NO. 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, Secretary of the Washington State Department of Health, et al.,
Defendants-Appellants,

and

JUDITH BILLINGS, et al.,
Intervenor-Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA
No. 3:07-cv-05374-RBL
The Honorable Ronald B. Leighton
United States District Court Judge

STATE APPELLANTS' SUPPLEMENTAL BRIEF RE BURWELL v. HOBBY LOBBY STORES, INC.

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I. INTRODUCTION

This brief responds to the Court's Order dated June 30, 2104, directing the parties to file supplemental briefs on the effect, if any, of *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354, 2014 WL 2921709 (U.S. June 30, 2014), on the issues in this case.[1]

There is no effect. The *Stormans* case involves a challenge to *state* rules under the Free Exercise Clause of the First Amendment. The majority opinion in *Burwell* explicitly declined to address any issue under the Free Exercise Clause, instead deciding the case solely under the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U. S. C. §§ 2000bb to 2000bb-4. Because RFRA does not apply to state laws, under *City of Boerne v. Flores*, 521 U.S. 507 (1997), the *Burwell* decision does not affect the outcome of this case.

[1] The slip opinion is available at http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf (*Burwell*, slip op.).

II. ARGUMENT

A. *Burwell* Was Decided Under a Narrow RFRA Analysis, Did Not Interpret or Apply the Free Exercise Clause, and Did Not Change the Rational Basis Scrutiny Appropriate in a Free Exercise Challenge to a Neutral Law of General Applicability

Free exercise challenges to state regulations are evaluated under the standards set out in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Under those decisions, a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. *Smith*, 494 U.S. at 885-86; *Lukumi*, 508 U.S. at 531. In *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1142 (9th Cir. 2009), this court applied *Smith* and *Lukumi* to the pharmacy regulations at issue in this case. Under the free exercise analysis compelled by *Smith* and *Lukumi*, this court ordered a remand to the District Court with instructions to apply rational basis review.[2]

[2] Instead, the District Court conducted a 12-day trial and applied strict scrutiny to find the challenged pharmacy regulations in violation of the Free Exercise Clause as applied to the three plaintiffs.

The decision in *Burwell* did not diminish the controlling precedent *Smith* and *Lukumi* provide in free exercise cases, because *Burwell* was not decided as a free exercise case. The majority decided the case solely under RFRA:

> 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 raised by Conestoga and the Hahns.

Burwell, slip op. at 49. The majority took pains to distinguish the protection provided under RFRA from that provided under the Free Exercise Clause, explicitly rejecting the argument that RFRA did no more than codify the Court's pre-*Smith* Free Exercise Clause precedents. *Burwell*, slip op. at 25. It flatly refused to tie the statutory phrase "exercise of religion under the First Amendment" to the Court's pre-*Smith* interpretation of that Amendment, pointing to a 2000 amendment to RFRA that deleted a reference to the First Amendment. *Id.* at 25-26 (citing the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U. S. C. § 2000cc *et seq*.).[3]

[3] The majority's discussion of *United States v. Lee*, 455 U.S. 252 (1982), also explicitly acknowledges that the analysis under the Free Exercise Clause is "squarely inconsistent" with the analysis the majority applied under RFRA, *Burwell*, slip op. at 48 n.43, further demonstrating that the *Burwell* decision has no application to this Court's consideration of the free exercise claim raised by the plaintiffs in this case.

The majority assessed Hobby Lobby's claim solely under RFRA, applying the strict scrutiny RFRA requires rather than the rational basis review properly afforded a neutral law of general applicability in a First Amendment analysis under *Smith.* While the majority observed that "women (and men) have a constitutional right to obtain contraceptives" (citing *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965), it found it unnecessary to elaborate on that interest; rather, it simply assumed "that the interest in guaranteeing cost-free access to the four challenged contraceptives methods is compelling within the meaning of RFRA." *Burwell*, slip op. at 39-40. The majority concluded the challenged "contraceptive mandate" violated RFRA because it was not the least restrictive, since the Government already had developed alternative methods to protect that interest for some corporate entities (religious non-profits) that would eliminate the burden on Hobby Lobby's corporate practice of religion. *Id.* at 40-45. The least restrictive alternative analysis in RFRA is not a part of rational basis review. *Stormans*, 586 F.3d at 1137 (under rational basis review, the rules will be upheld if they are rationally related to a legitimate governmental purpose and the burden is on one seeking to invalidate the rules to "negative every conceivable basis which might support it." (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993)).

