Case No. 14-6028

In the United States Court of Appeals for the Tenth Circuit

Reaching Souls International, Inc., *et al.*, *Plaintiffs-Appellees*,
v.
Kathleen Sebelius, 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,
Judge Timothy D. DeGiusti, No. 13-cv-01092

Amicus Brief of the American Center for Law & Justice Supporting Plaintiffs-Appellees and Urging Affirmance

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* certifies that is not a publicly held corporation, issues no stock, and has no parent corporation. Because the American Center for Law & Justice issues no stock, no publicly held corporation owns 10% or more of its stock.

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Identity and Interest of Amicus Curiae

Amicus curiae, the American Center for Law & Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel for a party, *e.g.*, *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007), *rev'd*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for *amici*, *e.g.*, *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245 (10th Cir. 2008).

The federal regulations at issue in this case require non-exempt health plans to include coverage of abortifacient drugs and devices, contraception, sterilization, and related patient education and counseling services without copays ("the Mandate"). The ACLJ has been active in litigation concerning the Mandate. In total, the ACLJ currently represents clients in seven pending actions against the government, including two cases with petitions for certiorari currently pending before the United States Supreme Court.[1] The ACLJ has also

[1] *See Korte v. Sebelius,* 735 F.3d 654 (7th Cir. 2013), petition for cert. pending, No. 13-937 (filed Feb. 6, 2014); *Gilardi v. U.S. Dep't of Health & Human Servs*., 733 F.3d 1208 (D.C. Cir. 2013), petitions for cert. pending, Nos. 13-567, 13-915 (filed Nov. 5, 2013 & Jan. 30, 2014); *O'Brien v. U.S. HHS*, No. 12-3357 (8th Cir.) (oral argument heard on

submitted amicus briefs with this Court on behalf of parties challenging the Mandate in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1138 (10th Cir.) (en banc), *cert. granted*, 134 S. Ct. 678 (2013), and *Newland v. Sebelius*, 542 Fed. Appx. 706 (10th Cir. 2013) (unpublished), petition for cert. pending, No. 13-919 (filed Jan. 31, 2014).

October 24, 2013); *Am. Pulverizer Co. v. U.S. HHS*, No. 12-3459-cv-S-RED (W.D. Mo.); *Lindsay v. U.S. HHS*, No. 1:13-cv-01210 (N.D. Ill.); *Bick Holdings, Inc. v. U.S. HHS*, No. 4:13-cv-462-AGF (E.D. Mo.); *Hartenbower v. U.S. HHS*, No. 1:13-cv-2253 (N.D. Ill.).

Statements Regarding Consent to File, Authorship, and Financial Contributions

The parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* and its counsel made such a monetary contribution.

Argument

I. The Government's Attempt to Import Third Party Interests into the Substantial Burden Analysis Distorts RFRA and Contradicts Precedent.

The question whether a government action burdens a claimant, and whether that burden is justified, are separate issues. Yet the government conflates them. In support of the argument that its so-called "accommodations" do not substantially burden Plaintiffs' religious exercise under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. ("RFRA"), the government asserts that courts evaluating a burden on religious exercise must take into account "the burden on third parties," *i.e.*, plan participants and beneficiaries. Gov't Br. at 21-22 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *United States v. Lee*, 455 U.S. 252 (1982); and *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)). The government's position confuses the *existence* of a burden with possible *justifications* for that burden. This warps the analysis. Moreover, the government's cases do not support its novel proposition; in fact, those cases actually support Plaintiffs' well-established position.

In *Sherbert*, when the Supreme Court considered "whether the disqualification for [unemployment] benefits imposes any burden on the free exercise of appellant's religion," it looked *only* to whether the religious claimant was pressured to forego her religious practice. *Id*. at 404. Whatever relevance "other person's religious liberties" had for the Court in *Sherbert*, *see* Gov't Brief at 21 (quoting *Sherbert*, 374 U.S. at 409), it did not import this consideration into the substantial burden stage of its analysis.

