Nos. 14-6163, 14-6171,
15-6029, 15-6037, 15-6139,
16-6030, 16-6217, & 16-6313

In the United States Court of Appeals for the Tenth Circuit

THE CATHOLIC BENEFITS ASSOCIATION, ET AL.,

Plaintiffs-Appellees/
Cross-Appellants,

v.

THOMAS E. PRICE, M.D., SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Defendants-Appellants/
Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of Oklahoma,
Case Nos. 5:14-cv-240-R and 5:14-cv-685-R
(Honorable David L. Russell)

APPELLEES' MOTION FOR SUMMARY AFFIRMANCE

OR TO DISMISS APPEAL

Table of Contents

INTRODUCTION

More than three years ago, the district court granted the Catholic Benefits Association ("CBA") a preliminary injunction because it found that the Defendants-Appellants' attempt to force them into providing contraceptives, abortifacients, sterilizations, and related counseling is likely illegal under the Religious Freedom Restoration Act. The Defendants-Appellants, three federal agencies and their respective secretaries (collectively, "the Departments"), then filed this appeal.

Recently, the Departments revisited their mandate and concluded that "applying the contraceptive coverage requirement" to such ministries "would violate RFRA." But while the Departments now agree with the district court's RFRA analysis, the Department of Justice continues to seek continuances from this Court.

Given the Departments' new conclusions, there is no substantial question for the Court to decide related to the district court's preliminary injunction. Accordingly, pursuant to 28 U.S.C. § 2106, Federal Rule of Appellate Procedure 2, and Tenth Circuit Rule 27.3, this Court should summarily affirm the district court's order. In the alternative, the CBA requests that the Court dismiss the Departments'

appeal. Either way, the CBA requests that the Court end this appeal and return this matter to the district court for further proceedings in light of the important developments discussed in this motion.

BACKGROUND

This is one of many cases pending before the Tenth Circuit that challenges the Affordable Care Act's preventive service mandate, 42 U.S.C. § 300gg-13(a)(4), as applied through regulations promulgated by the Departments. As interpreted, the law generally requires employers to provide their employees with free access to **c**ontraceptives, **a**bortifacients, **s**terilizations, and related **c**ounseling ("CASC services"). The Plaintiffs-Appellees are the Catholic Benefits Association, a non-profit association committed to helping its more than 880 Catholic employer members[1] provide health coverage to their employees consistent with Catholic values; the Catholic Insurance Company, which provides stop-loss insurance for CBA members with self-funded plans; and seven named CBA members (collectively, "CBA").

[1] The CBA's member-employers include over 60 Catholic dioceses and archdioceses, hospitals, Catholic Charities, mental health service providers, counseling centers, nursing homes, senior residence facilities, schools, colleges, religious orders, and other Catholic ministries and Catholic-owned businesses.

The Defendants-Appellants are the three federal agencies that promulgated the challenged mandate—HHS, Labor, and Treasury—and their respective secretaries.

The challenged mandate forces CBA members to cover CASC services in their employee health plans in violation of their religious convictions. Pls' Verified Cmplt., No. 5:14-cv-240, ¶¶ 118-27, 169, 173, 232-46. Later regulations exempt churches but only provide an "accommodation" to non-exempt ministries. *Id.* ¶¶ 198-99. The accommodation's alternative compliance mechanism would require CBA members to issue a notice that would empower the Departments to hijack their plans and would trigger CASC coverage under these plans. *Id.* ¶¶ 198-214.

The CBA filed its lawsuit in March 2014 seeking protection from this mandate and the Departments' implementing regulations under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb ("RFRA"). The district court agreed with the CBA and issued a preliminary injunction on June 4, 2014. *Catholic Benefits Ass'n v. Sebelius*, 24 F.Supp.3d 1094 (W.D. Okla. 2014).

On October 9, 2014, this Court placed the CBA appeals is appeal under abatement. Since then, the Departments have filed status reports in the CBA appeals on ***ten separate occasions***—on October 9 and November 9, 2015; on June 22, July 22, October 25, and December 15, 2016; and on January 10, March 15, May 15, and July 14 of 2017—each asking the Court to delay ruling on the merits.

In their latest status report, the DOJ states that the Departments need yet another sixty day extension to continue "analyzing the legal and policy issues" presented by their mandate. ***But the Departments have already completed their analysis and concluded that their mandate fails every part of the RFRA test***.

These concessions began when the Departments were required to defend their accommodation before the Supreme Court. Based on new arguments from the parties, the Supreme Court vacated this Court's decisions against the Little Sisters of the Poor, Southern Nazarene University, and Reaching Souls International and remanded the consolidated cases to see if the parties could resolve their dispute. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

More recently, the administration and the Departments showed a willingness to revisit their CASC mandate and its impact on religious liberty. On May 4, 2017, the President issued an Executive Order entitled "Promoting Free Speech and Religious Liberty." Section 3 of that order, entitled "Conscience Protections with Respect to Preventive-Care Mandate," instructed the Departments to "consider issuing amended regulations . . . to address conscience-based objections" to the challenged mandate.[2]

That same day, Appellant Thomas E. Price, M.D., Secretary of the Department of HHS, stated: "We welcome today's executive order . . . and will be taking action in short order to follow the President's instruction to safeguard the deeply held religious beliefs of Americans who provide health insurance to their employees."[3]

On May 23, the Departments sent the White House's Office of Management and Budget ("OMB") the fruit of their deliberations, the 125-page interim final rule mentioned in the Department's May 23,

---

[2] Exec. Order, No. 13798, 82 Fed. Reg. 21675 (May 4, 2017).

