

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

LITTLE SISTERS OF THE POOR HOME
FOR THE AGED, DENVER, COLORADO,
Plaintiffs-Appellants,

v.

No. 13-1540

KATHLEEN SEBELIUS, Secretary of the
United States Department of Health & Human
Services, et al.
Defendants-Appellees

SOUTHERN NAZARENE UNIVERSITY, et al.,
Plaintiffs-Appellees,

v.

No. 14-6026

KATHLEEN SEBELIUS, Secretary of the
United States Department of Health & Human
Services, et al.
Defendants-Appellants

REACHING SOULS INTERNATIONAL, et al.
Plaintiffs-Appellees,

v.

No. 14-6028

KATHLEEN SEBELIUS, Secretary of the
United States Department of Health & Human
Services, et al.
Defendants-Appellants

MOTION TO CONSOLIDATE APPEALS IN PART

The three above-captioned appeals present substantially the same questions of law regarding the regulatory accommodations for non-profit employers with religious objections to providing contraceptive coverage. For the following reasons, the government respectfully requests **(1)** that the three cases be argued before the same panel on the same day; and **(2)** that the Court grant leave for the government to file a single opening brief and a single reply brief in the *Southern Nazarene* and *Reaching Souls* appeals. The plaintiffs in *Little Sisters* and *Reaching Souls* oppose this motion in full. The plaintiffs in *Southern Nazarene* consent to having the three appeals argued on the same day before the same panel but do not consent to the government's filing of consolidated briefs.

A. The plaintiffs in these cases challenge regulations that establish minimum health coverage requirements under the Patient Protection and Affordable Care Act insofar as they include contraceptive coverage as part of women's preventive health coverage. The plaintiffs acknowledge, however, that they may opt out of the contraceptive-coverage requirement by informing their insurance issuer or third-party administrator that they are eligible for the religious accommodations set out in the regulations and therefore are not required "to contract, arrange, pay, or refer for contraceptive coverage." 78 Fed. Reg. 39,870-01, 39,874 (July 2, 2013). Plaintiffs object to opting out on the ground that, once they have opted out, federal regulations will either require third parties (the

insurance issuer or third-party administrator) to make separate payments for contraceptive services, or, for the third-party administrator of a “church plan,” will permit the third-party administrator to make such separate payments and seek reimbursement from the federal government.

In *Little Sisters*, the district court denied the plaintiffs relief under Religious Freedom Restoration Act (“RFRA”) and the First Amendment; the plaintiffs appealed; and the Supreme Court issued an injunction pending appeal. In *Southern Nazarene* and *Reaching Souls*, the district courts granted the plaintiffs relief under RFRA, and the government appealed.

B. 1. The government respectfully requests that the Court schedule these three appeals for argument before the same panel on the same day. Hearing these appeals together will conserve judicial resources and allow the Court to consider the full range of factual scenarios in which the challenges to these regulatory accommodations arise. *Southern Nazarene* presents the most common set of scenarios in which, if the plaintiffs opt out of providing contraceptive coverage, the federal regulations require third parties—here both insurance issuers and third-party administrators—to make separate payments for contraceptive services. By contrast, in *Little Sisters* and *Reaching Souls*, separate payments for contraceptives will not occur unless the third-party administrator chooses to make or arrange such payments voluntarily. The plaintiffs in *Little Sisters* and *Reaching Souls* provide

health coverage through what they contend are “church plans” exempt from regulation under ERISA, and, as a result, the third-party administrators are permitted but not required to make separate payments for contraceptive services if the plaintiffs opt out of doing so. In *Little Sisters*, the third-party administrator has represented that it will not make or arrange separate payments for contraceptive services; the plaintiffs have referenced another entity, that they suggest may be a third-party administrator that have given no assurances about whether it will make or arrange such payments. In *Reaching Souls*, a third-party administrator has stated that it will make or arrange such payments.

As noted, the *Southern Nazarene* plaintiffs consent to scheduling the cases for oral argument on the same day before the same panel. The plaintiffs in *Little Sisters* and *Reaching Souls*, which are represented by the same counsel, oppose this motion on the ground that it would delay oral argument in *Little Sisters*. However, any delay would be minimal and would not prejudice the plaintiffs, which obtained injunction pending appeal from the Supreme Court. *See* 134 S. Ct. 1022 (2014). In *Little Sisters*, briefing will close on or about April 14. In *Southern Nazarene*, briefing will close on or about May 14. In *Reaching Souls*, briefing is due to close on or about May 21. Therefore, hearing the three arguments together would not substantially delay consideration of these cases.

