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

PRIESTS FOR LIFE, et al.,
Plaintiffs-Appellants,
and

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, et al.,
Plaintiffs-Appellants/Cross-Appellees,
v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,
Defendants-Appellees/Cross-Appellants.

On Appeals from the United States District Court for the District of Columbia
(No. 13-1261 (Sullivan, J.) and No. 13-1441 (Berman Jackson, J.))

RESPONSE TO PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

*Authorities upon which we chiefly rely are marked with an asterisk.

Regulations:

Other Authorities:

GLOSSARY

ACA	Affordable Care Act
HHS	U.S. Department of Health and Human Services
IOM	Institute of Medicine
RFRA	Religious Freedom Restoration Act
TPA	Third party administrator

INTRODUCTION AND SUMMARY

Plaintiffs challenge regulations that establish minimum health coverage requirements under the Affordable Care Act (ACA) insofar as they include contraceptive coverage as part of women's preventive health coverage. The regulations contain accommodations for a non-profit organization that holds itself out as religious and that has a religious objection to providing contraceptive coverage. Such an organization may opt out of the contraceptive-coverage requirement by notifying its insurance issuer or third party administrator (TPA) or, alternatively, the Secretary of Health and Human Services (HHS), that the organization is eligible for an accommodation and declines to provide contraceptive coverage.

A panel of this Court determined that the regulations do not impermissibly burden plaintiffs' exercise of religion under the Religious Freedom Restoration Act of 1993 (RFRA). The two other courts of appeals to have addressed this issue have reached the same conclusion. *Mich. Catholic Conference* v. *Burwell*, 755 F.3d 372 (6th Cir. 2014), *reh'g en banc denied*, Nos. 13-2723, 13-6640, ECF No. 63 (Sept. 16, 2014), *cert. pet. pending*, No. 14-701 (filed Dec. 12, 2014); *Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547 (7th Cir. 2014), *reh'g en banc denied*, No. 13-3853, ECF No. 64 (May 7, 2014), *cert. pet. pending*, No. 14-392 (filed Oct. 3, 2014).

Although plaintiffs urge that that the panel's opinion conflicts with the Supreme Court's decision in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the panel correctly recognized that *Hobby Lobby* confirms the validity of the

accommodations offered by the agencies. Unlike plaintiffs here, the plaintiffs in *Hobby Lobby* were closely held for-profit companies that were not eligible for the accommodations. The linchpin of the Court's "very specific" holding in *Hobby Lobby* was the existence of the opt-out alternative afforded to organizations such as the plaintiffs in this case. *Id.* at 2759-2760. The Court recognized that the accommodations "effectively exempt[]" eligible organizations, *id.* at 2763, and emphasized that the accommodations "seek[] to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage," *id.* at 2759. The Court also stressed that the effect of its decision "would be precisely zero," because if the accommodations were made available to for-profit organizations, "these women would still be entitled to all FDA-approved contraceptives without cost sharing," *id.* at 2760, and "they would continue to face minimal logistical and administrative obstacles because their employers' insurers would be responsible for providing information and coverage," *id.* at 2782 (internal quotation marks omitted).

BACKGROUND

1. The relevant factual and regulatory background is set out fully in the panel's opinion. In brief, the ACA requires group health plans to offer women's preventive health services "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration," 42 U.S.C. § 300gg-13(a)(4), which include

coverage of "'[a]ll [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,' as prescribed" by a health care provider. 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012).

The Departments have implemented regulatory accommodations that are available to any nonprofit organization that "holds itself out as a religious organization" and that opposes covering some or all of the required contraceptive services "on account of religious objections." 45 C.F.R. § 147.131(b); *accord* 29 C.F.R. § 2590.715-2713A(a); 26 C.F.R. § 54.9815-2713A(a).[1] Regulations promulgated in July 2013 provided that to opt out, an organization need only declare its eligibility using a standard form to its insurance issuer or third party administrator. *Hobby Lobby*, 134 S. Ct. at 2782. An organization that opts out is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. 39,870, 39,874 (July 2, 2013).

