Nos. 13-1540, 14-6026, 14-6028

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, a Colorado non-profit corporation, *et al.*,

Plaintiffs-Appellants,

SOUTHERN NAZARENE UNIVERSITY, *et al.*,

Plaintiffs-Appellees,

REACHING SOULS INT'L, INC., an Oklahoma not for profit corporation, *et al.*,

Plaintiffs-Appellees,

v.

SYLVIA M. BURWELL, Secretary of the United States Department of Health and Human Services, *et al.,*

Defendants-Appellants and Defendants-Appellees.

On Appeal from the United States District Courts
for the District of Colorado, No. 13-cv-2611 (Martinez, J.), and
Western District of Oklahoma, No. 13-cv-1015 (Friot, J.), No. 13-cv-1092 (DeGiusti, J.),

SUPPLEMENTAL BRIEF FOR THE GOVERNMENT

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INTRODUCTION

Pursuant to this Court's August 27, 2014 order, the government respectfully submits this supplemental brief to address the questions posed by the Court regarding the impact of the interim final rules on the issues raised in these cases. *See Coverage of Certain Preventive Services Under the Affordable Care Act*, 79 Fed. Reg. 51,092 (Aug. 27, 2014).

Under the preexisting regulatory accommodations, an eligible organization could opt out of the Affordable Care Act's contraceptive coverage requirement by informing its insurer or third party administrator that it was declining to provide contraceptive coverage. The interim final rules provide eligible organizations with another means for opting out of contraceptive coverage. Under the augmented regulations, an eligible organization may opt out by notifying the Department of Health and Human Services (HHS), rather than its insurer or third party administrator, that it is declining to provide contraceptive coverage.

Plaintiffs may decide that the alternative approach permitted by the interim final rules satisfies their concerns under the Religious Freedom Restoration Act (RFRA). If, however, they decide to proceed with these cases, the interim final rules present questions of law that this Court may resolve in the first instance.

It is crucial that these appeals be resolved now. Because of the injunctions issued in these cases, the women employed by plaintiffs have been and continue to be denied access to contraceptive coverage. That result is inconsistent with the Supreme Court's recent guidance on the accommodations in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) and *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014). In both *Hobby Lobby* and *Wheaton*

College, the Supreme Court recognized the importance of ensuring that women have access to contraceptive services with minimal obstacles.

Specifically, in *Hobby Lobby*, which involved closely held for-profit corporations that—unlike the plaintiffs here—were not eligible for the opt-out accommodations, the Supreme Court pointed to the accommodations at issue in this case and stressed 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*." 134 S. Ct. at 2760 (emphasis added); *see id.* at 2759 (explaining that the accommodation "ensur[es] 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"). After employers opt out, 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." *Id.* at 2782 (citation and internal quotation marks omitted).

The Supreme Court's interim order in *Wheaton College* identified an alternative form of accommodation that would neither affect "the ability of [Wheaton College's] employees and students to obtain, without cost, the full range of FDA approved contraceptives," nor preclude the government from relying on the notice it receives from Wheaton College "to facilitate the provision of full contraceptive coverage under the Act." 134 S. Ct. at 2807.

The interim final rules provide an additional option for eligible organizations to opt out of providing such coverage, while "serv[ing] the Government's compelling interest in

providing insurance coverage that is necessary to protect the health of female employees." *Hobby Lobby*, 134 S. Ct. at 2785-86 (Kennedy, J., concurring). The government's arguments regarding the preexisting accommodations apply with equal force to the interim final rules. And by proceeding with these appeals, the Court will ensure that there is no further delay in securing contraceptive coverage for plaintiffs' employees.