In *Yoder*, the Amish parents did not have to carry the "difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education" in order to demonstrate a substantial burden on their religious exercise. Gov't Brief at 22 (quoting *Yoder*, 406 U.S. at 235-36). In holding that the "impact of the compulsory-attendance law" on the Amish parents' religious exercise was "not only severe, but inescapable," the Court looked no further than the Wisconsin law at issue to assess the burden on the Amish parents' exercise of their religious beliefs, their way of life, and their manner of education. *Yoder*, 406 U.S. at 216-18. The adequacy of the Amish parents' alternate form of education was noted by the Court with

respect to a distinct stage of the analysis, namely, the government's assertion of a compelling governmental interest, *not* the government's assertion that the law did not substantially burden their religious exercise in the first place. *Id.* at 235-36.

Lee similarly fails to support the government's proposition. The Court's statement, quoted by the government, that granting the Amish farmer in that case a religious exemption would "operate[] to impose the employer's religious faith on [his] employees," was made in the context of evaluating the government's compelling governmental interest, not in whether the Social Security tax imposed a substantial burden on his religious exercise in the first place. *Id.* at 261. In fact, as *Lee* makes clear, the Court held that Lee's religious exercise was burdened, even though it ultimately held that imposition of the Social Security tax satisfied strict scrutiny. *Id.* at 257.

The government's use of *Cutter* fares no better. Potential burdens on nonbeneficiaries, the Court held, are to be taken into "adequate account" with respect to "a requested *accommodation*," not with respect to whether a substantial *burden* has been imposed. Gov't Br. at 22-23 (quoting *Cutter*, 544 U.S. at 720) (emphasis supplied). While third

party interests might be relevant in applying strict scrutiny under RFRA, they are not relevant as to whether strict scrutiny is triggered under RFRA through the demonstration of a substantial burden.

When this Court considered whether the Mandate substantially burdened the religious exercise of the employers in *Hobby Lobby*, it focused on the challenged government act relative *only to* the religious claimants, without any regard to their employees' interests or those of other third parties. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1140 (10th Cir. 2013) (en banc), *cert. granted*, 134 S. Ct. 678 (2013) (stating that, in applying the substantial burden test, "First, we must identify the religious belief in this case . . . . Second, we must determine whether this belief is sincere . . . . Third, we turn to the question of whether the government places substantial pressure on the religious believer."). There is no reason for this Court to do otherwise here.

Case law is clear: a substantial burden on religious exercise is determined by focusing on whether a government act "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief." *Id.* at 1138 (quoting *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010). To import arguments

from the *application of strict scrutiny* back into the *burden* analysis would be to double-count those arguments and contort well-settled RFRA review. This Court should reject the government's efforts to overturn this firmly established framework.

II. Employers Often Decline to Provide Employees With Specific Benefits They Desire.

The government's position that third party interests in getting certain employment perks are relevant to "the nature of the [Plaintiffs'] asserted burden" is not just analytically wrong, it is unpersuasive. Gov't Br. at 21. *Employers deny employees things all the time.* A dress code denies the freedom to dress as one chooses. *E.g.*, *Mt. Healthy Sch. Dist. Bd. of Educ.*, 429 U.S. 274, 282 (1977) (employee criticizing workplace dress code). Fixed work shifts deny employees the freedom to work the hours they choose. *E.g.*, *Bhd. of Locomotive Engineers v. Atchison, Topeka & Santa Fe R.R.*, 516 U.S. 152, 158 (1996) (noting fatigue likely to result from 12-hour shift). Office layouts deny employees the space and furniture arrangements they might prefer. *E.g.*, *Kilby v. CVS Pharm., Inc.*, 739 F.3d 1192, 1194 (9th Cir. 2013) (noting role of "business judgment" in determining the "physical layout of the workplace"). Finite salaries deny employees money beyond their

pay. *E.g.*, *Comm'r of Internal Revenue v. Kowalski*, 434 U.S. 77, 81 (1977) (amount of salary subject to labor negotiation). Employers may impose these various working conditions as a matter of financial planning, or personal taste, or corporate philosophy, to list just some possible motivations. That religious beliefs, personal moral values, or a sense of fairness might also motivate the determination of work conditions and compensation—for better or worse, from the employees' perspective—is not remarkable.

