No. 14-6026

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

Plaintiffs-Appellees

v.

SYLVIA BURWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *ET AL.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Oklahoma
Case No. 5:13-cv-01015-F
(Honorable Stephen P. Friot)

APPELLEES' SUPPLEMENTAL BRIEF

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INTRODUCTION

The Supreme Court's decision in *Burwell v. Hobby Lobby* confirms that forcing Southern Nazarene University, Oklahoma Wesleyan University, Oklahoma Baptist University, and Mid-America Christian University to facilitate access to abortifacient drugs and devices against their religious beliefs violates the Religious Freedom Restoration Act. The government had urged the Court second-guess the plaintiffs' sincere beliefs that complying with the challenged regulations would contradict their convictions. The high Court refused, embracing instead this Court's holding that government "substantially burdens" religious exercise under RFRA when it imposes substantial pressure upon a claimant to violate its convictions. And the Court's analysis and result both confirm that the alternative compliance mechanism set forth in the so-called "accommodation" is not the least restrictive means of achieving any compelling governmental interest. Accordingly, the *Hobby Lobby* decision requires this Court to affirm the district court's preliminary injunction in favor of the Universities.

ARGUMENT

I. THE SUPREME COURT'S DECISION IN *HOBBY LOBBY* CONFIRMS THAT THE MANDATE SUBSTANTIALLY BURDENS THE UNIVERSITIES' RELIGIOUS EXERCISE.

A. *Hobby Lobby* Confirms the District Court's Approach and Result.

1. *The correct test is whether the government is substantially pressuring a claimant to violate its sincere religious beliefs.*

In *Hobby Lobby v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), this Court declared that the federal government "substantially burdens" religious exercise under RFRA when it substantially pressures a claimant to engage in conduct contrary to its sincerely stated religious convictions. *Id*. at 1137 (rather

than examining closeness of connection between companies' actions and abortifacient use, "[o]ur only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief.")

In adjudicating the Universities' motion for preliminary injunction in the instant case, the district court faithfully applied this Court's test. Accepting the parties' joint stipulations, the district court concluded that the Universities would violate their religious convictions by complying with the HHS Mandate, either as originally written or as modified by the so-called "accommodation." It then held, consistent with this Court's conclusion in *Hobby Lobby*, that the government substantially pressured the Universities to violate their convictions, given the magnitude of the fines they would face for either (a) continuing to offer health insurance plans that would not facilitate access to abortifacients; or (b) dropping employee health insurance altogether. Applying this Court's test, the district court held that the government had substantially burdened the Universities' religious exercise, a *prima facie* RFRA violation.

The Supreme Court has confirmed the correctness of this Court's (and thus the district court's) approach to the "substantial burden" inquiry. In *Hobby Lobby*, the Court first observed that "[b]y requiring the Hahns and the Greens and their companies to arrange for [objectionable] coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs." *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354, slip op. at 32 (U.S. June 30, 2014) [hereinafter "Slip op."]. The Court then recounted the financial penalties their companies would face if they offered non-compliant plans or dropped employee health insurance altogether, remarking that "[t]hese sums are surely substantial." *Id*. Summarizing its analytical approach to the "substantial burden" question, the Court first stated that the companies' compliance with the Mandate "violates their

religious beliefs, and HHS does not question their sincerity." Slip op. at 38. It then declared:

> Because the contraceptive mandate forces them to pay an enormous sum of money—as much as $475million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.

Slip op. at 38.

The Supreme Court thus approved this Court's understanding of RFRA's "substantial burden" inquiry, which the district court in the instant case correctly applied in adjudicating the Universities' motion for preliminary injunction.

2. *The district court correctly applied the test.*

Given the Supreme Court's *Hobby Lobby* decision, this Court must affirm the district court's conclusion that the government is substantially burdening the Universities' religious exercise. It is substantially pressuring the Universities to violate their sincere religious conviction against facilitation of abortifacient coverage and use.

As noted above, the government stipulated that the Universities' religious beliefs prevent them from complying with the Mandate through the accommodation. Joint App. at 267, ¶ 2; at 274, ¶ 64-65. The fines the Universities would incur if they continued to offer health plans that do not facilitate access to objectionable abortifacients are substantial.[1]

[1] For Southern Nazarene, the annual penalty would be $11,497,000; for Oklahoma Wesleyan, $4,088,000; for Oklahoma Baptist, $9,818,500; and for Mid-America Christian, $5,073,500. *See* 26 U.S.C. § 4980D(b).

