.; SAINT ANNE HOME & RETIREMENT COMMUNITY OF THE DIOCESE OF FORT WAYNE-SOUTH BEND, INC.; FRANCISCAN ALLIANCE, INC.; SPECIALTY PHYSICIANS OF ILLINOIS, LLC; UNIVERSITY OF SAINT FRANCIS; and OUR SUNDAY VISITOR, INC.,

Plaintiffs-Appellees,

v.

SYLVIA M. BURWELL, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; THOMAS E. PEREZ, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Indiana
No. 12-cv-459 (DeGuilio, J.) and No. 12-cv-159 (DeGuilio, J.)

SUPPLEMENTAL AND REPLY BRIEF

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INTRODUCTION AND SUMMARY

Pursuant to this Court's orders of July 3 and 11, 2014, the government respectfully submits this supplemental and reply brief to respond to plaintiffs' arguments and to address the impact of *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), on the issues raised in these cases.

As discussed in our opening brief, the Affordable Care Act established additional minimum standards for group health plans, including coverage of certain preventive health services for women without cost sharing. The regulations implementing this provision generally require group health plans to include coverage of contraceptive services as prescribed by a health care provider.

The regulations contain accommodations, however, for plans established by non-profit organizations that hold themselves out as religious organizations and that have a religious objection to contraceptive coverage. Such an organization may opt out of the contraceptive coverage requirement by informing its insurer or third-party administrator that the organization is eligible for an accommodation and is declining to provide contraceptive coverage. When an eligible organization declines to provide such coverage, the regulations generally require the insurance issuer or third-party administrator to provide contraceptive coverage separately for the affected women, at no cost to the eligible organization.

The plaintiffs in the two cases on appeal are either eligible for an accommodation or are religious employers (as defined by reference to a provision of

the Internal Revenue Code) that are exempt from the contraceptive coverage provision. Thus, none of the plaintiffs is required to provide contraceptive coverage.

They nevertheless claim, however, that the regulations impose an impermissible substantial burden under the Religious Freedom Restoration Act (RFRA). Plaintiffs' central argument is that, by opting out of the contraceptive coverage requirement, they "authorize" or "facilitate" the provision of coverage by third parties. Our opening brief explains that this theory is fundamentally mistaken: "Federal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services." *Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547, 554 (7th Cir. 2014), *reh'g en banc denied*, No. 13-3853, ECF No. 64 (May 7, 2014). Plaintiffs' additional substantial burden theories fail for similar reasons.

The Supreme Court's decision in *Hobby Lobby* underscores plaintiffs' error in asserting that this case is essentially indistinguishable from *Korte* v. *Sebelius*, 735 F.3d 654 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2903 (July 1, 2014). In *Hobby Lobby*, the Supreme Court held that the contraceptive coverage requirement violated RFRA with respect to closely held for-profit corporations that—like the plaintiffs in *Korte*, but unlike the plaintiffs here—could not opt out of the requirement. The existence of the opt-out regulations that plaintiffs challenge here was crucial to the Supreme Court's reasoning. The Court explained that the opt-out regulations "effectively exempt[]" organizations that are eligible for an accommodation. *Hobby Lobby*, 134 S. Ct. at 2763.

The Court emphasized that the opt-out regulations "seek[] to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." *Id.* at 2759.

The Supreme Court concluded that the opt-out regulations demonstrate that the Department of Health and Human Services (HHS) has "at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs." *Id.* at 2782. The Court reasoned that the accommodations allowed under the regulations "serve[] HHS's stated interests equally well" because "female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to 'face minimal logistical and administrative obstacles' " in obtaining the coverage. *Ibid.* (citation omitted).

Plaintiffs here are "effectively exempt[]" (*id.* at 2763) from the contraceptive coverage requirement. They seek to preclude the government from independently ensuring that their tens of thousands of employees (and students) have the "same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." *Id.* at 2759. That argument is irreconcilable with this Court's precedent and the reasoning of *Hobby Lobby*. This Court should reverse the preliminary injunctions.