If an eligible organization opts out, individuals covered under its plan generally will "still have access to insurance coverage without cost sharing for all FDA-approved contraceptives," but without involvement by the objecting organization. *Hobby Lobby*, 134 S. Ct. at 2759. If the eligible organization offers an insured plan, the

[1] "'[C]hurches, their integrated auxiliaries, and conventions or associations of churches,' as well as 'the exclusively religious activities of any religious order'" are exempt from the contraceptive-coverage requirement under a separate regulation that cross-references the Internal Revenue Code. *Hobby Lobby*, 134 S. Ct. at 2763 (quoting 26 U.S.C. § 6033(a)(3)(A) and citing 45 C.F.R. § 147.131(a)).

insurance issuer is required to "provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries." *Id.* at 2763. If the eligible organization offers a self-insured plan, the third party administrator ordinarily "must 'provide or arrange payments for contraceptive services' for the organization's employees without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries." *Id.* at 2763 n.8 (quoting 78 Fed. Reg. at 39,893); *see* 29 C.F.R. § 2590.715-2713A(b)(2).

In all cases, the objecting organization will not contract for or in any way pay for this separate coverage. 78 Fed. Reg. at 39,874, 39,887. The organization also need not inform plan participants or enrollees of the coverage provided by third parties. Instead, issuers and third party administrators must do so "separate from" materials that are distributed in connection with the eligible organization's coverage. 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(d). That notice must make clear that the organization is not administering or funding the contraceptive benefits. *Ibid.*

The Departments reviewed the regulatory accommodation process in light of the Supreme Court's interim order in *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014) (per curiam), which required Wheaton to inform HHS in writing that it satisfied the eligibility requirements for the accommodations. *Id.* at 2807. The order provided that Wheaton "need not use the form prescribed by the Government" and "need not send copies to health insurance issuers or [TPAs]." *Ibid.* But the Court also specified that

"[n]othing in [its] order precludes the Government from relying on" the written notice provided by Wheaton "to facilitate the provision of full contraceptive coverage under the Act." *Ibid.* Accordingly, the Court emphasized that "[n]othing in [its] interim order affects the ability of [Wheaton's] employees and students to obtain, without cost, the full range of FDA approved contraceptives." *Ibid.*

Although the Court's interim order in *Wheaton College* cautioned that it "should not be construed as an expression of the Court's views on the merits," 134 S. Ct. at 2807, the Departments augmented the accommodations to provide that an eligible organization may opt out by notifying HHS of its decision rather than by notifying its insurance issuer or third party administrator. An organization need not use any particular form and need only indicate the basis on which it qualifies for an accommodation and its objection to providing some or all contraceptive services, as well as the type of plan and contact information for the plan's third party administrators and health insurance issuers. 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii); 45 C.F.R. § 147.131(c)(1)(ii). If an eligible organization notifies HHS that it is opting out using this alternative method, the Departments make the necessary communications to ensure that health insurance issuers or third party administrators make or arrange separate payments for contraception. 45 C.F.R. § 147.131(c)(1)(ii); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B).

2. Plaintiffs are employers and universities that collectively provide health coverage to thousands of employees, students, and dependents. Plaintiffs are either

automatically exempt because they are houses of worship under the Internal Revenue Code, or are eligible to opt out of providing coverage under the accommodations.

A panel of this Court held that plaintiffs have not established a substantial burden under RFRA, and that even if they had, the regulations satisfy RFRA's compelling interest test. The panel observed that the opt-out regulations work as "such mechanisms ordinarily do." Op. 32. They "fully relieve Plaintiffs from the obligation to provide or pay for contraceptive coverage, and instead obligate a third party to provide that coverage separately." Op. 37-38; *see* Op. 31-34. The panel explained that "[r]eligious objectors do not suffer substantial burdens under RFRA" where "they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out." Op. 24. The panel rejected plaintiffs' attempt to collapse their decision to opt out with requirements placed on third parties by the government after plaintiffs opt out. Op. 36-38. The Court noted that such a theory "is extraordinary and potentially far reaching." Op. 24.

The panel also held that the challenged regulations satisfy RFRA's compelling interest test. *See* Op. 45-66. Relying on the opinions in *Hobby Lobby*, a report by the Institute of Medicine, and other applicable authorities, the panel identified a number of interrelated compelling interests that are served by this opt-out regime, relating to women's access to healthcare. Op. 46-60. The panel explained that, as *Hobby Lobby* recognized, these interests are still well served if organizations opt out and the government arranges seamless coverage for affected women, but not if affected

women must go through additional obstacles to obtain coverage to which the organizations object. Op. 60-66.