2. The government also respectfully requests leave to file a single opening brief and a single reply brief in the *Southern Nazarene* and *Reaching Souls* appeals. The D.C. Circuit, Sixth Circuit, and Seventh Circuit have ordered consolidation in comparable appeals in which the plaintiffs challenge the same religious accommodations that are at issue here. (Copies of the consolidation orders are attached.) Consolidation is likewise appropriate here.

Plaintiffs oppose the government's request for leave to file a consolidated opening and reply brief on the ground that the cases involve different factual records. However, the government's appeals present legal issues that do not depend on such factual differences. The appeals that have been consolidated in the D.C. Circuit, Sixth Circuit, and Seventh Circuit also involve different factual records. Indeed, in the D.C. Circuit and Sixth Circuit, the parties cited these factual differences as a ground for extending the word limits for the parties' consolidated briefs. (Copies of the parties' joint motions are attached.) The government defers to this Court's judgment with respect to whether the plaintiffs in *Southern Nazarene* and *Reaching Souls* should be directed to file consolidated briefs and whether an extension of the word limits is appropriate.

Respectfully submitted,

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MARCH 2014

CERTIFICATIONS

I hereby certify that all of the required privacy redactions have been made, that any required paper copies are exact versions of the document filed electronically; that the electronic submission was scanned for viruses and found to be virus-free; and that, on March 6, 2014, I filed and served the foregoing motion on counsel of record through this Court's CM/ECF system.

/s/ Adam Jed

Adam C. Jed

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5368

September Term, 2013

1:13-cv-01261-EGS

1:13-cv-01441-ABJ

Filed On: January 29, 2014

Priests For Life, et al.,

Appellants

v.

United States Department of Health and
Human Services, et al.,

Appellees

Consolidated with 13-5371, 14-5021

ORDER

Upon consideration of the joint briefing proposal and motion to expedite, it is

ORDERED that the following briefing format and schedule shall apply:

Joint Principal Brief for Appellants/Cross-Appellees February 28, 2014
(not to exceed 16,000 words)

Joint Appendix February 28, 2014

Principal and Response Brief for Appellees/
Cross-Appellants March 28, 2014
(not to exceed 16,000 words)

Joint Response and Reply Brief for Appellants/
Cross-Appellees April 11, 2014
(not to exceed 8,000 words)

The Clerk is directed to calendar these consolidated cases on an appropriate date following the completion of briefing. Any extension of the briefing schedule may preclude the case from being heard this term.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5368

September Term, 2013

Parties are directed to hand deliver the paper copies of their briefs to the Clerk's office on the date due. All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Timothy A. Ralls
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

13-2723)
)
MICHIGAN CATHOLIC CONFERENCE, in its)
own name and, obo Michigan Catholic Conference)
Second Amended and Restated Group Health)
Benefit Plan for Employees; et al.)

Plaintiffs-Appellants,)

v.)

KATHLEEN SEBELIUS, in her official capacity)
as Secretary of the U.S. Department of Labor: et al.)

Defendants-Appellees.)

_____)
13-6640)

THE CATHOLIC DIOCESE OF NASHVILLE;)
CATHOLIC CHARITIES OF TENNESSEE,)
INCORPORATED; et al.,)

Plaintiffs-Appellants,)

v.)

KATHLEEN SEBELIUS, In her official capacity)
as Secretary of the U.S. Department of Health and)
Human Services; et al.)

Defendants-Appellees.)

FILED
Jan 13, 2014
DEBORAH S. HUNT, Clerk

ORDER

In these two appeals, from separate cases entered in separate district courts, the parties jointly move to consolidate the briefing and the submission, for a unification of the briefing schedule, and for additional words in the briefs. To facilitate the briefing and submission of these appeals, the motion is GRANTED as follows:

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The appellants in both appeals may file a single, unified principal brief, not to exceed 17,000 words, in both appeals on or before January 24, 2014. The appellees may file a single, unified principal brief in both appeals, not to exceed 17,000 words, on or before February 14, 2014. The appellants may file a single, unified reply brief, not to exceed 8,500 words, on or before seven days after the filing of the appellees' brief.

Upon the completion of the briefing, the appeals shall be consolidated for submission to the court.

ENTERED PURSUANT TO RULE 45(a)
RULES OF THE SIXTH CIRCUIT



Deborah S. Hunt, Clerk

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 3, 2014

By the Court:

| | | |
|--|----|--|
| GRACE SCHOOLS, et al., and DIOCESE OF FORT WAYNE-SOUTH BEND, et al., Plaintiffs-Appellees. | |] Appeals from the United] States District Court for] the Northern District] of Indiana, South Bend] Division. |
| Nos. 14-1430 and 14-1431 | v. |] Nos. 3:12-cv-00459-JD-CAN] 1:12-cv-00159-JD-RBC] Jon E. DeGuilio, Judge. |
| KATHLEEN SEBELIUS, et al., Defendants-Appellants. | | |

ORDER

The court, on its own motion, orders that these appeals are CONSOLIDATED for purposes of briefing and disposition.

