[ORAL ARGUMENT REQUESTED]

No. 14-6026

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SOUTHERN NAZARENE UNIVERSITY; OKLAHOMA WESLEYAN UNIVERSITY; OKLAHOMA BAPTIST UNIVERSITY; MID-AMERICA CHRISTIAN UNIVERSITY,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Oklahoma No. 13-cv-1015 (Friot, J.)

REPLY BRIEF

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INTRODUCTION AND SUMMARY

Plaintiffs urge that this case is not meaningfully distinguishable from *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013), on the theory that "[t]he Government is imposing the same pressure on the Universities that it imposed upon the *Hobby Lobby* plaintiffs[.]" Br. 9. It is thus irrelevant, in plaintiffs' view, that the *Hobby Lobby* plaintiffs were required to provide contraceptive coverage whereas plaintiffs in this case need not do so. The regulations impose a substantial burden on their exercise of religion under the Religious Freedom Restoration Act of 1993 ("RFRA"), plaintiffs urge, whether or not an entity is free to opt out of providing contraceptive coverage.

The Sixth and Seventh Circuits properly rejected the same argument that plaintiffs make here. *See Mich. Catholic Conference* v. *Burwell*, _ F.3d _, Nos. 13-2723, 13-6640, 2014 WL 2596753 (6th Cir. June 11, 2014); *Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547, 557 (7th Cir. 2014), *reh'g en banc denied*, No. 13-3853, ECF No. 64 (May 7, 2014). As plaintiffs do not dispute, they need only inform their insurance issuers and third party administrators that they are eligible for 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, 39,874 (July 2, 2013).

Plaintiffs do not and cannot argue that the act of declining to provide coverage is a substantial burden on the exercise of their religion under RFRA. Plaintiffs' quarrel is not with the act of informing insurance issuers and third party

administrators that plaintiffs are not legally required to provide contraceptive coverage and are declining to provide such coverage. Indeed, plaintiffs presumably would need to do so even if they were automatically exempt from the coverage requirement, or if they were to obtain the injunction that they seek here. Plaintiffs object, instead, to the fact that after they do so, third parties like Blue Cross Blue Shield will make or arrange separate payments for contraception for the thousands of employees, students, and families who will not be receiving contraceptive coverage from their employers or institutions of higher education. But plaintiffs cannot transform the protections of the Free Exercise Clause that were recognized in the jurisprudence incorporated by RFRA into a means of prohibiting government requirements on third parties or of prohibiting the government itself from funding health coverage of which plaintiffs disapprove.

ARGUMENT

A. Opting Out of Providing Contraceptive Coverage Does Not "Substantially" Burden Plaintiffs' Religious Exercise Under RFRA.

1. Plaintiffs challenge minimum health coverage requirements under the Affordable Care Act insofar as the requirements include contraceptive coverage as part of women's preventive-health coverage. Plaintiffs, however, are either already exempt from this requirement or may opt out of this requirement by informing their insurance issuers or third party administrators that they are eligible for 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, 39,874 (July 2, 2013). In other words, plaintiffs used to provide health coverage that excluded certain contraception, and they may continue to do so. They need only "attest to [their] religious beliefs and step aside." *Mich. Catholic Conference* v. *Sebelius*, _ F. Supp. 2d _, 2013 WL 6838707, at *7 (W.D. Mich. Dec. 27, 2013), *aff'd*, _ F.3d _, Nos. 13-2723, 13-6640, 2014 WL 2596753 (6th Cir. June 11, 2014).

Plaintiffs do not object to informing insurance issuers and third party administrators that they are eligible to opt out and thus are legally permitted not to provide contraceptive coverage, and that they are declining to provide such coverage.[1] Indeed, plaintiffs presumably would need to inform their insurance issuers and third party administrators of their objection even if they were automatically exempt from the coverage requirement, or if they obtained the injunction that they seek here, to ensure that they would not be contracting, arranging, paying, or referring for such coverage. *Univ. of Notre Dame* v. *Sebelius*, _ F. Supp. 2d _, 2013 WL 6804773, at *8 (N.D. Ind. Dec. 20, 2013), *aff'd*, 743 F.3d 547 (7th Cir. 2014).