Moreover, under the government's approach, the federal government itself denies employees guaranteed coverage of preventive services not included in the HHS Mandate. *E.g.*, Michelle Diament, "Feds Omit ABA Therapy From New Insurance Requirements," disabilityscoop (Feb. 22, 2013) (autism therapy omitted despite heavy lobbying effort);[2] Jen Wieczner, "Will Obamacare take bite out of dental coverage?," MarketWatch (July 24, 2013) (no adult dental coverage and gaps in coverage for children).[3] The federal government also denies, through the Affordable Care Act's individual mandate, the freedom to

[2] http://www.disabilityscoop.com/2013/02/22/feds-aba-insurance/17346/ (last visited, May 19, 2014).

[3] http://www.marketwatch.com/story/will-obamacare-take-bite-out-of-dental-coverage-2013-07-12 (last visited, May 19, 2014).

choose to forego health insurance for the present in order to allocate those resources elsewhere. And, of course, the federal government is content to deny mandatory coverage to the class of employees whose employers are not bound by the HHS mandate.

The mischaracterization of religious free exercise as denying or imposing burdens upon third parties is a charge that knows no limits. The employee who refuses a Sabbath shift imposes upon his employer or, perhaps, co-workers who need to fill in. *But see Sherbert*, 374 U.S. 398. The parent who removes his or her Amish child from formal high school education denies that child the instruction that would otherwise be given. *But see Yoder*, 406 U.S. 205. The owners of a kosher deli who refuse to sell pork deny their patrons the option of a ham sandwich. *But see* Jonathan D. Sarna, "Constitutional Dilemma on Birth Control," Forward.com (Mar. 16, 2012) ("We all might agree that kosher delis should not be coerced into selling ham.").[4] And the physician who refuses to perform a "female circumcision," *see* Female Genital Mutilation, World Health Organization media centre fact sheet (Feb.

[4] http://forward.com/articles/152606/constitutional-dilemma-on-birth-control/ (last visited, May 19, 2014).

2014),[5] or an unnecessary amputation, *see* David Brang *et al.*, "Apotemnophilia: a neurological disorder," 19 NeuroReport 1305 (2008) (disorder characterized by intense desire for amputation of healthy limb),[6] each impose upon the would-be recipients of those procedures (or their parents). To be sure, concrete injury to third parties, when actually present, is a valid consideration in applying strict scrutiny to assertions of religious freedom. But treating religious exercise as presumptively suspect because it may affect third parties makes no more sense than treating free speech, freedom of association, or Fourth Amendment rights as presumptively suspect because they, too, may affect third parties in some vague or indirect way.

[5] http://www.who.int/mediacentre/factsheets/fs241/en/ (last visited, May 19, 2014).
[6] http://cbc.ucsd.edu/pdf/apotem.pdf (last visited, May 19, 2014).

Conclusion

The court below was correct not to consider the interests of any party other than Plaintiffs in determining the existence of a substantial burden on Plaintiffs' religious exercise. Such considerations belong, instead, in the application of strict scrutiny—where the government's arguments fail on the merits. This Court should affirm.

Respectfully submitted,

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Certificate of Compliance

I hereby certify to the following:

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 1,897 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it was prepared in Microsoft Word, Century Schoolbook, 14-point font.

/s/ *Jay Alan Sekulow*
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Certificate of Digital Submission

I certify that, with respect to this brief of *amicus curiae*

(1) all privacy redactions have been made as required by Tenth Circuit Rule 25.5;

(2) the hard copies to be submitted to the Clerk of Court are exact copies of the ECF submission; and

(3) the digital submission has been scanned for viruses and is free from viruses.

/s/ *Jay Alan Sekulow*
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Certificate of Service

On May 23, 2014, I electronically filed the foregoing brief with the Clerk of this Court through the appellate CM/ECF system. The participants in the case are registered CM/ECF users, and service will be accomplished through the CM/ECF system.

/s/ *Jay Alan Sekulow*
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