DISCUSSION

A. The panel correctly concluded that the Supreme Court's decision in *Hobby Lobby* confirms the validity of the regulatory accommodations, and the Supreme Court's reasoning cannot be reconciled with plaintiffs' position here. The Supreme Court held that application of the contraceptive coverage requirement to the plaintiffs in that case—closely held companies that were not eligible for the regulatory opt out—violated their rights under RFRA. Central to the Court's reasoning was the existence of the opt-out alternative that the Departments afford to organizations such as the plaintiffs here.

The Supreme Court explained that the opt-out regulations "effectively exempted" organizations that are eligible for an accommodation. *Hobby Lobby*, 134 S. Ct. at 2763. This accommodation, the Court observed, "seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." *Id.* at 2759; *see id.* at 2786-2787 (Kennedy, J., concurring) ("[T]he means to reconcile" the "two priorities" of respecting religious freedom without "unduly restrict[ing] other persons, such as employees, in protecting their own interests, interests the law deems compelling" "are at hand in the existing accommodation.").

The Supreme Court did not suggest that employers could prevent their employees from obtaining contraceptive coverage from third parties through the regulatory accommodations. To the contrary, the Court reiterated that "in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'" *Id.* at 2781 n.37 (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005)). The Court thus stressed that its decision "need not result in any detrimental effect on any third party," *ibid.*, and repeated in at least six places that "[t]he effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be *precisely zero*," *id.* at 2760 (emphasis added); *accord id.* at 2759 (accommodations "ensur[e] that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage"); *ibid.* (the "system available to religious nonprofits . . . constitutes an alternative that achieves all of the Government's aims"); *id.* at 2782 (The accommodations would "protect the asserted needs of women as effectively" insofar as employees "would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to face minimal logistical and administrative obstacles because their employers' insurers would be responsible for providing information and coverage.") (citation and internal quotation marks omitted); *ibid.* (the accommodation "serves HHS's stated interests equally well"); *id.* at 2783 (the accommodations would not "'[i]mped[e] women's

receipt of benefits by "requiring them to take steps to learn about, and to sign up for, a new government funded and administered health benefit."'") (alterations in original, quoting dissent (quoting 78 Fed. Reg. at 39,888)).[2]

B. The Supreme Court's observation in *Hobby Lobby* that organizations eligible for the opt-out are "effectively exempt[]," 134 S. Ct. at 2763, is consistent with this Court's observation that "[t]he accommodation here works in the way such mechanisms ordinarily do: the objector completes the written equivalent of raising a hand in response to the government's query as to which religious organizations want to opt out." Op. 32. They "fully relieve Plaintiffs from the obligation to provide or pay for contraceptive coverage, and instead obligate a third party to provide that coverage separately." Op. 37-38; *see* Op. 31-34, 36-44.

Plaintiffs do not object to informing third parties or the government that they are legally permitted to opt out of providing contraceptive coverage and choose to do so. Plaintiffs have done so in the past and would presumably continue to do so even

[2] Similarly, the Supreme Court's interim order in *Wheaton College* required Wheaton to inform HHS in writing that it satisfied the eligibility requirements for the accommodations and made clear that the Departments could "rely[] on" this notice to "facilitate the provision of full contraceptive coverage under the Act." 134 S. Ct. at 2807. Accordingly, the Court emphasized that "[n]othing in [its] interim order affects the ability of [Wheaton's] employees and students to obtain, without cost, the full range of FDA approved contraceptives." *Ibid.* That is how the augmented accommodations operate. Plaintiffs' theory that they need not inform the government of their decision not to provide coverage, if the government will rely on that notice by requiring or offering to pay third parties to make or arrange separate payments, is thus in significant tension with the *Wheaton College* order.

if they obtained the injunctions they seek. Plaintiffs object instead to the fact that, after they opt out of providing contraceptive coverage, the government generally requires insurance issuers or third party administrators such as AETNA to make or arrange separate payments for contraceptive services for the affected women.