ARGUMENT

The Supreme Court's Reasoning in *Hobby Lobby* Confirms the Validity of the Opt-Out Regulations

1. Plaintiffs do not dispute that they are either eligible for religious accommodations or are religious employers as defined by reference to the Internal Revenue Code. Their challenge to the accommodations rests on their assertion that, by providing health plans and exercising their right to opt out, they "authorize" or "facilitate" the provision of contraceptive coverage by third parties. *See, e.g.,* Pl. Br. 28 (characterizing opt out as causing plaintiffs to "facilitate or become entangled in the provision of access to objectionable coverage"); *id.* at 30 (characterizing opt out as " 'turn[ing] on the tap' " to provision of contraceptives); *id.* at 40 (characterizing self-certification form as "authorizing" contraceptive coverage by third parties).

The Supreme Court's decision in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), confirms the validity of the regulatory accommodations, and its reasoning cannot be reconciled with plaintiffs' position here. The Supreme Court held that application of the contraceptive coverage requirement to the plaintiffs in that case—closely held companies that were not eligible for the regulatory opt-out—violated their rights under RFRA. Central to the Court's reasoning was the existence of the opt-out alternative that the Departments afford to organizations such as the plaintiffs here. This accommodation, the Supreme Court explained, "seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the

employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." *Id.* at 2759. The Court declared that this accommodation is "an alternative" that "achieves" the aim of seamlessly providing coverage of recommended health services to women "while providing greater respect for religious liberty." *Ibid.*

The Supreme Court did not suggest that employers could (or should be entitled to) prevent their employees from obtaining contraceptive coverage from third parties through the regulatory accommodations. To the contrary, the Court reiterated that "in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.' " *Id.* at 2781 n.37 (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005)). The free exercise of religion protected by RFRA cannot "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Id.* at 2787 (Kennedy, J., concurring).

The Supreme Court thus stressed that "[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." *Id.* at 2760; *see id.* at 2782-2783. After employers opt out, employees "would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to face minimal logistical and administrative obstacles because their employers' insurers would be responsible for providing information and coverage."

Id. at 2782 (citation and internal quotation marks omitted). In responding to the dissent, the Court emphasized that the accommodations would not " '[i]mped[e] women's receipt of benefits by "requiring them to take steps to learn about, and to sign up for, a new government funded and administered health benefit." ' " *Id.* at 2783 (alterations in original, quoting dissent (in turn quoting 78 Fed. Reg. 39,870, 39,888 (July 2, 2013) with alterations)).

2. This Court has already squarely rejected most of plaintiffs' substantial burden theories, all of which lack merit. *Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547, 554-558 (7th Cir. 2014), *reh'g en banc denied*, No. 13-3853, ECF No. 64 (May 7, 2014). Plaintiffs argue that *Notre Dame* is not controlling for various procedural reasons (Pl. Br. 34-37), but this Court's careful analysis of the merits of a RFRA claim by a non-profit organization entitled to the accommodations is both controlling and supported by *Hobby Lobby*.

Arguing that they face "substantial pressure" to take actions contrary to their religious beliefs (*e.g.*, Pl. Br. 20, 25), plaintiffs equate the burden of opting out to the burden faced by the plaintiffs in *Hobby Lobby* and *Korte* v. *Sebelius*, 735 F.3d 654 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2903 (July 1, 2014), insisting that any difference between the accommodations and the regulation applicable to for-profit entities "is irrelevant to the substantial burden inquiry" (Pl. Br. 21).

The linchpin of plaintiffs' reasoning is the mistaken view that opting out of providing contraceptive coverage "facilitates" or "authorizes" provision of such

coverage by third parties, because only if employers or universities opt out does the government require or offer to pay third parties to make or arrange separate payments for contraception. This Court has correctly rejected this argument, explaining that "[f]ederal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services." *Notre Dame*, 743 F.3d at 554; *see also id.* at 556 ("If the government is entitled to require that female contraceptives be provided to women free of charge, we have trouble understanding how signing the form that declares [an organization's] authorized refusal to pay for contraceptives for its students or staff, and mailing the authorization document to those companies, which under federal law are obligated to pick up the tab, could be thought to 'trigger' the provision of female contraceptives."); *accord Mich. Catholic Conference* v. *Burwell*, __ F.3d __, Nos. 13-2723, 13-6640, 2014 WL 2596753, at *9 (6th Cir. June 11, 2014), *reh'g petition pending* (filed July 25, 2014). Thus, as the Court explained in *Notre Dame*, 743 F.3d at 558, plaintiffs like Notre Dame and plaintiffs here "can derive no support from [the Court's] decision in *Korte*" because the accommodations authorize non-profit religious employers to refuse to comply with the contraceptive regulation.