BACKGROUND

As discussed in the government's principal briefs, the preexisting regulatory accommodations require only that eligible organizations fill out a self-certification form stating their objections to contraceptive coverage and send a copy of that form to the plan's health insurer or third party administrator. On August 22, 2014, HHS and the Departments of Labor and the Treasury (collectively, the Departments) augmented that regulatory accommodation process in light of the Supreme Court's interim order in *Wheaton College*. The interim order in *Wheaton College* provided that, "[i]f [Wheaton College] informs the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services, the [Departments] are enjoined from enforcing against" Wheaton College the challenged ACA contraceptive coverage requirements "pending final disposition of appellate review." 134 S. Ct. at 2807. The order stated that Wheaton College need not use the self-certification form prescribed by the government or send a copy of the executed form to its health insurance issuers or third party administrators to meet the condition for this injunctive relief. The order also stated that this relief neither affected "the ability of [Wheaton College's] employees and students to obtain, without cost, the full range of FDA

approved contraceptives," nor precluded the government from relying on the notice it receives from Wheaton College "to facilitate the provision of full contraceptive coverage under the Act." *Ibid.*[1]

The *Wheaton College* injunction does not reflect a final Supreme Court determination that RFRA requires the government to apply the accommodations in this manner. Nevertheless, the Departments responsible for implementing the accommodations issued regulations that augment the accommodation process in light of *Wheaton College* by "provid[ing] an alternative process for the sponsor of a group health plan or an institution of higher education to provide notice of its religious objection to coverage of all or a subset of contraceptive services." 79 Fed. Reg. at 51,094.

Under the interim final rules, an organization may opt out by notifying HHS of its decision directly rather than by notifying its insurance carrier or third party administrator. An organization need not use any particular form, but the notice must be in writing and "must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of some

[1] In *Little Sisters of the Poor Home for the Aged* v. *Sebelius,* the Supreme Court enjoined enforcement of the challenged regulations on the condition that "the employer applicants inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services[.]" 134 S. Ct. 1022, 1022 (2014) (mem.). The Court noted that it "issues this order based on all the circumstances of the case," *ibid.*, which included the circumstances that the third party administrator administered a church plan, and therefore the regulation's requirements could not be enforced against it, and it had already declared that it would not voluntarily provide independent coverage. The Court also made explicit that "this order should not be construed as an expression of the Court's views on the merits." *Ibid.* The interim final rules are consistent with the Court's interim order in *Little Sisters*.

or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 C.F.R. § 147.145(a) or a church plan within the meaning of ERISA [the Employee Retirement Income Security Act] section 3(33)); and the name and contact information for any of 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).[2] If there is a change in any of the information required to be included in the notice, the organization must provide updated information to HHS. *Ibid.*

If a group health plan notifies HHS that it is opting out, the Departments will then make the necessary communications to ensure that health insurance issuers or third party administrators make or arrange separate payments for contraception. In the case of an "insured" group health plan, HHS "will send a separate notification to each of the plan's health insurance issuers informing the issuer" that HHS "has received a notice" that the group health plan is opting out of providing contraceptive coverage on religious grounds, "and describing the obligations of the issuer" under the regulations. 45 C.F.R. § 147.131(c)(1)(ii). An issuer that receives such a notice from HHS will "remain responsible for compliance with the statutory and regulatory requirement to provide coverage for contraceptive services to participants and beneficiaries," but the objecting organization "will not have to contract, arrange, pay, or refer for such coverage." 79 Fed. Reg. at 51,095.

[2] All citations to the implementing regulations are to those regulations as amended by the interim final rules.

In the case of a "self-insured" group health plan, the Department of Labor will "send a separate notification to each third party administrator of the ERISA plan." *Ibid.* The notification will state that HHS has received a notice that the group health plan is opting out of the contraceptive coverage requirement and will "describe[] the obligations of the third party administrator under" the applicable regulations. 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B). These include the obligation to make or arrange separate payments for contraceptive services. *Id.* § 2590.715-2713A(b)(2). The Department of Labor's communication to the third party administrator(s) will also "designate the relevant third party administrator(s) as plan administrator under section 3(16) of ERISA for those contraceptive benefits that the third party administrator would otherwise manage." 79 Fed. Reg. at 51,095; *see* 29 C.F.R. § 2510.3-16(b).