As this Court observed, "[p]laintiffs' claim is extraordinary and potentially far reaching." Op. 24. "What makes this case and others like it involving the contraception exemption paradoxical and virtually unprecedented is that the beneficiaries of the religious exemption are claiming that the exemption process itself imposes a substantial burden on their religious faiths." *Ibid.* (quoting *Notre Dame*, 743 F.3d at 557). Plaintiffs' argument that their decision to opt out of providing coverage constitutes a "substantial burden" under RFRA is at odds with our Nation's long history of allowing religious objectors to opt out and the government then requiring others to fill the objectors' shoes. On plaintiffs' reasoning, a conscientious objector to the draft can not only can refrain from serving himself, but can also allege that his religion is substantially burdened if the government drafts a replacement to serve instead. Under plaintiffs' construction of RFRA, such objectors can point to the act of opting out and declare that the government has imposed "substantial pressure" to "violate their religious beliefs" (Pet. 2, 6, 7). Similarly, the claimant in *Thomas* v. *Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), on which plaintiffs heavily rely (Pet. iii, 6, 7), could have demanded not only that he not make weapons but also that he not be required to *opt out* of doing so, because his opt out would cause

someone else to take his place on the assembly line.

Plaintiffs do not advance their argument by noting that the government will enlist the same third party that administers plaintiffs' health coverage to provide contraceptive coverage to the affected women. *See, e.g.*, Pet. 10. This is not an objection to a requirement imposed on plaintiffs but rather to obligations that the government imposes on third parties such as AETNA. A religious objector cannot subject to strict scrutiny any requirement imposed on *others* with whom the objector interacts, simply by stating the objection as an objection to interacting with others who are subject to such a requirement.

C. The Supreme Court's analysis in *Hobby Lobby* is also fully consistent with this Court's holding that even if the accommodations impose a substantial burden under RFRA, they satisfy RFRA's compelling interest test. *See* Op. 45-66. "RFRA does not permit religious exercise to 'unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.'" Op. 64 (quoting *Hobby Lobby*, 134 S. Ct. at 2786-87 (Kennedy, J., concurring)). In *Hobby Lobby*, five Justices recognized that providing contraceptive coverage serves compelling interests. 134 S. Ct. at 2785-2786 (Kennedy, J., concurring); *id.* at 2799-2800 & n.23 (Ginsburg, J., dissenting).[3] The remaining Justices assumed this to be the

[3] Plaintiffs' assertion (Pet. 13 n.3) that Justice Kennedy merely "observ[ed] that the Government 'makes the case'" that the regulations serve compelling interests cannot be squared with the opinion itself. Immediately after noting that the

Continued on next page.

case and stressed that the accommodation would have "precisely zero" effect on women, *id.* at 2760, because women "would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, *and* they would continue to face minimal logistical and administrative obstacles because their employers' insurers would be responsible for providing information and coverage," *id.* at 2782 (citation and internal quotation marks omitted; emphasis added).

Plaintiffs mistakenly assert (Pet. 10 n.4, 11) that *Hobby Lobby* rejected the relevant interests as too "broadly framed." In the passage immediately following the language quoted by plaintiffs, the Court distinguished between "broadly framed interests" and the "compelling interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing." 134 S. Ct. at 2779. Here, the "government has pathmarked the more focused inquiry by explaining how those larger interests inform and are specifically implicated in its decision to support women's unhindered access to contraceptive coverage." Op. 51.

Plaintiffs note (Pet. 12) that not every employer is presently required to provide contraceptive coverage and posit that therefore there can be no compelling interest in

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government "makes the case" that the contraceptive coverage requirement furthers compelling interests, Justice Kennedy declared that "[i]t is important to confirm that a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the heath of female employees." *Hobby Lobby*, 134 S. Ct. at 2785-2786. He went on to emphasize that while the government may not "restrict[] or demean[]" a person's exercise of religion, "neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, *interests the law deems compelling*." *Id.* at 2786-2787 (emphasis added).

the government's relying on their decision to opt out and stepping in to provide such coverage. But, of course, "[t]he government can have an interest in the uniform application of a law, even if that law allows some exceptions." Op. 65. Numerous organizations are not required to pay taxes; more than half of the country is exempt from having to register for the draft; and Title VII does not apply to the 80% of employers in the United States that have fewer than fifteen employees (*see* 42 U.S.C. § 2000e(b) for example). But it does not follow that raising tax revenue, raising an army, and combatting discrimination are not compelling interests.[4]

