

No. 14-20112

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

EAST TEXAS BAPTIST UNIVERSITY;
HOUSTON BAPTIST UNIVERSITY

Plaintiffs – Appellees

WESTMINSTER THEOLOGICAL SEMINARY,

Intervenor Plaintiff – Appellee

v.

SECRETARY KATHLEEN SEBELIUS; DEPARTMENT OF HEALTH
AND HUMAN SERVICES; DEPARTMENT OF LABOR;
DEPARTMENT OF TREASURY; SECRETARY OF LABOR THOMAS
PEREZ; SECRETARY JACOB LEW,

Defendants – Appellants

consol w/ 14-10241

UNIVERSITY OF DALLAS,

Plaintiff – Appellee

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the
United States Department of Health and Human Services; THOMAS
PEREZ, in his official capacity as Secretary of the United States
Department of Treasury; JACOB J. LEW, in his official capacity as
Secretary of the United States Department of Labor; UNITED STATES
DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED

STATES DEPARTMENT OF LABOR; UNITED STATES
DEPARTMENT OF TREASURY,

Defendants – Appellants

Consol w/ 14-40212

CATHOLIC DIOCESE OF BEAUMONT; CATHOLIC CHARITIES
OF SOUTEAST TEXAS, INCORPORATED,

Plaintiffs – Appellees

v.

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

Defendants – Appellants

**APPELLEE/INTERVENOR’S OPPOSITION TO APPELLANTS’
MOTION FOR FURTHER CONSOLIDATION OF APPEALS**

Appellee/Intervenor Westminster Theological Seminary opposes the
government’s motion to consolidate yet another appeal with this matter.
The newly proposed appeal presents significantly different fact patterns,
implicates different aspects of the challenged regulations, and involves

different arguments. For example, this new case involves different and broader challenges to the ACA Mandate than those involved in Intervenor's case and, almost as importantly, it will necessitate additional Record material. That is important to the consolidation question, because not only would consolidation bring factual/evidentiary complications into this case, it would bring a request for yet another delay in the Appellants' briefing schedule. Moreover, there is risk that this will be a continuing pattern and will result in additional delays.

Intervenor/Appellee submits that it would be more efficient for this Court to stand on the current briefing schedule, because (a) it would avoid unnecessarily complicating this case, (b) it would avoid delaying this case and (c) especially if, as the Appellants assert, the issues they want to add here are substantially similar to those already in issue here, deciding this case as it is will facilitate deciding the one they now want to add when it becomes ripe for this Court's consideration. Appellants have already obtained a degree of consolidation and, on that basis, achieved a delay in their briefing schedule because of it. They should be satisfied with the schedule and structure of this appeal as they have already asked for it.

Different fact patterns. Although the appeals do arise from a common source—the regulatory mandate that religious institutions must provide health insurance to their employees that covers various contraceptives — the similarities end there. The Appellees (including Intervenor/Appellee) in this appeal are Protestant institutions that are challenging only 4 out of 20 types of drugs and devices for which the government is mandating coverage. The Catholic Appellees are objecting to all twenty of the types required by the Mandate.

The insurance programs at issue are also different. The plaintiffs in *Catholic Diocese of Beaumont* are an exempt Catholic Diocese and a small non-profit covered under the Diocese’s church plan.¹ The University of Dallas is covered by a self-funded insurance plan. HBU is self-insured through a church plan for Protestant employers, operated by GuideStone, an arm of the Southern Baptist Convention. ETBU is self-insured, but not through a church plan. Westminster was insured

¹ A “church plan” is a benefit plan established by a church or a convention or association of churches. The plan covers the employees of those churches, and organizations controlled by or associated with the churches. *See* 29 U.S.C. § 1002(33); 29 U.S.C. § 414(e). Unless they choose otherwise, church plans are exempt from regulation under ERISA. 29 U.S.C. § 1003(b)(2).

through a Pennsylvania-based third-party insurer, but is on the brink of being insured by GuideStone. Each plan provides different sorts of health coverage for employees.

Third, the procedural postures are different. Judge Rosenthal granted a permanent injunction as to Intervenor/Appellee's RFRA claim, but the case the Appellants want to add appears to involve only a preliminary injunction.

Consolidation will cloud the issues. These important differences create the rare occasion where consolidation will cloud the merits of the issues raised in these separate appeals. The statute that grounds the issues in this case, the Religious Freedom Restoration Act, requires that the government bear its burden in reference to each individual case that arises. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (government must satisfy RFRA strict scrutiny "to the person"); *Korte v. Sebelius*, 735 F.3d 654, 685 (7th Cir. 2013) (the court must scrutinize the "harm of granting specific exemptions to particular religious claimants." In other words, under RFRA's version of strict scrutiny, the government must establish a compelling and specific justification for burdening *these* claimants.") (emphasis in original;

internal citation omitted). Yet the Government's motion for further consolidation would throw yet another diverse plaintiff, whom the core statute requires be addressed distinctly, into an already sufficiently blended hopper.

Logistical difficulties. Further consolidation also makes little logistical sense. This Court has already prescribed a procedure for limited consolidated briefing and has established a schedule for it. Layering on yet another case, with different facts, and with a record not yet prepared, will only confuse and unnecessarily delay the program this Court has already set. It would also make the factual record far more difficult for the Court to handle, especially in gauging the extent to which the records in each case support or fail to support the different results in the different cases, as to differently situated parties.

This appeal should be set for initial hearing *en banc*. As set forth in Appellees' unopposed Petition for Initial Hearing *En Banc*, Intervenor/Appellee continues to maintain that the most efficient way to resolve the appeals now before the Court (and any future appeals regarding the government's contraceptive mandate arising in the Fifth

Circuit) is to hold an initial, unconsolidated *en banc* hearing to decide this appeal.

Intervenor/Appellee respectfully requests that the Court deny the government's motion for further consolidation and grant the Petition for Initial Hearing *En Banc*.

Dated: June 30, 2014

Respectfully submitted,

/s/ Kenneth R. Wynne

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CERTIFICATE OF SERVICE

I certify that on June 30, 2014, I caused the foregoing to be served electronically via the Court's electronic filing system on the following parties who are registered in the system:

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