Plaintiffs instead urge that it is a substantial burden under RFRA to opt out of providing contraceptive coverage, because after plaintiffs opt out, the government

[1] Student plans are technically not provided by universities but instead are direct contractual relationships between students and health insurance issuers that are arranged by universities. The accommodations apply to student health insurance coverage arranged by an eligible organization, and are treated akin to insured group health plans. 45 C.F.R. § 147.131(f).

requires that insurance issuers and third party administrators, such as Blue Cross Blue Shield, make or arrange separate payments for contraception for the nearly 1,500 employees, students, and families who are not receiving such coverage from plaintiffs. Plaintiffs would not "contract, arrange, pay, or refer" for such coverage, 78 Fed. Reg. 39,870, 39,874 (July 2, 2013), or otherwise administer this coverage or bear any direct or indirect costs of this coverage. 45 C.F.R. § 147.131(c)(2)(ii), (f); 29 C.F.R. § 2590.715-2713A(b)(2)(i), (ii); *see also* 45 C.F.R. § 147.131(c)(2)(i)(A) (coverage would be "[e]xpressly exclude[d] . . . from the group health insurance coverage provided in connection with [plaintiffs'] group health plan[s]"); 29 C.F.R. § 2590.715-2713A(b)(1)(ii) ("Obligations of the third party administrator" are imposed by regulation, and the employer does "not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services."). Further, insurance issuers and third party administrators—rather than the eligible organizations—must notify plan participants and beneficiaries or enrollees and their covered dependents of the availability of separate payments for contraception; they must do so "separate from" materials that are distributed in connection with the eligible organizations' health coverage; and "[t]he notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services[.]" 45 C.F.R. § 147.131(d); *accord* 29 C.F.R. § 2590.715-2713A(d) (same for self-insured plans).

2. Plaintiffs cannot transform their right to opt out of providing contraceptive coverage into a substantial burden under RFRA by collapsing their decision *not* to provide such coverage with the fact that after they decline to do so, third parties like Blue Cross are required to provide such coverage.

a. In plaintiffs' view, it is immaterial whether they are required to offer and pay for contraceptive coverage or whether they may decline to do so. This view of what can constitute a "substantial burden" under RFRA is at odds with our Nation's long history of allowing religious objectors to opt out and then having others fill the objectors' shoes. *See, e.g., Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547, 556 (7th Cir. 2014) (giving the example of conscientious objection to the draft), *reh'g en banc denied*, No. 13-3853, ECF No. 64 (May 7, 2014); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 71-82 (1977) (under Title VII, employees with religious objections to working on particular days may ask to opt out and have other employees take their place where practicable). Plaintiffs cannot collapse their opt out with the fact that the government will subsequently require someone else to provide contraceptive coverage, by characterizing their decision to opt out as "trigger[ing]" (Br. 18), "facilitat[ing]" (*e.g.,* Br. 30), or "material[ly] cooperati[ng]" (*ibid.*) with such coverage.

As plaintiffs do not dispute, whether a burden is "substantial" under RFRA is a question of law, not a "'question[] of fact, proven by the credibility of the claimant.'" *Mich. Catholic Conference* v. *Burwell*, _ F.3d _, 2014 WL 2596753, at *7 (6th Cir. June 11, 2014) (quoting *Mahoney* v. *Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011) (alteration in

original)). This inquiry turns not just on whether there is "substantial pressure" on the plaintiff (*e.g.,* Br. 24), but also on the nature of the burden. *See, e.g., Mich. Catholic Conference,* _ F.3d _, 2014 WL 2596753, at *8-12; *Notre Dame*, 743 F.3d at 558 ("substantiality—like compelling governmental interest—is for the court to decide"); *Kaemmerling* v. *Lappin*, 553 F.3d 669, 673-674, 678-679 (D.C. Cir. 2008) ("[a]ccepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened"); *see also Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448 (1988) (program that would destroy place where plaintiffs' religion required them to pray did not impose burden covered by Free Exercise Clause); *Bowen* v. *Roy*, 476 U.S. 693, 701 n.6 (1986) ("Roy's religious views may not accept this distinction between individual and governmental conduct," but the law "recognize[s] such a distinction"); *Tilton* v. *Richardson*, 403 U.S. 672, 689 (1971) (plurality op.) (rejecting the plaintiffs' claim that "the Free Exercise Clause is violated because they are compelled to pay taxes, the proceeds of which in part finance grants" to religiously affiliated colleges to which they objected, on the ground that the plaintiffs were "unable to identify any coercion directed at the practice or exercise of their religious beliefs"); *cf.* 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (substantial burden requirement restores case law before *Employment Division* v. *Smith*, 494 U.S. 872 (1990)); 146 Cong. Rec. S7774, S7776 (daily ed. July 27, 2000) (same for RLUIPA, modeled on RFRA).