Nor does the fact that "85 percent of employer-sponsored health insurance plans" provided some contraceptive coverage before the ACA, or that contraception can sometimes be obtained "at free and reduced cost" mean that there is no "problem in need of solving." Pet. 13 (quotation marks omitted). Prior to the ACA, many plans offered no contraceptive coverage. And "reduced cost" contraception offered by many plans did not achieve the government's interests because even moderate copays deter people from obtaining contraceptive services. *See, e.g.*, Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 19, 109 (2011) (IOM Report).

[4] Plaintiffs note (Pet. 12) that churches and integrated auxiliaries as defined by the Internal Revenue Code are automatically exempt under a separate regulation that cross-references the definition of those religious organizations exempt from filing tax returns. *See* 45 C.F.R. § 147.131(a). There is a long tradition of "special solicitude" for such organizations. *See Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 706-707 (2012). Under plaintiffs' logic, there can be no interest in requiring other religious organizations (and perhaps for-profit corporations whose officers have religious views) to file tax returns.

Plaintiffs are on no firmer ground in declaring (Pet. 14) that the panel lacked adequate support for its conclusion that the opt-out regulations are the least restrictive means of allowing objectors to opt out while also ensuring that affected women "have precisely the same access to all FDA-approved contraceptives." *Hobby Lobby*, 134 S. Ct. at 2759. The panel noted the Supreme Court's repeated emphasis in *Hobby Lobby* that the accommodation "'serves HHS's stated interests equally well'" and that the effect on women "'would be precisely zero.'" Op. 61. The panel also relied on the agencies' conclusion, reached after notice and comment, that "[i]mposing additional barriers to women receiving the intended coverage (and its attendant benefits), by requiring them to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women," 78 Fed. Reg. at 39,888, and on the Institute of Medicine Report (on which the agencies also relied) which, in turn, recited studies linking obstacles to access with reduced use of services, *see* IOM Report 19, 109.

It is difficult to discern what sort of alternative would satisfy plaintiffs. Plaintiffs suggest (Pet. 14-15) that the Departments should create new programs modeled on Title X or Medicaid (perhaps available regardless of whether employers and universities have opted out). These approaches would not "protect the asserted needs of women as effectively," *Hobby Lobby*, 134 S. Ct. at 2782, or "equally further[] the Government's interest," *id.* at 2786 (Kennedy, J., concurring), because—as the Supreme Court disclaimed—such programs would at the very least require affected

women "to take steps to learn about, and to sign up for, a new government funded and administered health benefit." *Id.* at 2783. Indeed, the very point of requiring coverage of contraceptives without cost sharing is that even small burdens prevent women from using important preventive services, including contraception. *See, e.g.*, 78 Fed. Reg. at 39,888; IOM Report 19, 109. *Cf. Reno* v. *Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997) (alternatives must be equally effective).

In any event, the government is not required to create an entirely new program to provide contraception, but rather is permitted to work within the constraints of the existing employer-based healthcare system. *See Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring) ("In these cases, it is the Court's understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government."). Congress's statutory directive in RFRA cannot properly be interpreted to require agencies to adopt alternatives not authorized by law. If RFRA did not take cognizance of the limits of the Departments' statutory authority, then affected women would be left without coverage altogether unless Congress itself revised RFRA or authorized new programs. Such a result cannot be squared with the Supreme Court's reasoning in *Hobby Lobby* and *Wheaton College*, both of which emphasized that the Supreme Court was *not* impairing women's access to contraceptive coverage.

CONCLUSION

For the foregoing reasons, the petition for rehearing en banc should be denied.

Respectfully submitted,

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JANUARY 2015

CERTIFICATE OF COMPLIANCE

I hereby certify that this response complies with the requirements of Fed. R. App. P. 35(b)(2) and this Court's order of December 31, 2014, because it has been prepared in 14-point Garamond, a proportionally spaced font, and does not exceed 15 pages, excluding material not counted under Rule 32.

/s/ Adam C. Jed
Adam C. Jed

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2015, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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