The briefing schedule is as follows:

1. The appellants shall file their consolidated brief and required short appendix on or before April 8, 2014.
2. The appellees shall file their respective briefs on or before May 8, 2014.
3. The appellants shall file their consolidated reply brief, if any, on or before

Nos. 14-1430 and 14-1431

Page 2

May 22, 2014.

Counsel for appellees are encouraged to avoid unnecessary duplication by filing a joint brief or a joint appendix or by adopting parts of a co-appellee's brief. Duplicative briefing will be stricken and may result in disciplinary sanctions against counsel. See *United States v. Torres*, 170 F.3d 749 (7th Cir. 1999); *United States v. Ashman*, 964 F.2d 596 (7th Cir. 1992).

Important Scheduling Notice!

Notices of hearing for particular appeals are mailed shortly before the date of oral argument. Criminal appeals are scheduled shortly after the filing of the appellant's main brief; civil appeals after the filing of the appellee's brief. If you foresee that you will be unavailable during a period in which your particular appeal might be scheduled, please write the clerk advising him of the time period and the reason for such unavailability. Session data is located at <http://www.ca7.uscourts.gov/cal/calendar.pdf>. Once an appeal is formally scheduled for a certain date, it is very difficult to have the setting changed. See Circuit Rule 34(e).

[NOT SCHEDULED FOR ORAL ARGUMENT]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PRIESTS FOR LIFE, *et al.*,

Appellants,

v.

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

Appellees.

Case No. 13-5368

ROMAN CATHOLIC ARCHBISHOP
OF WASHINGTON, *et al.*,

Appellants, Cross-Appellees

v.

KATHLEEN SEBELIUS, in her
official capacity as Secretary of the
U.S. Department of Health and Human
Services, *et al.*,

Appellees, Cross-Appellants.

Case Nos. 13-5371, 14-5021

**JOINT RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE
REGARDING CONSOLIDATED BRIEFING AND JOINT MOTION FOR
EXPEDITED BRIEFING AND ORAL ARGUMENT**

The parties in these consolidated cases hereby submit this joint response to this court's order of January 23, 2014, which ordered the parties to submit a

proposed schedule and format for briefing. In addition, the parties jointly move for expedited briefing and oral argument and ask that these cases be heard before the Court's summer recess. The parties hereby submit the following joint proposal:

- February 28: Plaintiffs' joint opening brief due (up to 16,000 words)
- March 28: Government's response brief due (up to 16,000 words)
- April 11: Plaintiffs' joint reply brief due (up to 8,000 words)
- Oral argument to be heard before the Court's summer recess

Expedition is requested because the Court issued injunctions pending appeal in these cases. As part of this proposal, and to ensure that these cases can be heard before the Court's summer recess, the Government agrees to forgo a final reply brief on its cross appeal. In addition, the Government agrees to a word-limit of 16,000 words for its principal brief, which is fewer than the 16,500 words that are ordinarily allotted for a cross-appeal brief. As a result, the total briefing will be significantly shorter than otherwise permitted under FRAP 28.1(c), (e). The parties will submit a total of three briefs instead of four.

1. Plaintiffs in these consolidated cases are non-profit Catholic institutions and individuals that filed two different lawsuits in the district court against various agencies of the United States Government ("the Government") seeking injunctive relief against regulations ("the Mandate") that apply to Plaintiffs

and their insurance arrangements, and are designed to provide access to “FDA-approved contraception” for Plaintiffs’ students and employees.

2. In *Priests for Life*, the district court denied Plaintiffs’ claims for declaratory and injunctive relief on the merits. Plaintiffs filed a notice of appeal on December 19, 2013, which was docketed as Case No. 13-5368. Plaintiffs also sought an emergency injunction pending appeal.

3. In *Archbishop of Washington*, the district court granted injunctive relief for Plaintiff Thomas Aquinas College’s RFRA claim, and ruled in favor of Plaintiffs on their claim that the Mandate violated the First Amendment by prohibiting attempts to “influence” a third-party administrator’s decision to provide contraceptive coverage. The district court denied relief for Plaintiffs on all other claims. The district court held that the Archdiocese and the diocesan plaintiffs lack standing because they offer employees health insurance through the Archdiocese’s self-insured church plan, and the government lacks authority to enforce the requirement that the Archdiocese’s third-party administrator provide contraceptive coverage to employees who participate in that plan. The district court denied Catholic University’s claims on the merits. All Plaintiffs (except Thomas Aquinas College) filed a notice of appeal on December 23, 2013, which was docketed as Case No. 13-5371. Plaintiffs also sought an emergency injunction pending appeal.