As with the preexisting accommodations, in all cases, the eligible organization that opts out of providing contraceptive coverage has no obligation to inform plan participants or enrollees of the availability of these separate payments made by third parties. Instead, the health insurance issuer or third party administrator itself provides this notice, and does so "separate from" materials that are distributed in connection with the eligible organization's group health coverage. 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(d). That notice must make clear that the eligible organization is neither administering nor funding the contraceptive benefits. *Ibid.*

DISCUSSION

1. The impact of the interim final rules on the claims and requested remedies as to each plaintiff.

As an initial matter, whether this case proceeds at all depends on whether plaintiffs wish to pursue this litigation notwithstanding the additional regulatory accommodations. If they determine that the additional accommodations adequately address their concerns, the interim final rules will effectively resolve the litigation.

Assuming, however, that plaintiffs continue to press their suit, the new rules underscore the infirmity of plaintiffs' legal position. As explained in the government's principal briefs and its July 22 supplemental brief on the impact of the Supreme Court's decision in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the plaintiffs were already "effectively exempt[]" from the contraceptive-coverage requirement under the preexisting regulatory accommodations, *id.* at 2763. The Supreme Court's reasoning in *Hobby Lobby* confirms the validity of the preexisting regulatory accommodations and applies with equal force to the alternative accommodations. The existing accommodation, the Supreme Court explained, "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. The Court declared that this accommodation is "an alternative" that "achieves" the aim of seamlessly providing coverage of recommended health services to women "while providing greater respect for religious liberty." *Ibid.*; *see also id.* at 2782 (recognizing religious accommodation as a less burdensome alternative that "d[id] not impinge on the plaintiffs' religious belief that

providing insurance coverage for [contraceptives] violates their religion" while still "serv[ing] HHS's stated interests equally well" by generally ensuring that health coverage available to women does not vary according to the religious beliefs of their employers).

The linchpin of plaintiffs' reasoning is the mistaken view that opting out of providing contraceptive coverage "triggers" or "facilitates" provision of such coverage by third parties. But, as we have discussed in our previous filings, this argument reduces to the contention that an organization can prohibit the government from requiring insurers and administrators to provide coverage after the organization opts out of the coverage requirement. *See Mich. Catholic Conference* v. *Burwell*, 755 F.3d 372, 386-387 (6th Cir. 2014) ("[s]ubmitting the self-certification form to the insurance issuer or third-party administrator does not 'trigger' contraceptive coverage; it is federal law that requires the insurance issuer or the third-party administrator to provide this coverage"), *pet. for reh'g pending* (filed July 25, 2014); *accord Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547, 554 (7th Cir. 2014), *reh'g en banc denied*, No. 13-3853, ECF No. 64 (May 7, 2014). Moreover, the alternative accommodations allow employers to opt out by notifying HHS rather than their insurers or third party administrators. After receiving notification, the Departments send "a separate notification" to the insurer or third party administrator informing them of the employers' opt-out and describing the obligations imposed on them by federal law. 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B); 45 C.F.R. § 147.131(c)(1)(ii). As this sequence illustrates, an organization does not "facilitate" the provision of contraceptive coverage. It merely informs HHS that it is opting out, at which point federal law independently obligates the insurer or third party administrator to provide such coverage.

The augmented regulatory accommodations, like the preexisting 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." *Hobby Lobby*, 134 S. Ct. at 2759. The interim final rules provide an alternative opt-out mechanism that respects religious liberty while allowing the government to achieve its "compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee." *Id.* at 2785-2786 (Kennedy, J., concurring); *accord id.* at 2800 & n.23 (Ginsburg, J., dissenting). This alternative offers an administrable way for organizations to state that they object and opt out—without contacting their insurers or third party administrators directly—while providing the government with the information needed to implement the requirement that third parties provide contraceptive coverage so that participants and beneficiaries can "obtain, without cost, the full range of FDA approved contraceptives." *Wheaton Coll.* v. *Burwell*, 134 S. Ct. 2806, 2807 (2014). As the Supreme Court emphasized, "[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; *see also id.* at 2782 (explaining that after employers opt out, employees "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)). Plaintiffs have not identified any less restrictive mechanism through which the agencies could ensure women's access to contraceptive coverage.