Nothing in the state of the law prior to *Employment Division* v. *Smith,* which RFRA restored, supports plaintiffs' contention that opting out of an obligation may itself be deemed a substantial burden on the ground that someone else will take the objector's place. *See, e.g.*, *Notre Dame*, 743 F.3d at 557 (noting the "novelty of [the] claim—not for the exemption . . . but for the right to have it without having to ask for it"); *see also Mich. Catholic Conferenc*e, _ F.3d _, 2014 WL 2596753, at *8-12.

The cases on which plaintiffs rely only underscore the novelty of their argument. In *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), the plaintiff's "religious beliefs prevented him from participating in the production of war materials." *Id.* at 709. When his employer placed him in "a department that fabricated turrets for military tanks," the plaintiff looked for openings in departments not "engaged directly in the production of weapons" and, when he could not find one, quit his job. *Id.* at 710. He was denied unemployment compensation on the ground that "a termination motivated by religion is not for 'good cause' objectively related to the work." *Id.* at 711-713. The Supreme Court disagreed and held that the state could not deny unemployment compensation "because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs[.]" *Id.* at 717-718. Notably, Thomas objected to *his* "fabricat[ing] turrets for military tanks." *Id.* at 710; *see id.* at 711 (finding that he objected to "producing or directly aiding in the manufacture of items used in warfare"). He did not object to *opting out* of doing so.

Indeed, Thomas looked in the same company for jobs not "engaged directly in the production of weapons." *Id.* at 710; *see also id.* at 711-712 (""Claimant continually searched for a transfer to another department which would not be so armament related"'). The burden in *Thomas* thus resulted from the absence of the type of opt-out mechanism available in this case. Thomas did not suggest that his religious rights would be burdened if, as a consequence of his actions, *another employee* was assigned to work on armaments manufacture.

b. The scope of plaintiffs' argument is illustrated by their insistence that the burden on their exercise of religion is the same as the burden placed on the plaintiffs in *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013). Unlike the plaintiffs in cases like *Hobby Lobby*, the plaintiffs here need not "contract, arrange, pay, or refer for contraceptive coverage" to which they have religious objections. 78 Fed. Reg. at 39,874. They "need not place contraceptive coverage into 'the basket of goods and services'" that they furnish to their employees. *Priests for Life* v. *U.S. Dep't of Health & Human Servs.* _ F. Supp. 2d _, No. 13-cv-1261, 2013 WL 6672400, at *10 (D.D.C. Dec. 19., 2013) (quoting *Gilardi* v. *U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1217 (D.C. Cir. 2013), *cert. petns. pending*, Nos. 13-567, 13-915); *see also Notre Dame*, 743 F.3d at 558 (explaining that the plaintiffs that could opt out "can derive no support from [the] decision in *Korte* v. *Sebelius*, 735 F.3d 654 (7th Cir. 2013)," in which the for-profit plaintiffs could *not* opt out).

This Court did not suggest in *Hobby Lobby* that the burden of a coverage requirement is substantial under RFRA whether or not an entity may decline to provide coverage. By plaintiffs' reasoning, a conscientious objector could object not only to his own military service, but also to opting out, on the theory that his opt out would "'trigger' the drafting of a replacement who was not a conscientious objector." *Notre Dame*, 743 F.3d at 556. "That seems a fantastic suggestion," yet, "confronted with this hypothetical at the oral argument" in *Notre Dame*, the plaintiff's counsel "acknowledged its applicability and said that drafting a replacement indeed would substantially burden the [conscientious objector's] religion." *Ibid.* Plaintiffs' view that they need only point to any act (including the act of opting out) is also at odds with cases like *Tilton*, in which the plaintiffs urged that "the Free Exercise Clause is violated because they [we]re compelled to pay taxes, the proceeds of which in part finance[d] grants" to religiously-affiliated colleges, and the Court held that the plaintiffs were "unable to identify any coercion directed at the practice or exercise of their religious beliefs." 403 U.S. at 689; *see also Bd. of Educ.* v. *Allen*, 392 U.S. 236, 248-249 (1968); Br. of Appellants 35, *Allen*, *supra* (No. 660) (arguing that they were "forced to contribute" and comparing the burden to "forcing a man to attend a church").