The Court in *Notre Dame* also rejected the contention that, under ERISA, the opt-out form provided to third-party administrators of self-insured plans "authorizes" them to provide contraceptive coverage. *See* Pl. Br. 40, 42-43; *Notre Dame*, 743 F.3d at 554-555 (explaining that regulations require that the opt-out form " '*shall be treated* as a

designation of the third party administrator as the plan administrator' " and "reminds" the third-party administrator "of an obligation that the *law*, not the university, imposes on it" (quoting 29 C.F.R. § 2510.3-16(b)). An employer that objects to particular aspects of the accommodations for *self-insured* plans, would, in any event, be free to offer its employees an *insured* plan.

Plaintiffs' other substantial burden arguments fare no better. Plaintiffs assert that they are substantially burdened because they "[c]ontract with and pay premiums to insurance companies or [third-party administrators]" that provide coverage and take administrative steps relating to employee enrollment in the plans (*e.g.*, offer enrollment paperwork). Pl. Br. 30-31. This Court rejected this argument in *Notre Dame*, concluding that the "alleged" burden of being forced to identify and contract with third parties who provide contraceptive services "is entirely speculative and so not a ground for equitable relief." 743 F.3d at 557. The Court also explained that a *substantial* burden does not include signing and mailing paperwork. *See id.* at 558 (rejecting argument that "signing one's name and mailing the signed form" was a substantial burden).

Plaintiffs' theory that their health plans are "conduits for the delivery of the objectionable products and services" (Pl. Br. 29-30) only underscores that their complaint concerns requirements imposed not on themselves but on third parties. The government requires the insurers and third party administrators that have

contracted with plaintiffs to provide coverage after plaintiffs declare that they will not do so themselves.[1]

Plaintiffs also argue that the regulations impose a substantial burden because the Diocese must pay fees to keep its grandfathered status. Pl. Br. 39. It does not contest, however, that when the Diocese loses its grandfathered status, it will be exempt and Catholic Charities will be able to opt out of the coverage requirement which, as discussed, is not a "substantial burden" under RFRA.

Plaintiffs do not advance their argument by contending (Pl. Br. 39-40) that the accommodations "artificially divid[e] the Catholic Church." First, affiliated organizations can opt out of providing contraceptive coverage and thus continue to provide health coverage under the Diocese's group health plan. Second, as this Court has explained, "religious employers, defined as in the cited regulation, have long enjoyed advantages (notably tax advantages) over other entities, 26 U.S.C. §§ 6033(a)(3)(A)(i), (iii), without these advantages being thought to violate the establishment clause." *Notre Dame*, 743 F.3d at 560 (citing *Walz* v. *Tax Comm'n of the City of New York*, 397 U.S. 664, 666 (1970)).

3. Even if plaintiffs had shown a substantial burden, *Hobby Lobby* makes clear that the accommodations satisfy strict scrutiny.[2] In *Hobby Lobby*, five members of the

[1] This Court rejected the "conduit" theory in *Notre Dame* after counsel conceded the plaintiffs in that case would not object if female employees requested contraceptive coverage from the third-party administrator. 743 F.3d at 557.

Court endorsed the position that providing contraceptive coverage to employees "serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee." 134 S. Ct. at 2785-2786 (Kennedy, J., concurring); *accord id.* at 2799-2780 & n.23 (Ginsburg, J., dissenting). The remaining Justices assumed without deciding that the contraceptive coverage requirement furthers compelling interests, *id.* at 2780, and emphasized that, under the accommodations for eligible non-profit organizations, employees "would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to face minimal logistical and administrative obstacles because their employers' insurers would be responsible for providing information and coverage," *id.* at 2782 (citation and internal quotation marks omitted).