Hobby Lobby also underscores plaintiffs' error in urging that the Court should evaluate their challenge to the regulatory accommodations without regard to their employees' interest in obtaining contraceptive coverage from third parties through the regulatory accommodations. *Hobby Lobby* explained that "in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.' " 134 S. Ct. at 2781 n.37 (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005)). The free exercise of religion protected by RFRA cannot "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Id.* at 2787 (Kennedy, J., concurring).

2. Whether any or all of the cases must be remanded for consideration in the district court in light of the interim final rules.

Issuance of the interim final rules does not necessitate a remand, which would result in significant additional delays in ensuring access to contraceptive coverage for the plaintiffs' employees and their beneficiaries.

The parties have fully briefed the issues relating to the preexisting accommodations, including the impact of the Supreme Court's decision in *Hobby Lobby*. The same legal principles apply to the augmented accommodations (assuming that plaintiffs decide to pursue their challenge notwithstanding the issuance of the interim final rules). If plaintiffs determine to press their suit, they will presumably explain why they believe that the alternative accommodations also fail to address their concerns. In that event, the

government would request the opportunity to file a short response, at which point the legal issues will be fully briefed.[3]

3. Whether these cases may be appropriately heard during the 60-day written comment period and before final regulations become effective.

These cases may be appropriately heard during the 60-day written comment period. The interim final rules are effective now, *see* 79 Fed. Reg. at 51,092 (providing for August 27, 2014 effective date), and plaintiffs may take advantage of the alternative opt-out mechanism set forth in the interim final rules. If plaintiffs instead decide to pursue this litigation notwithstanding the alternative accommodations, they may raise any challenges to the alternative accommodations in their supplemental briefs. As discussed, the Court may resolve any legal questions relating to the alternative accommodations set forth in the interim final rules.

[3] On September 2, 2014, the D.C. Circuit ordered supplemental briefing on the impact of *Hobby Lobby*, *Wheaton College*, and the interim final rules on consolidated appeals raising substantially the same legal issues presented here. Those appeals were argued in May 2014. *See Priests for Life, et al.* v. *U.S. Dep't of Health & Human Servs.*, No. 13-5368 (D.C. Cir.) (oral argument held May 8, 2014). Also on September 2, 2014, the Third Circuit remanded an appeal raising similar issues for reconsideration by the district court in light of *Hobby Lobby*, *Wheaton College*, and the interim final rules. In that case, the parties had not yet filed their briefs on the merits of the appeal. *See Catholic Charities Archdiocese of Phila., et al.* v. *Sec'y U.S. Dep't of Health & Human Servs.*, No. 14-3126 (3d Cir.). Other appeals in the Third Circuit that, like this one, have been fully briefed remain pending before that court. *See Geneva College, et al.* v. *Burwell, et al.*, Nos. 13-3536, 14-1374, 14-1376 & 14-1377 (3d Cir.) (briefing completed Aug. 11, 2014).

4. [A] Whether the interim final rules must satisfy the Administrative Procedure Act's "good cause" requirement of 5 U.S.C. § 553(b)(B) and § 553(d)(3), and [B] whether the interim final rules satisfy the "good cause" requirement.

Section 553(b)(B) of the Administrative Procedure Act (APA) allows agencies to depart from normal notice and comment rule-making procedures for "good cause." 5 U.S.C. § 553(b)(B) ("Except when notice or hearing is required by statute, this subsection does not apply … when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."). Section 553(d), in turn, requires publication of a substantive rule "not less than 30 days before its effective date, except … as otherwise provided by the agency for good cause found and published with the rule." *Id.* § 553(d)(3).