Accordingly, application of the Mandate to the Universities violates their RFRA rights unless the government has employed the least restrictive means of furthering a compelling governmental interest.

3. *The Court did not hold that the accommodation's alternative compliance mechanism satisfies RFRA.*

After concluding that the Mandate substantially burdened religious exercise, the *Hobby Lobby* Court held that the Mandate was not the least restrictive means of advancing a compelling governmental interest, and thus violated RFRA. Slip op. at 40-45. The Court observed that the government could advance its stated objectives by "assum[ing] the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." Slip op. at 41. The Court noted that the government "has not shown . . . that this is not a viable alternative." *Id*. (citing 42 U.S.C. § 2000bb-1(b)(2)).[2]

The Court also observed that the accommodation results in the availability of free abortifacients through a mechanism that is less restrictive of the plaintiffs' stated religious exercise than the direct requirement that plan sponsors like them

[2] Indeed, the government has, in a sense, already embraced a version of that mechanism, creating a new program under which it reimburses (at a premium) third-party administrators for the cost of making separate payments for drugs and devices to which a plan sponsor objects. *See* 45 C.F.R. § 156.50 (providing for an "adjustment in the Federally-facilitated Exchange user fee"); 29 C.F.R. § 2590.715-2713A(b)(3) (same); 26 C.F.R. § 54.9815-2713A(b)(3) (same). Given that the government tacitly conceded that cost is not an obstacle to its assumption of the cost of objectionable abortifacients, the only remaining question is whether it is impossible for the government to create a mechanism that does not make the Universities an indispensable cog in the government's machinery. The government has failed to prove that such a mechanism—in which the Universities would not facilitate access to abortifacients in violation of the religious convictions—is impossible.

pay for those drugs and devices. Slip op. at 43. The Court noted that the Greens and Hahns *only* objected to the Mandate's requirement that they directly pay for the objectionable drugs and devices, slip op. at 44; given the unavailability of the accommodation to them, they had no reason to even consider whether it satisfies their moral concerns about facilitating immoral acts. *Id*., n. 40.

To foreclose any potential misinterpretation of its discussion, the Court explicitly declared, "[w]e do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims." Slip op. at 44. The Court cited its earlier order in *Little Sisters of the Poor v. Sebelius*, 2014 WL 272207 (U.S. Jan. 24, 2014), in which it relieved a non-profit eligible for the accommodation of the obligation to execute and convey the self-certification form to the administrator of its employee health plan. *Id*., n. 39. Indeed, just three days after the Court issued its *Hobby Lobby* opinion, the Court did likewise in *Wheaton College v. Burwell*, 573 U.S. ___, 2014 WL 3020426 (U.S. July 3, 2014).

In short, the fact that the accommodation's alternative compliance mechanism is a less restrictive way of pursuing the government's stated interests tells us nothing about whether the alternative mechanism substantially burdens the religious exercise of those to whom it is available. But, of course, the Court's interpretation and application of RFRA's substantial burden inquiry undeniably shows that the accommodation's alternative compliance mechanism substantially burdens the religious exercise of those entities, like the Universities, whose religious beliefs forbid them from facilitating access to abortifacients through the accommodation.

B. *Hobby Lobby* Repudiated the Government's Efforts to Alter the "Substantial Burden" Inquiry.

The Supreme Court explicitly repudiated three "substantial burden" arguments the government made both there and in the instant case. Each was an

unsuccessful effort to reject and replace the substantial burden test set forth by this Court in its en banc *Hobby Lobby* opinion.

1. *The Court rejected the government's "attenuation" argument.*

The Supreme Court held that it will not second-guess a religious claimant's sincere ethical conclusions about whether compliance with the government's demands would violate its religious convictions. Slip op. at 35-38. The government had argued that "the connection between what the objecting parties must do . . . and the end they find to be morally wrong . . . is simply too attenuated." Slip op. at 35. Of course, the government is making the same argument in the instant case, challenging the Universities' belief that compliance with the Mandate via the accommodation constitutes morally impermissible "facilitation" of abortifacient use (and thus substantially burdens their religious exercise in light of the enormous fines for non-compliance).

Without equivocation, the Supreme Court rejected the government's contention:

> This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable).