To emphasize its narrow focus, the majority further limited the scope of its opinion solely to the administrative "contraceptive mandate"—i.e., the regulations adopted to implement 42 U.S.C. § 300gg-13(a)(4)[4]—and cautioned that it should not be understood as holding that any other insurance-coverage mandate necessarily must fall if it conflicts with an employer's religious beliefs and that it provides no "shield" to those who would claim religious practice as a basis for discrimination in hiring. *Burwell*, slip op. at 46.

[4] In relevant part, 42 U.S.C. § 300gg-13(a) (Supp. V 2011) provides:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—
>
> . . .
>
> (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the health resources and services administration for purposes of this paragraph.

The relevant regulations adopted by the three departments implementing this portion of the Act (the Department of Health and Human Services, the Department of Labor, and the Department of the Treasury) require non-grandfathered group health plans to cover, among other preventive services, the contraceptive services recommended in the HRSA guidelines. 45 C.F.R. § 147.130(a)(1)(iv) (HHS); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. § 54.9815-2713(a)(1)(iv) (Treasury).

Finally, the majority stressed that its opinion does not give license to for-profit corporations to avoid compliance with laws to which they assert religious objection under RFRA:

> We do not hold . . . 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." Nor do we hold . . . that such corporations have free rein to take steps that impose "disadvantages . . . on others" or that require "the general public [to] pick up the tab." And we certainly do not hold or suggest that "RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on . . . thousands of women employed by Hobby Lobby."

Burwell, slip op. at 3-4 (citations omitted).

While the dissenting justices criticized the analysis in the majority opinion as lacking principled limits on its ultimate scope,[5] we respectfully submit that the majority must be taken at its word when it said it decided only a narrow issue: "whether [RFRA] permits the United States Department of

[5] *See*, *e.g.*, *Burwell*, slip op. (dissent) at 33-34 suggesting the majority's analysis could extend to "employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others), and warning that distinguishing among such objections could put courts in the impermissible "business of evaluating the relative merits of differing religious claims." (quoting *United States* v. *Lee*, 455 U. S. 252, 263 n.2 (1982)).

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." *Burwell*, slip op. at 1. By the majority's own statement, its opinion is limited to RFRA.

This Court's 2009 decision set out and applied the proper standard for the First Amendment free exercise challenge presented in this case, when it held, first, that "[t]he right to freely exercise one's religion, however, 'does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes),'" *Stormans*, 526 F.3d at 1127 (quoting *Smith*, 494 U.S. at 879) (internal quote omitted); and second, that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* at 1127-28 (quoting *Lukumi*, 508 U.S. at 531). That standard, including the application of rational basis review to a neutral law of general applicability, is not affected by the decision in *Burwell*. The challenged pharmacy regulations in this case (which are unchanged since their adoption in 2007) are neutral and generally applicable

and should be evaluated under that standard now, just as they should have been all along. *See Stormans*, 526 F.3d at 1137.

B. This Court's 2009 Holding Regarding Stormans' Standing to Raise a Free Exercise Claim Is Consistent with *Burwell*

No issue under RFRA is at issue in this case, and the extension of RFRA to closely-held for-profit corporations therefore has no effect on any issue in this case. Nevertheless, it is noteworthy that this Court already declined to decide whether Stormans, Inc., a closely-held for-profit corporation, could assert its own rights under the Free Exercise Clause, electing instead to examine the rights at issue as those of the Stormans family. *Stormans*, 526 F.3d at 1119-20) (citing *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n. 15 (9th Cir. 1988)). The Court treated the rights of the owners as the basis for the Free Exercise claim.

III. CONCLUSION

Because the *Stormans* case is a challenge to state laws under the Free Exercise Clause, the *Burwell* decision has no effect. The decision in *Burwell* rests entirely on the Religious Freedom Restoration Act of 1993, which does not apply to state laws. The Free Exercise Clause is unaffected because the Court expressly detached its application of RFRA from the analysis of a constitutional free exercise claim.

RESPECTFULLY SUBMITTED this 28th day of July, 2014.

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CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Numbers: 12-35221 & 12-35223

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 28, 2014.

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Signature: /s/ Alan D. Copsey
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