Nos. 12-35221 & 12-35223

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STORMANS INC., doing business as Ralph's Thriftway, et al.,
Plaintiffs-Appellees,

v.

JOHN WIESMAN, et al.,
Defendants-Appellants

and

JUDITH BILLINGS, et al.,
Intervenors-Appellants.

On Appeal From the United States District Court for the Western District of Washington
Case No. 07-CV-05374-RBL (Hon. Ronald B. Leighton)

Intervenor-Appellants' Supplemental Brief in Response to the Court's Order Dated June 30, 2014

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I. INTRODUCTION

The United States Supreme Court's recent decision in *Burwell v. Hobby Lobby Stores, Inc.*, Nos. 13-354, 13-356, 2014 WL 2921709 (U.S. June 30, 2014), has no effect on this case. Whereas the present case addresses the application of the Free Exercise Clause to neutral and generally applicable *state* regulations, *Hobby Lobby* evaluates how a *federal* statute applies to *federal* regulations. Accordingly, the Court should reaffirm the constitutionality of the rules at issue in this case by again finding them neutral and generally applicable.

II. ARGUMENT

A. The Supreme Court's Interpretation of the Religious Freedom Restoration Act in *Hobby Lobby* Has No Effect on This Appeal

The central issue in *Hobby Lobby* was whether the Religious Freedom Restoration Act ("RFRA"), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.*, "permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners." 2014 WL 2921709, at *5. The Court pointed out that RFRA "prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest." *Id.* After finding that RFRA does

apply to "closely held corporations," the Court concluded that the *federal* regulation at issue did not survive RFRA scrutiny. *Id.*

Hobby Lobby does not apply here for two simple reasons. First, RFRA applies only to federal laws and regulations, not, as here, to state and local laws. In fact, the Court emphasized that its "holding [was] very specific," and that it was "not hold[ing] . . . that for-profit corporations and other commercial enterprises can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs." *Id.* at *6 (internal quotation marks omitted).

Second, the instant appeal involves a constitutional question under the Free Exercise Clause, and the manner in which the Supreme Court interpreted RFRA in *Hobby Lobby* has no bearing on this Court's Free Exercise analysis. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127-28, 1129, 1137-38 (9th Cir. 2009) (describing the "current governing standard" of the Free Exercise Clause, derived from *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990), and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993): "a neutral law of general applicability will not be subject to strict scrutiny.").

B. The Religious Freedom Restoration Act Does Not Apply to States

RFRA does not apply to state actions such as the regulations at issue in this appeal. When enacted by Congress in 1993, RFRA applied to *both* the federal

government and the states. *Hobby Lobby*, 2014 WL 2921709, at *7. Yet as the Court in *Hobby Lobby* noted, "the constitutional authority invoked for regulating federal and state agencies differed." *Id.* Congress invoked its enumerated power to regulate agencies to apply RFRA to the federal government. *Id.* "[B]ut in attempting to regulate the States and their subdivisions, Congress relied on its power under Section 5 of the Fourteenth Amendment to enforce the First Amendment." *Id.* (citing *City of Boerne v. Flores*, 521 U.S. 507, 516-17 (1997)). In doing so, however, "Congress. . . overstepped its Section 5 authority because '[t]he stringent test RFRA demands' 'far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*.'" *Id.* (quoting *Flores*, 521 U.S. at 533-34).

Here, the regulations to which Plaintiffs object are *state* Board of Pharmacy rules. *Stormans*, 586 F.3d at 1115-16 (the Board of Pharmacy adopted Washington Administrative Code 246-869-010 and amended Washington Administrative Code 246-863-095). These state rules plainly do not implicate RFRA's governance of *federal* regulations.

C. *Hobby Lobby* Is Not a Free Exercise Clause Case

This case is about the Free Exercise Clause, as interpreted by the *Smith* line of cases. The key question here is whether two rules adopted by the Washington

Board of Pharmacy in 2007 to "ensure safe and timely patient access to lawful and lawfully prescribed medications" are neutral and generally applicable, and thus subject to rational basis review, *Stormans*, 586 F.3d at 1131, 1134, 1137-38 (not the "exceptionally demanding" standard under RFRA, *Hobby Lobby*, 2014 WL 2921709, at *24).

Given this posture, the Supreme Court's decision in *Hobby Lobby* has no impact on this case because the Court did not interpret the Free Exercise Clause as applied in *Smith*. Indeed, the Court repeatedly distinguished the standard under RFRA as different. *See*, *e.g.*, *Hobby Lobby*, 2014 WL 2921709, at *7 (distinguishing between *Smith*'s "general applicability" test and RFRA's "least restrictive means" test); *id.* at *12-13, *24 (applying RFRA's "least restrictive means" test, which is an "exceptionally demanding" standard); *id.* at *13 ("By enacting RFRA, Congress went *far beyond* what this Court has held is constitutionally required.") (emphasis added); *see also id.* at *7 ("Congress responded to *Smith* by enacting RFRA"); *id.* at *26 (distinguishing *Hobby Lobby* from *U.S. v. Lee*, 455 U.S. 252 (1982), because "*Lee* was a free-exercise, not a RFRA, case").

At no point does the Court suggest, much less hold, that its decision in *Hobby Lobby* in any way overturned *Smith* or any of its progeny. Indeed, in

concluding its opinion, the Court emphasized that *Hobby Lobby* is a statutory interpretation case, *not* a Free Exercise case: "The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it *unnecessary* to reach the First Amendment claim[.]" 2014 WL 2921709, at *27 (emphasis added).[1]

As *Hobby Lobby* does not affect *Smith*, the Court in this case should again find that the rules at issue are neutral and generally applicable. *See Stormans*, 586 F.3d at 1137-38 (this Court held in 2009 that "the rules are neutral and generally applicable" and therefore remanded to the district court to decide "[w]hether the rules pass muster under the rational basis test.").

III. CONCLUSION

The Supreme Court was careful and deliberate in categorizing *Hobby Lobby* as a RFRA case, not a Free Exercise case under *Smith*. Because RFRA does not apply to "the States and their subdivisions," this Court should reaffirm its previous decision upholding the constitutionality of the challenged state rules.

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[1] Likewise, the Court's holding in *Hobby Lobby* that "a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA," 2014 WL 2921709, at *19, has no impact on whether corporations have Free Exercise rights under the First Amendment. This Court has already expressly declined to decide this issue, electing instead to "examine the rights at issue as those of the corporate owners." *Stormans*, 586 F.3d at 1119.

RESPECTFULLY SUBMITTED and presented this 28th day of July, 2014

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CERTIFICATE OF COMPLIANCE

I certify that:

☒ 1. This brief complies with the Court's supplemental briefing order, which limited the length of this brief to 15 pages. Pursuant to Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6), this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

DATED this 28th day of July, 2014.

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