Id. at 36 (emphasis in original). The Hahn and Green families believed that providing the required coverage was "connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage." *Id*. Their belief "implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to

perform an act that is innocent in itself but that has the effect of enabling or facilitating[3] the commission of an immoral act by another." *Id*.

By arguing that the families' moral concerns were too "attenuated" to implicate RFRA's substantial burden component, the government was "[a]rrogating the authority to provide a binding national answer to this religious and philosophical question" and "in effect tell[ing] the plaintiffs that their beliefs are flawed." Slip op. at 36-37. The Court stated, "[f]or good reason, we have repeatedly refused to take such a step." *Id*. at 37 (citing *Emp. Div. v. Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim")).

Just as the Universities argue and the district court held, the Supreme Court remarked that, in *Thomas v. Review Board*, it "considered and rejected an argument that is nearly identical to the one now urged by HHS and the dissent." *Id*. (citing *Thomas*, 450 U.S. 707 (1981)). As the Court recounted, the claimant there drew a non-self-evident moral line between permissible and impermissible employment tasks. *Id*. The state court questioned the coherence of his moral line-drawing and rejected his claim. *Id*. Reversing, the Supreme Court stated that "it is not for us to say that the line he drew was an unreasonable one." 450 U.S. at 715.

In *Hobby Lobby*, the Hahns and Greens sincerely believed that providing the required insurance coverage "lies on the forbidden side of the line." Slip op. at 37. In the instant case, the Universities believe that facilitating access to abortifacients through the accommodation's alternative compliance mechanism also lies on the forbidden side of their moral line. Just as the *Hobby Lobby* Court declared that "it

[3] The government's persistent objection to the Universities' use of the word "facilitation" to describe their role under the accommodation is particularly unwarranted given the Supreme Court's language here.

is not for us to say that their religious beliefs are mistaken or insubstantial," *id*., it is not for this Court to say that the Universities' religious beliefs are mistaken, and thus that the enormous pressure on them to violate those beliefs is not a substantial burden under RFRA.

2. *The Court rejected the argument that the Mandate did not substantially burden the plaintiffs' religious exercise because they could drop health insurance.*

The *Hobby Lobby* Court rejected another argument made by the government both there and in the instant case: that the Mandate does not substantially burden an objecting plan sponsor's religious exercise because it could drop health insurance. Slip op. at 32-35. The argument rested on the premise that the penalty for dropping insurance was less than the cost of providing coverage. *Id*. at 32-33.

At the outset, the Court noted that the argument had not been raised below, and that it generally does not consider such contentions. Slip op. at 33. It observed that "the plaintiffs have never had an opportunity to respond to this novel claim that—contrary to their longstanding practice and that of most employers—they would be better off discarding their employer insurance plans altogether." *Id*. The same is true in the instant case: the government failed to make this assertion in the district court, and thus this Court need not (and should not) consider it.

Should this Court choose to consider the government's argument, it must follow the Supreme Court and reject it. The high Court declared, "we refuse to sustain the challenged regulations on the ground . . . that dropping insurance coverage eliminates the substantial burden that the HHS mandate imposes." Slip op. at 35.

3. *The Court rejected the argument that regulations conferring benefits on third parties cannot substantially burden religious exercise.*

The *Hobby Lobby* Court also rejected the government's argument that regulations conferring benefits on third parties are not susceptible to RFRA challenges. Slip op. at 42, n. 37. The government has made the same contention in the instant case, oddly claiming that the interests of third parties must be considered at the "substantial burden" stage of the RFRA analysis.

Stating that nothing in the text or purposes of RFRA supported this line of argument, the *Hobby Lobby* Court indicated (as the Universities have done in the instant case[4]) that RFRA's compelling governmental interest inquiry may include consideration of third party interests. *Id*. Otherwise, as the Court aptly noted, "[b]y framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless." *Id*.

In the opening brief in the instant case, the government seemed to suggest that Free Exercise Clause cases decided prior to *Employment Division v. Smith* approached the burden issue in this peculiar way. The government's contention that RFRA merely codified pre-*Smith* case law apparently is intended to bolster its claim that third-party interests figure into the substantial burden inquiry. *See, e.g.*, Gov. Br. at 21 ("RFRA is not properly interpreted to create tension with the approach of these pre-*Smith* cases.").