[3] Press Release, U.S. Dep't of Health & Human Services, Secretary Price Welcomes Opportunity to Reexamine Contraception Mandate (May 7, 2017), available at https://www.hhs.gov/about/news/2017/05/04/secretary-price-welcomes-opportunity-to-reexamine-contraception-mandate.html.

2017, status report ("IFR," attached as Ex. A). The draft was leaked to Vox, a news website, which made the IFR public.[4]

OMB's role in the regulatory process is not to second-guess the Departments' analysis and conclusion, but merely "to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in [Executive Order 12,866], and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency." Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). As noted above, the President and the HHS Secretary have made their priorities clear, and the Departments necessarily consulted with each other before submitting their IFR to OMB.

ARGUMENT

The Departments' appeal presupposes that they believe the district court committed a reversible error by issuing a preliminary injunction. The district court issued its order because it found that the Departments' attempt to coerce CBA members into complying with their mandate is likely illegal under RFRA. Under RFRA, a government

[4] Dylan Scott and Sarah Kliff, *Leaked regulation: Trump plans to roll back Obamacare birth control mandate*, Vox (May 31, 2017), https://www.vox.com/policy-and-politics/2017/5/31/15716778/trump-birth-control-regulation.

action that imposes a substantial burden on religious exercise is illegal unless the government proves that it advances a compelling governmental interest and does so through the least restrictive means. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).[5]

The Departments may have believed the decision below was wrong when they filed their appeal in 2014, but that is no longer the case. As shown below, the Departments now acknowledge that their mandate fails each element of the RFRA test. The Departments have, therefore, concluded that their mandate is illegal under RFRA.

Given these developments, the Court should summarily affirm the district court's order granting the CBA a preliminary injunction. Federal appellate courts have broad authority to "affirm . . . any judgment, decree, or order of a court lawfully brought before it for review . . . as may be just under the circumstances." 28 U.S.C. § 2106. Summary affirmance is appropriate where there is "no substantial question regarding the outcome of the appeal." *Joshua v. United States*, 17 F.3d 378, 280 (Fed. Cir. 1994). To summarily affirm, a court must be

[5] *See also Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1143 (10th Cir. 2013) (quoting *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 423 (2006)).

able to conclude that "no benefit will be gained from further briefing and argument of the issues presented." *Taxpayers Watchdog v. Stanley*, 819 F.2d 294, 297-98 (D.C. Cir. 1987).

A. The parties agree that the mandate substantially burdens religious exercise.

The Supreme Court has held that the mandate substantially burdens the religious exercise of objecting religious employers when the Departments' accommodation is not available. *Hobby Lobby*, 134 S. Ct. at 2775. The only remaining question under this prong of the RFRA test is whether the accommodation alleviates this burden.

The Departments convinced this Court in 2015 that the availability of the accommodation's alternative compliance mechanism does made a crucial difference. The Departments had told this Court that the accommodation was an "opt out" and that under the accommodation religious ministries "need not place contraceptive coverage into the basket of goods that constitute their healthcare plans." Gov't Br. at 20, 23, *Little Sisters of the Poor v. Burwell*, 794 F.3d 1151 (10th Cir. 2015) (No. 13-1540).[6] This Court accepted the

[6] Available at http://www.becketfund.org/wp-content/uploads/2014/10/LSP_DOJ-Merits-Opp.pdf.

Departments' representations and held that the accommodation did not substantially burden ministries' religious exercise because it "ensures [the Little Sisters of the Poor] will play no part in the provision of contraceptive services." *Little Sisters of the Poor v. Burwell*, 794 F.3d 1151, 1192 (10th Cir. 2015).

But the next year, the Departments admitted before the Supreme Court that these representations were false. They conceded in their merits brief "that the existing accommodation with respect to self-insured plans requires contraceptive payments ***as 'part of the same plan as the coverage provided by the employer'*** and operates in a way 'seamless' to those plans. ***As a result, in significant respects the accommodation process does not actually accommodate the objections of many entities.***" IFR at 58-59 (quoting Br. for Resps. at 38, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) (emphasis added)).[7]

Because the Departments now agree with the CBA that the accommodation substantially burdens religious exercise, the Departments' mandate is illegal under RFRA unless it furthers a

[7] *See also* Mark L. Rienzi, *Fool Me Twice: Zubik v. Burwell and the Perils of Judicial Faith in Government Claims,* 2016 Cato. Sup. Ct. Rev. 123, 132 (2016).

compelling government interest and does so in the least restrictive manner.