3. In addition to opting out of providing contraceptive coverage, plaintiffs also may choose to discontinue offering health coverage. In that scenario, plaintiffs' employees and students could purchase health insurance, which covers all essential health benefits including contraceptive benefits, on exchanges where many may

qualify for subsidies. *See* 26 U.S.C. § 36B; *see also id.* § 36B(c)(2)(B),(C) (employees are generally ineligible for subsidies if they are offered health coverage by employers). It is not clear whether plaintiffs believe that this too would constitute "facilitating" contraceptive coverage. But it also would not constitute the kind of burden that is "substantial" under RFRA. If plaintiffs pursued that course, they would save the cost of providing health coverage and may be subject to a tax of $2,000 per full-time employee (and no tax for students). *See* 26 U.S.C. § 4980H(a), (c)(1). This is yet another means by which plaintiffs can avoid providing the coverage to which they object. *See, e.g., Tony & Susan Alamo Found.* v. *Sec'y of Labor*, 471 U.S. 290, 303-305 (1985) (option to compensate employees by furnishing room and board obviates religious objection to paying cash wages).

Plaintiffs posit that if they save the cost of providing health coverage, pay any applicable tax, and then also pay their employees additional compensation, plaintiffs may not "come out ahead" financially and this could "complicate [plaintiffs'] relationships with current employees and job applicants." Br. 36. Plaintiffs are mistaken, however, in assuming that these are substantial burdens under RFRA. The Supreme Court has made clear that a burden is not substantial when it merely "operates so as to make the practice of [an adherent's] religious beliefs more expensive." *Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961); *see, e.g., Tony & Susan Alamo Found.*, 471 U.S. at 303-305 (plaintiffs must compensate employees by furnishing room and board rather than having them work for free); *Pinsker* v. *Joint Dist. No. 28J,* 735

F.2d 388, 391 (10th Cir. 1984) (requiring teacher to take unpaid leave to celebrate religious holiday is not a substantial burden). This is so even if it "put[s] [them] at a serious economic disadvantage," *Braunfeld*, 366 U.S. at 602, which plaintiffs have not posited here.[2]

Finally, plaintiffs urge that they "offer insurance (both employee and student) out of religious conviction." Br. 36. Plaintiffs, however, cannot claim that choosing not to provide health coverage for employees or students would itself substantially burden their exercise of religion. While plaintiffs "believe that their religious duties include promoting the physical well-being and health of their employees [and students] by providing them health insurance," A255, it is insufficient for RFRA analysis that their decision to provide insurance coverage to employees is "religiously motivated." *See, e.g., Henderson* v. *Kennedy,* 253 F.3d 12, 17 (D.C. Cir. 2001) ("To make religious motivation the critical focus is, in our view, to read out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement."). Providing health coverage for employees and

[2] Plaintiffs either misunderstand or mischaracterize our argument when they state that under the government's logic, "enormous fines" and taxes on attending church would raise no religious problem. Br. 37-38. Examples such as taxing "attendance at a worship service" are presumably laws targeted at religion and thus analyzed differently. More importantly, the argument is *not* that any fine or tax merely "operates so as to make the practice of [an adherent's] religious beliefs more expensive," *Braunfeld*, 366 U.S. at 605, and is therefore not a substantial burden. The point is simply that a law does not impose a substantial burden merely because an entity incurs greater expense in complying with the law's provisions in a way that also accords with the entity's religious beliefs.

students is "one of a multitude of means" to achieve the goal of furthering those employees' and students' well-being and health. *Ibid.* ("Because the Park Service's ban on sales on the Mall is at most a restriction on one of a multitude of means, it is not a substantial burden on their vocation."). Among other things, plaintiffs could further the same goal by paying higher salaries and wages, thereby helping their employees purchase individual health insurance through the exchanges. *See* Br. 36 (explaining that if they dropped health coverage, they would increase compensation).