The *Hobby Lobby* Court rejected this contention as well, declaring that "the results would be absurd if RFRA merely restored this Court's pre-*Smith* decisions in ossified form." Slip op. at 27; *see also id*. ("we are not aware of any pre-*Smith* case in which this Court entertained a free-exercise claim brought by a resident

[4] *See* Appellees' Br. at 32.

noncitizen. Are such persons also beyond RFRA's protective reach simply because the Court never addressed their rights before *Smith*?").

In sum, the Supreme Court's decision in *Hobby Lobby* confirms that the Mandate substantially burdens the Universities' religious exercise, a *prima facie* violation of their RFRA rights.

II. THE MANDATE FAILS STRICT SCRUTINY.

Because the Mandate substantially burdens the Universities' religious exercise under the approach set forth by the Supreme Court in *Hobby Lobby*, the government must prove that forcing the schools to violate their religious beliefs is the least restrictive means of advancing a compelling governmental interest. This it cannot do.

A. Application of the Mandate to the Universities Does Not Advance a Compelling Governmental Interest.

In *Hobby Lobby*, the government urged the Supreme Court to reverse this Court's judgment that the Mandate does not advance a compelling governmental interest. The high Court declined that invitation, electing not to adjudicate that element of the RFRA analysis. Slip op. at 40.

As a consequence, the en banc Tenth Circuit's decision that the Mandate does not further a compelling interest remains controlling. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1143-44 (10th Cir. 2013). *See also Newland v. Sebelius*, 542 Fed. Appx. 706, 709 (10th Cir. Oct. 3, 2013); *Korte v. Sebelius*, 735 F.3d 654, 685-86 (7th Cir. 2013); *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1219-22 (D.C. Cir. 2013). Therefore, the application of the Mandate to the Universities violates RFRA.

B. Application of the Mandate to the Universities is Not the Least Restrictive Means of Advancing the Government's Stated Interests.

When the Universities moved for a preliminary injunction, this Court had already held in *Hobby Lobby* that the Mandate was not the least restrictive means of advancing a compelling governmental interest. 723 F.3d at 1144.[5] In opposing that motion, the government failed even to argue that the accommodation was the least restrictive means of advancing its stated interests. ECF No. 25, at p. 27-28. It instead acknowledged that "a majority of the en banc Tenth Circuit rejected these arguments in *Hobby Lobby*, and that this Court is bound by that decision." *Id*. The government noted that the Supreme Court had recently granted its petition for a writ of certiorari.

In its opening and reply briefs on appeal to this Court, the government once again failed even to mount an argument on this front, apparently counting upon (or hoping for) the Supreme Court to reverse this Court's decision. Of course, the high Court did not do so, concluding that the Mandate was not the least restrictive means of advancing the government's stated interests. That decision leaves the government without any argument that applying the Mandate to the Universities is the least restrictive means of advancing its stated interests.

The Court's conclusion that the Mandate with the accommodation is *less* restrictive than the Mandate without it hardly means that the accommodation is the *least* restrictive means. Other means exist, including the assumption by the government of "the cost of providing the four contraceptives at issue to any women

[5] This Court stated that the government had failed to explain how its stated interests would be undermined by exempting the plaintiff companies from the Mandate. *Id*. "Hobby Lobby and Mardel ask only to be excused from covering four contraceptive methods out of twenty, not to be excused from covering contraception altogether. The government does not articulate why accommodating such a limited request fundamentally frustrates its goals." *Id*. The Universities object to the same four drugs and devices.

who are unable to obtain them under their health-insurance policies due to their employers' religious objections." Slip op. at 41. As noted above, the Supreme Court observed that the government "has not shown . . . that this is not a viable alternative." It has not even attempted such a showing in the instant case.

The government has thus failed to carry its burden of proving that there is no means less restrictive of the Universities' religious exercise than the accommodation's alternative compliance mechanism. Accordingly, application of the Mandate to the schools violates their rights under RFRA.

CONCLUSION

The Universities respectfully request that this Court affirm the district court's order preliminarily enjoining application of the Mandate to them.

Respectfully submitted this the 22nd day of July, 2014.

By:

s/ Gregory S. Baylor

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the page limit of 15 pages set by court order on July 1, 2014 and has been prepared in a proportionally spaced typeface Times New Roman 14 point font. 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/ Gregory S. Baylor
Attorney for Appellees

CERTIFICATE OF SERVICE

I herby certify that on July 22, 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system and caused 7 hard copies to be delivered within two business days. Opposing counsel and counsel for amici supporting Appellants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/Gregory S. Baylor
Gregory S. Baylor