The challenged accommodations serve a number of interrelated and compelling interests, as the Supreme Court acknowledged in *Hobby Lobby*. As an initial matter, the government's ability to accommodate religious concerns in this and other areas depends on the government's ability to fill the gaps created by the accommodations.

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[2] Following this Court's determination in *Korte* that the government lacked a compelling interest in the contraception mandate, we acknowledged in the district court that our strict scrutiny argument was foreclosed. *See* Defs.' Sur-reply in Opp. to Fort Wayne Pls.' Cross-Mot. For Summ. J., Doc. 105 at 2 n.1. We expressly preserved that argument for appeal (*id.*), however, noting our view that *Korte* was wrongly decided, and the district courts analyzed the issue (*see* A26, A65). As discussed below, *Hobby Lobby* confirms that *Korte*'s analysis of the compelling interest prong no longer controls.

Plaintiffs, by contrast, assert that it is insufficient to permit an objector to opt out of an objectionable requirement; in their view, the government may not shift plaintiffs' obligations to a third party but must instead fundamentally restructure its operations. Under that view, any effort by the government to fill a gap created by an accommodation would, itself, be subject to RFRA's compelling interest test.

Hobby Lobby confirms that, when religious objectors opt out of their legal obligations, the government may fill those gaps and do so as seamlessly as possible. *See* 134 S. Ct. at 2782-2783. In our diverse Nation, many requirements may be the object of religious objections. But national systems of health and welfare cannot vary from point to point or be based around what, if any, method of provision of medical coverage can be agreed upon by all parties, including those who object. The challenged accommodations provide an administrable way for organizations to state that they object and opt out, and for the government to require third parties to provide contraceptive coverage. The Supreme Court admonished in its pre-*Smith* decisions that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen* v. *Roy*, 476 U.S. 693, 699 (1986).

The contraceptive coverage requirement in particular furthers compelling interests by directly and substantially reducing the incidence of unintended pregnancies, improving birth spacing, protecting women with certain health conditions for whom pregnancy is contraindicated, and otherwise preventing adverse

health conditions. *See* 78 Fed. Reg. at 39,872; Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 103-107 (2011) (IOM Report); *see also Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring) ("There are many medical conditions for which pregnancy is contraindicated," and "[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 in the health of female employees.").

Physician and public health organizations, such as the American Medical Association, the American Academy of Pediatrics, and the March of Dimes accordingly "recommend the use of family planning services as part of preventive care for women." IOM Report 104. This is not a "broadly formulated interest[] justifying the general applicability of government mandates," *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006), but rather a concrete and specific one, supported by a wealth of empirical evidence.

Use of contraceptives reduces the incidence of unintended pregnancies. IOM Report 102-104. Unintended pregnancies pose special health risks because a woman with an unintended pregnancy "may not immediately be aware that [she is] pregnant, and thus delay prenatal care" and engage in behaviors that "pose pregnancy-related risks." 78 Fed. Reg. at 39,872; *see* IOM Report 103. As a result, "[s]tudies show a greater risk of preterm birth and low birth weight among unintended pregnancies." *Ibid.* And, because contraceptives reduce the number of unintended pregnancies, they "reduce the number of women seeking abortions." 78 Fed. Reg. at 39,872.

The contraceptive coverage regulations, including the religious accommodations, also advance the government's related compelling interest in assuring that women have equal access to recommended health care services. 78 Fed. Reg. at 39,872, 39,887. Congress enacted the women's preventive-services coverage provision because "women have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. 29,070 (2009) (statement of Sen. Feinstein); *see* IOM Report 18. Prior to the Affordable Care Act, "[w]omen of childbearing age spen[t] 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. at 29,070 (statement of Sen. Feinstein); *see* Ctrs. for Medicare & Medicaid Servs., *National Health Care Spending By Gender and Age: 2004 Highlights*, available at http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/downloads/2004GenderandAgeHighlights.pdf. These disproportionately high costs had a tangible impact: Women often found that copayments and other cost sharing for important preventive services "[were] so high that they avoid[ed] getting [the services] in the first place." 155 Cong. Rec. at 29,302 (statement of Sen. Mikulski). Studies have demonstrated that "even moderate copayments for preventive services" can "deter patients from receiving those services." IOM Report 19.

