

Nos. 14-10241, 14-20112, 14-40212

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

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UNIVERSITY OF DALLAS, *et al.*  
*Plaintiff-Appellee,*

v.

KATHLEEN SEBELIUS, *et al.*,  
*Defendants-Appellants.*

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EAST TEXAS BAPTIST UNIVERSITY, *et al.*,  
*Plaintiffs-Appellees,*

WESTMINSTER THEOLOGICAL SEMINARY,  
*Intervenor-Plaintiff-Appellee,*

v.

SECRETARY KATHLEEN SEBELIUS, *et al.*,  
*Defendants-Appellants.*

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CATHOLIC DIOCESE OF BEAUMONT, *et al.*,  
*Plaintiffs-Appellees,*

v.

KATHLEEN SEBELIUS, *et al.*,  
*Defendants-Appellants.*

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**OPPOSITION TO APPELLANTS' MOTION TO  
CONSOLIDATE APPEALS IN PART**

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For the reasons set forth in their March 31, 2014 opposition (“March Opp.”) to the Government’s prior motion for partial consolidation, Appellees East Texas Baptist University (“ETBU”) and Houston Baptist University oppose the government’s motion to partially consolidate yet another appeal involving the HHS mandate. Indeed, the Government’s request to consolidate another appeal only reemphasizes the concerns we raised in March: The appeals present significantly different fact patterns and involve different arguments. Because of those differences, leaving the appeals consolidated will both have a significant effect on the merits and create unwarranted procedural advantages for the Government. March Opp. 1-4.<sup>1</sup>

The Court should therefore (a) deny further partial consolidation, (b) de-consolidate the previously-consolidated appeals, and (c) grant the still-pending Petition for Initial Hearing *En Banc* in the *ETBU* appeal.

***Effect on the merits.*** As we explained in our previous opposition, the appeals involve different religious objections (two Protestant institutions with narrower objections to the HHS mandate in No. 14-20112, and numerous Catholic institutions with broader objections in

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<sup>1</sup> Judge Dennis, sitting as a single judge, granted the Government’s previous opposed motion for partial consolidation on April 28, 2014.

Nos. 14-10241, 14-10661, 14-40212), different insurance arrangements (third-party insurer, third-party administrator, and church plan), and different procedural postures with different standards of review (final judgment and preliminary injunction). March Opp. 1-4. Throwing these many different factual and procedural scenarios into a single appeal proceeding will make it harder to do justice to each of the different fact patterns.

More importantly, consolidating multiple RFRA appeals undermines the requirement that the Court measure the Government's interest "to the person[.]" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U. S. \_\_\_, slip op. at 39 (June 30, 2014) (quoting *Gonzales v. O Centro Espirita*, 546 U.S. 418, 430-31 (2006)). The Government has resisted that requirement in all of the HHS mandate cases around the country. Consolidating multiple appeals inevitably puts pressure on the Court to conduct RFRA balancing in gross, rather than "to the person."

***Procedural disadvantages.*** Consolidating multiple appeals into a day of four or more back-to-back hearings will put Appellees at a significant disadvantage during argument. The Government would have a single person present argument, while Appellants would have to

divide the same amount of argument time among three or four separately-represented parties. That sort of oral argument would be far less likely to help the Court and would unduly harm the various plaintiffs' ability to make their arguments. The problem would be exacerbated because much of the time during plaintiffs' arguments would likely be spent explaining the factual differences between the various appeals. That procedural disadvantage is unfair to Appellees.

Finally, since there are other cases concerning the HHS mandate pending in the district courts of this Circuit, the Court can expect future requests from the Government to consolidate the inevitable appeals in those cases as well. *See, e.g., Louisiana College v. Sebelius*, No. 12-cv-00463 (W.D. La.); *Catholic Diocese of Biloxi v. Sebelius*, No. 14-cv-00146 (S.D. Miss.). That will lead to an even more unfair and unwieldy approach to the important issues in these appeals.

For these reasons, the Court should deny further partial consolidation, de-consolidate the already-consolidated appeals, and grant the still-pending Petition for Initial Hearing *En Banc* in No. 14-20112.

Respectfully submitted,

Dated: July 3, 2014

/s/ Eric C. Rassbach

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**CERTIFICATE OF SERVICE**

I certify that on July 3, 2014, I caused the foregoing to be served electronically via the Court's electronic filing system.

*/s/ Eric C. Rassbach*  
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*Attorney for Plaintiffs-Appellees*