B. The parties agree that the mandate does not further a compelling interest.

The Departments now believe that "the application of the Mandate to [ministries like CBA members] does not serve a compelling governmental interest." IFR at 31. The IFR explains at length how the Departments reached this conclusion.

First, the Departments acknowledge that their mandate "was not imposed by Congress, but rather was the result of HRSA's discretionary decision." *Id.* at 28. Second, the Departments recognize that their mandate treats "similarly situated" religious organizations "very differently," exempting some but not others, which is "strong evidence that the Mandate 'cannot be regarded as protecting an interest 'of the highest order.'" *Id.* at 33 (quoting *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993)).

Third, the Departments acknowledge that the Institute of Medicine's report, which HRSA relied on in creating the mandate, is riddled with methodological flaws and "does not show a direct causal

nexus between denying exemptions to the Mandate and harm being caused to a compelling government interest." *Id.* at 36-41.

The Departments concluded that "[a]ll these methodological uncertainties and lack of tailoring support the Departments' present conclusion that the interest in applying the Mandate to objecting entities is not compelling." *Id.* at 42.

C. The parties agree that the Departments have less restrictive means of advancing their interests.

The Departments have also admitted that their mandate is not the least restrictive means of advancing their interest. After years of telling the lower courts that they were already using the least restrictive means possible, the Departments told the Supreme Court that their system actually "could be modified" to avoid forcing religious organizations to execute documents that violate their faith, while still getting women contraceptives. Br. for Resps. at 14-15, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418). *See also* Rienzi, *Fool Me Twice,* at 133.

The Departments also recognize in their IFR that there are dozens of existing federal family planning programs that allow the government

to advance its policy goals without hijacking CBA members' health plans:

> [T]he Departments' present view is that alternative approaches can further the interests the Departments previously identified behind the Mandate. As noted above, the Government already engages in dozens of programs that subsidize contraception for the low-income women identified by the IOM as the most at risk for unintended pregnancy. The Departments have also acknowledged in legal briefing that contraception access can be provided through means other than through coverage offered by religious objectors, for example, through "a family member's employer," "an Exchange," or "another government program."

IFR at 43 (citing Br. for Resps. at 65, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418)).

D. The parties agree that the mandate is illegal under RFRA.

Based on the above, the Departments have concluded that "applying the contraceptive coverage requirement to [ministries like CBA members] would violate RFRA." *Id.* at 29.

E. The parties agree that it is time to end this litigation.

The Departments have acknowledged the toll that "more than five years" of litigation over the CASC mandate has taken on the federal government and on hundreds of ministries like CBA members. *Id.* at 27. The litigation has "consumed substantial governmental resources while

also creating uncertainty for objecting organizations, issuers, third party administrators, and employees and beneficiaries." *Id*. at 27-28. Aware that not even a preliminary injunction has fully lifted this cloud of uncertainty, the Departments have expressed their "desire to resolve the pending litigation." *Id*. at 28.

CONCLUSION

The Departments now agree with the CBA on all of the legal issues central to their appeal. They now acknowledge that their mandate substantially burdens religious exercise, that it does not advance a compelling governmental interest, and that less restrictive means are available. The Departments have connected these dots and now agree with the CBA that their mandate is illegal under RFRA and that this litigation should end.

Given these concessions, there is no longer any dispute between the parties regarding the correctness of the district court's preliminary injunction order. As such, the Court should refuse the Department of Justice's attempts to drag this matter out further. The Court should lift the abatement and summarily affirm the decision below. In the alternative, the CBA requests that the Court dismiss the Departments'

appeal. Either way, the CBA requests that the Court end this appeal and return this matter to the district court for further proceedings in light of the important developments discussed in this motion.

Respectfully submitted,

s/ L. Martin Nussbaum

L. Martin Nussbaum
Eric Kniffin
Ian Speir
LEWIS ROCA ROTHGERBER CHRISTIE LLP
90 South Cascade Ave., Suite 1100
Colorado Springs, CO 80903-1662
(719) 386-3000
(719) 386-3070 (facsimile)
mnussbaum@lrrc.com
ekniffin@lrrc.com
ispeir@lrrc.com

CERTIFICATE OF SERVICE

On July 21, 2017, I filed the foregoing with the Clerk of this Court by using the appellate CM/ECF system. Opposing counsel will be served by the appellate CM/ECF system.

s/ Eric N. Kniffin
Eric N. Kniffin

CERTIFICATE OF COMPLIANCE

This response complies with the page limitation of Fed. R. App. P. 27(d)(2) because it does not exceed twenty pages. This response complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5), (6), and 10th Cir. R. 32(a) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 and 14-point Century Schoolbook.

CERTIFICATE OF DIGITAL SUBMISSION

Undersigned counsel certifies that (1) no privacy redactions were needed, (2) every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the Clerk, and (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Trend Micro OfficeScan, Version 11.0.1454, last updated July 13, 2017, and, according to the program, are free of viruses.

s/ Eric N. Kniffin
Eric N. Kniffin