4. In *Hobby Lobby*, the Supreme Court recognized the religious accommodation as a less burdensome alternative that "d[id] not impinge on the plaintiffs' religious belief that providing insurance coverage for [contraceptives] violates their religion"

while still "serv[ing] HHS's stated interests equally well" by generally ensuring that health coverage available to women does not vary according to the religious beliefs of their employers. 134 S. Ct. at 2782; *see also supra* pp. 4-6 (discussing importance of accommodations to the Court's reasoning in *Hobby Lobby*).

Plaintiffs' view about what types of action (or inaction) can be said to trigger or facilitate contraceptive coverage makes it difficult to assess how one accommodation might be less restrictive than another under their theory of the case. For example, plaintiffs rely on this Court's generalized statement in *Korte* that there are less restrictive means of providing access to contraceptive coverage. Pl. Br. 26 n.10; *see Korte*, 735 F.3d at 686 ("The government can provide a 'public option' for contraception insurance; it can give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers; it can give tax incentives to consumers of contraception and sterilization services."). Of course, *Korte* evaluated the mandate, not the accommodations; indeed, *Korte* relied on the accommodations as evidence of less restrictive alternatives. 735 F.3d at 686.

Plaintiffs' suggestion that the Departments should directly provide contraceptives to women or provide tax credits to women who pay for contraception out-of-pocket themselves would not "equally further[] the Government's interest," *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring), by ensuring that women can seamlessly obtain contraceptive coverage without additional burden—the very point of requiring that health coverage include coverage of contraceptives without cost

sharing. *See* 78 Fed. Reg. at 39,888; *see also, e.g.,* IOM Report 18-19. Moreover, generalized statements that the government can work with third parties to provide contraceptive coverage to women who work for objecting employers ignore the fact that, in the regulations at issue here, the government *is* working with third parties to provide contraceptive coverage, and the government *is* offering to pay third-party administrators of self-insured plans for providing or arranging such coverage.

RFRA does not require the government to create entirely new programs to accommodate religious objections. *See Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring) ("[T]he Court does not address whether the proper response to a legitimate claim for freedom in the health care arena is for the Government to create an additional program. The Court properly does not resolve whether one freedom should be protected by creating incentives for additional government constraints. In these cases, it is the Court's understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government." (citation omitted)).

The Supreme Court's interim order in connection with an application for an injunction in *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014), suggests an alternative accommodation. The interim order provides that, "[i]f [Wheaton College] informs the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services, the [Departments of Health and Human Services,

Labor, and the Treasury] are enjoined from enforcing against" Wheaton College provisions of the Affordable Care Act and related regulations requiring coverage without cost-sharing of certain contraceptive services "pending final disposition of appellate review." *Id.* at 2807. The order stated that Wheaton College need not use the self-certification form prescribed by the government or send a copy of the executed form to its health insurance issuers or third-party administrators to meet the condition for this injunctive relief. The order also stated that this relief neither affected "the ability of [Wheaton College's] employees and students to obtain, without cost, the full range of FDA approved contraceptives," nor precluded the government from relying on the notice it receives from Wheaton College "to facilitate the provision of full contraceptive coverage under the Act." *Ibid.*

The *Wheaton College* injunction does not reflect a final Supreme Court determination that RFRA requires the government to apply the accommodations in this manner. Nevertheless, the Departments responsible for implementing the accommodations have informed us that they have determined to augment the regulatory accommodation process in light of the *Wheaton College* injunction and that they plan to issue interim final rules on or before August 22. We will inform the Court when the rules are issued.

CONCLUSION

The preliminary injunctions should be reversed.

Respectfully submitted,

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AUGUST 2014

CERTIFICATIONS OF COMPLIANCE

I hereby certify this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that this brief complies with the type-volume limitation of this Court's July 3, 2014 order because it contains 3,902 words, excluding the parts of the brief exempted under Rules 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Megan Barbero
Megan Barbero

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Megan Barbero
MEGAN BARBERO