4. On December 31, 2013, this court entered an order consolidating the *Priests for Life* and *Archbishop of Washington* cases, and granting Plaintiffs' motions for injunction pending appeal.

5. On January 23, 2014, the Government filed a cross-appeal in *Archbishop of Washington* seeking review of the district court's rulings in Plaintiffs' favor. The cross-appeal has been docketed as Case No. 14-5021.

6. On January 23, 2014, this court issued an order instructing the parties to propose a schedule and format for briefing these consolidated cases. The court encouraged the parties to submit a joint proposal.

7. After conferring, the parties have agreed upon the joint proposed schedule set forth above. Plaintiffs have agreed to joint briefing and the parties are requesting significantly fewer words than ordinarily would be allotted for cross-appeals. The parties respectfully submit that the requested word limits are appropriate because, in addition to the common RFRA and First Amendment issues, the two cases also involve several different legal issues and two different district-court opinions, which will each require separate treatment. Moreover, the two cases involve several different plaintiffs with various insurance arrangements. The Government's cross-appeal will require additional briefing.

For the foregoing reasons, the parties submit the joint proposed briefing schedule and format indicated above.

Respectfully submitted, this the 28th day of January, 2014.

AMERICAN FREEDOM LAW CENTER

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CERTIFICATE OF SERVICE

I hereby certify that, on January 28, 2014, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

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Case No. 13-6640

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

THE CATHOLIC DIOCESE OF NASHVILLE, *et al.*,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Tennessee, Nashville Division,
Case No. 3:13-cv-01303, Honorable Todd J. Campbell

**JOINT MOTION TO CONSOLIDATE THE APPEAL PENDING IN THIS
CASE WITH THE APPEAL PENDING IN CASE NUMBER 13-2723, FOR
EXCESS PAGES FOR APPELLANTS' & APPELLEES' BRIEFS, AND TO
RESET BRIEFING SCHEDULES**

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Counsel for Appellants

Appellants and Appellees in this case hereby jointly move the Court for an order (1) consolidating the appeal pending in this case with the appeal pending in Case Number 13-2723, (2) extending the page limits for Appellants' and Appellees' consolidated briefs, and (3) re-setting the briefing schedules.

The grounds for consolidation are that the two appeals arise from the same locus of facts and constitutional and statutory legal issues, and that both appeals are from denials of similar motions for preliminary injunction issued by the United States District Court for the Middle District of Tennessee on December 26, 2013 (Case No. 3:13-cv-01303, Doc. No. 65) and the United States District Court for the Western District of Michigan on December 27, 2013 (Case No. 1:13-cv-01247, Doc. Nos. 40 & 41). The legal issues in the two appeals are substantially similar and judicial economy will be served by consolidating the two appeals such that this Court may review a single set of briefs and a single argument, rather than six briefs and two arguments.

In addition, while the bulk of the statutory background and legal issues are the same, there are nine different Appellants between this case and Case Number 13-2723 with factual distinctions that require separate discussion. There are also a few legal issues that arise in Case Number 13-2723 that do not arise in this appeal. As such, Appellants and Appellees seek an additional 3,000 words for their consolidated principal briefs (bringing the total to 17,000 words for Appellants'

and Appellees' consolidated principal briefs under Fed. R. App. P. 32(a)(7)(B)(i)), and Appellants seek an additional 1,500 words for their consolidated reply brief (bringing the total to 8,500 words for Appellants' consolidated reply brief under Fed. R. App. P. 32(a)(7)(B)(ii)).

Finally, Appellants' principal brief in this case is currently due January 23, 2014, and Appellants' principal brief in Case Number 13-2723 is currently due January 24, 2014. Appellants seek a single due date for their consolidated principal brief on or before Friday, January 24, 2014. Appellees' principal brief in this case is currently due February 13, 2014, and Appellees' principal brief in Case Number 13-2723 is currently due February 14, 2014. Appellees seek a single due date for their consolidated principal brief on or before Friday, February 14, 2014. Appellants' also seek an order stating that their consolidated reply brief shall be filed seven (7) days after the filing of Appellees' consolidated principal brief.

Respectfully submitted, this the 10th day of January, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that, on January 10, 2014, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

By: s/ Matthew A. Kairis _____

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