B. Plaintiffs' Claims Would Fail Even If the Accommodations Were Subject to RFRA's Compelling Interest Test.

Plaintiffs' claims would fail even if the accommodations were subject to RFRA's compelling interest test. In *Hobby Lobby*, this Court held that the interests in public health and gender equality did not justify the requirement that employers provide contraceptive coverage. 723 F.3d at 1143-1145. As the Court is aware, *Hobby Lobby* is pending before the Supreme Court. We respectfully submit that *Hobby Lobby*'s analysis of these compelling interests is incorrect for the reasons set out in the government's Supreme Court briefs, but we recognize that *Hobby Lobby* controls at this juncture with respect to the plans offered by for profit corporations.

At issue in this case, however, are a far narrower set of regulations, which allow plaintiffs to opt out of providing contraceptive coverage by declaring that they are eligible to do so and are exercising that option. This is the way that many opt outs work. The government's ability to accommodate religious concerns in this and other

schemes depends on its ability to ask that religious objectors that do not belong to a pre-defined class (such as exempt organizations under the Internal Revenue Code) certify that they are entitled to the religious exception. *See Notre Dame*, 743 F.3d at 557 ("The novelty of [plaintiff's] claim—not for the exemption, which it has, but for the right to have it without having to ask for it—deserves emphasis."). Plaintiffs' insistence (Br. 39-42) that the government must demonstrate a compelling interest with respect to the government's requiring that companies like Blue Cross provide contraceptive coverage, after plaintiffs decline to do so, only underscores the fact that plaintiffs' objection is to acts taken by the government as to third parties.

Plaintiffs' sweeping argument ignores the fact that 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 those accommodations. Plaintiffs' analysis asserts that it is insufficient to permit an objector to opt out of an objectionable requirement; the government also may not place plaintiffs' obligations on a third party without subjecting the entire program to compelling interest analysis.

Plaintiffs' argument as to the compelling interests in this case is illustrative of the difficulties such a regime may pose. Plaintiffs assert that many of their lay employees share their religious beliefs, and therefore that the government's decision to require third parties to provide contraceptive coverage after plaintiffs decline to do so serves no compelling interest. Br. 39. This case alone involves thousands of employees, college students, and their dependents. Plaintiffs cannot seriously contend

that the government must conduct discovery of these non-parties' gender, age, medical needs, religious views, and sexual habits to determine how many will benefit from the availability of FDA-approved, doctor-prescribed contraception. Moreover, in determining whether application of a "burden to the person" being burdened "is in furtherance of a compelling governmental interest," 42 U.S.C. § 2000bb-1(b), courts must look to the type of exception being demanded. The outcome does not vary, for example, based on whether there is a large class of plaintiffs (and thus it is highly likely that some employees or students will benefit from contraceptive coverage), or a small class. Thus, in the case law that RFRA restored, the Supreme Court looked at the effect of a religious exception writ large, not just as applied to particular plaintiffs before the Court. *See Wisconsin* v. *Yoder*, 406 U.S. 205, 221 (1972) (evaluating the effects of "the claimed Amish exemption" even though only three families were before the Court); *see also Thomas*, 450 U.S. at 719 (considering "the number of people" who may be affected by the kind of accommodation sought in the case); *United States* v. *Lee,* 455 U.S. 252, 260 (1982) (looking at the effect if other adherents opted out of the Social Security system); *id.* at 262-263 (Stevens, J., concurring in the judgment) (explaining that the effect of the opt out on just the plaintiffs before the Court was small).

Many people have religious objections to many practices. These persons may object to different features of a requirement or, in this case, of a religious accommodation. But national systems of health and welfare cannot vary from point

to point or be based around what, if any, method of provision can be agreed upon by all objecting parties. 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. As the Supreme Court admonished in its pre-*Smith* decisions, "[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*, 476 U.S. at 699.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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JUNE 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 page limitation of Fed. R. App. P. 32(a)(7)(A), because it does not exceed 15 pages.

I further certify that (1) all required privacy redactions have been made; (2) the required paper copies are exact versions of the document filed electronically; and (3) that the electronic submission was scanned for viruses and found to be virus-free.

/s/ Adam C. Jed
Adam C. Jed

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system and caused seven hard copies to be delivered within two business days. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Adam C. Jed
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