A. The Departments' interim final rules need not satisfy the APA's "good cause" requirement because, in the Employee Retirement Income Security Act, the Internal Revenue Code, and the Public Health Service Act, Congress expressly authorized the Secretaries to "promulgate any interim final rules as the Secretary determines are appropriate to carry out this part." 29 U.S.C. § 1191c; 26 U.S.C. § 9833 (same but replacing "part" with "chapter"); 42 U.S.C. § 300gg-92 (same but replacing "part" with "subchapter"); *see also* 79 Fed. Reg. at 51,095 (discussing statutory authority).

Because of this express statutory grant of authority to issue interim final rules, the APA's default notice and comment rulemaking procedures and "good cause" requirement do not apply. *See Asiana Airlines* v. *FAA*, 134 F.3d 393, 396, 398 (D.C. Cir. 1998) (upholding issuance of interim final rule without public notice and comment or invocation of "good

cause" exception and concluding Congress expressly created an exception to APA by, *inter alia*, directing agency to publish an "interim final rule" and to seek comment "'pursuant to,' not in anticipation of, that rule").

B. Even if the interim final rule were subject to the "good cause" requirement, it would readily satisfy that standard. Courts, including this Court, have found the good cause standard satisfied in a variety of circumstances. *See, e.g., N. Am. Coal Corp.* v. *Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 854 F.2d 386, 389 (10th Cir. 1988) (explaining that "the loss or delay of medical benefits to many eligible coal miners was a real harm" that satisfied the APA's "good cause" requirement); *Mid–Tex Elec. Coop., Inc.* v. *FERC*, 822 F.2d 1123, 1132-1134 (D.C. Cir. 1987) (concluding "good cause" requirement was satisfied where interim final rule was necessary to avoid " 'regulatory confusion' and 'irremedial financial consequences,' " particularly where rule was temporary—a "key consideration[] in evaluating an agency's 'good cause' claim"); *see also Methodist Hosp. of Sacramento* v. *Shalala*, 38 F.3d 1225, 1236 (D.C. Cir. 1994) ("[D]eviation from APA requirements has been permitted where congressional deadlines are very tight and where the statute is particularly complicated.").

In this case, the interim final rules explain that "the Secretaries have determined that it would be impracticable and contrary to the public interest to delay putting the provisions in these interim final regulations in place until a full public notice and comment process is completed" and that "there is good cause to make these interim final regulations effective immediately." 79 Fed. Reg. at 51,095, 51,096. The Departments issued the interim final rules "in light of the Supreme Court's order in Wheaton College … and to preserve participants' and beneficiaries' (and, in the case of student health insurance coverage,

enrollees' and dependents') access to coverage for the full range of FDA-approved contraceptive services, as prescribed by a health care provider, without cost sharing." 79 Fed. Reg. at 51,095. The Departments explained that "[i]n order to provide other eligible organizations with an option equivalent to the one the Supreme Court provided to Wheaton College on an interim basis, regulations must be published and available to the public as soon as possible." *Ibid.* Moreover, "[d]elaying the availability of the alternative process in order to allow for a full notice and comment period would delay the ability of eligible organizations to avail themselves of this alternative process and could delay women's access to contraceptive coverage without cost sharing, thereby compromising their access to necessary contraceptive services." *Id.* at 51,905-51,906.

In short, the Departments issued the interim final rules in direct response to the Supreme Court's July 3, 2014 order in *Wheaton College*. The fact that delay in implementation of the rules would result in inconsistent application of the accommodations (given the *Wheaton College* order) and would delay thousands of women's access to contraceptive services and Congress's express authorization to issue interim final rules strongly support a finding of "good cause."

CONCLUSION

This Court should proceed with oral argument in these cases.

Respectfully submitted,

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SEPTEMBER 2014

CERTIFICATIONS OF COMPLIANCE

I hereby certify this brief complies with this Court's order of August 27, 2014, because it is no longer than 15 pages long in a 13 point font.

I further certify that (1) all required privacy redactions have been made; and (2) that the electronic submission was scanned for viruses and found to be virus-free. Pursuant to this Court's order, hard copies of the brief are not required.

/s/ Megan Barbero
Megan Barbero

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 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/ Megan Barbero
Megan Barbero