No. 12-35221, 12-35223

IN THE 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.*,
Intervenors-Appellants

On Appeal from the United States District Court
for the Western District of Washington
No. 3:07-cv-05374-RBL – Hon. Ronald B. Leighton

SUPPLEMENTAL BRIEF FOR APPELLEES

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INTRODUCTION

On June 30, 2014, this Court ordered supplemental briefs addressing "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 before this court." Order at 2. Even though the Supreme Court's decision in *Hobby Lobby* was based on the Religious Freedom Restoration Act, rather than the First Amendment, it involves overlapping legal issues. The Supreme Court's reasoning supports the Plaintiffs' claims in four key respects.

First, *Hobby Lobby* confirms this Court's ruling in *Stormans I* that closely-held corporations like Ralph's Thriftway have standing to raise a free exercise claim.

Second, *Hobby Lobby* confirms that the Regulations burden Plaintiffs' religious exercise.

Third, *Hobby Lobby* confirms that the Regulations cannot satisfy strict scrutiny, especially when the State has stipulated that there is a less restrictive alternative fully satisfies the State's interests—namely, facilitated referral.

Finally, *Hobby Lobby* confirms that religious freedom includes "the right to express [religious] beliefs" in the "economic life of our larger community," 2014 WL 2921709, at *28 (Kennedy, J., concurring), which is precisely what the Regulations restrict.

BACKGROUND

Hobby Lobby involved a challenge to federal regulations implementing the Patient Protection and Affordable Care Act of 2010. Those regulations require certain employers to provide insurance coverage for all FDA-approved methods of contraception. *Id.* at *8-9. The owners of Hobby Lobby, a closely held corporation, objected to covering four types of contraception that may prevent a fertilized egg from implanting in the uterus. *Id.* at *11. They filed suit, alleging that the regulations violated their right to the free exercise of religion as protected under the Religious Freedom Restoration Act (RFRA).

The Supreme Court ruled in favor of Hobby Lobby. First, it held that RFRA's protections extend to closely held, for-profit businesses, because protecting the free-exercise rights of corporations protects the religious liberty of the people who own them. *Id.* at *13. Second, it held that the regulations substantially burdened the owners of Hobby Lobby, because the regulations required them to violate their religious beliefs or suffer severe economic consequences. *Id.* at *19. Third, it held that the regulations failed strict scrutiny, because the government could have offered the plaintiffs a less restrictive accommodation that still accomplished the government's interests. *Id.* at *24.

ARGUMENT

I. *Hobby Lobby* confirms that Plaintiffs can raise a free exercise claim.

In *Stormans I*, this Court held that the Plaintiffs' closely held corporation is "an extension of the beliefs of the members of the Stormans family," and therefore "has standing to assert the free exercise rights of its owners." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009); *accord EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619-20 (9th Cir. 1988) (characterizing a closely held corporation as "the instrument . . . by which [the owners] express their religious beliefs"). Defendants have not challenged this ruling on appeal, and *Hobby Lobby* confirms that it was correct. As the Supreme Court explained, "protecting the free-exercise rights of corporations . . . protects the religious liberty of the humans who own and control those companies." 2014 WL 2921709, at *13.

II. *Hobby Lobby* confirms that the Regulations burden the Plaintiffs' religious exercise.

Hobby Lobby also confirms that the Regulations burden the Plaintiffs' religious exercise. The State and Intervenors have never disputed this point, and *Hobby Lobby* demonstrates that they were correct not to do so. The Supreme Court had "little trouble" concluding that the contraception mandate burdened the plaintiffs' religious exercise, because

it "demands that [the plaintiffs] engage in conduct that seriously violates their religious beliefs," and "[i]f the [plaintiffs] and their companies do not yield to this demand, the economic consequences will be severe." *Id.* at *19. The same is true here. The Regulations require Plaintiffs to stock and dispense Plan B and *ella* in violation of their religious beliefs, and if they do not comply, "it is undisputed that . . . [Ralph's] will have to close its pharmacy," and Thelen and Mesler will lose their jobs. ER 126.

Although Intervenors have not disputed the burden on Plaintiffs' religious exercise, they have suggested that Plaintiff's beliefs are unreasonable, citing two newspaper articles discussing Plan B's mechanism of action. Interv. Br. at 13-14 & n.1. But *Hobby Lobby* confirms that the "reasonableness" or "plausibility" of the Plaintiffs' religious concerns is not the relevant issue. 2014 WL 2921709, at *21 (quotation omitted). The State cannot resolve "difficult and important question[s] of religion and moral philosophy," including whether stocking and distributing drugs like Plan B and ella "is wrong." *Id.* In any event, as the Supreme Court noted, both HHS and the FDA have disagreed with Intervenors, acknowledging that Plan B and *ella* may "prevent[] an already fertilized egg from developing any further by inhibiting its attachment to the

uterus." *Id.* at *9 & n.7 (citing HHS's brief and the FDA's birth control guide).

III. *Hobby Lobby* Confirms that the Regulations cannot satisfy strict scrutiny.

Hobby Lobby also confirms that the Regulations cannot satisfy strict scrutiny. It supports the Plaintiffs' arguments on this point in three respects.

First, the Supreme Court held that the government cannot satisfy strict scrutiny when it "has at its disposal an approach that is less restrictive" of religious freedom but still "serves [the government's] stated interests equally well." *Id.* at *24-25. In particular, the Court highlighted a regulatory "accommodation," which "effectively exempted" nonprofit organizations from the mandate, but still ensured that employees "would continue to receive contraceptive coverage." *Id.* at *9, 25. When there is "an existing, recognized, workable, and already-implemented" alternative that is "less restrictive than the means challenged by the plaintiffs," the government is required to use that alternative. *Id.* at *28 (Kennedy, J., concurring).

Here, there is just such an "existing, recognized, workable, and already-implemented" alternative: facilitated referral. Facilitated referral is standard pharmacy practice, and it ensures that customers seeking Plan B or *ella* promptly receive it from one of dozens of nearby pharma-

cies. ER 61, 79, 82-83, 94-95. Plaintiffs have engaged in this practice for many years, and it is undisputed that "[n]one of Plaintiffs' customers has ever been denied timely access to emergency contraception." ER 61, 82-83. In fact, the State has stipulated that Plaintiffs' practice of facilitated referral "is a time-honored practice," "occur[s] for many reasons," and "do[es] not pose a threat to timely access to lawfully prescribed medications . . . includ[ing] Plan B." SER 1619-20. Plaintiffs' position is also fully supported by at least 35 state and national pharmacy associations. *See* Brief *Amici Curiae* American Pharmacists Association, *et al.* at 14-27. In light of this recognized, workable, and readily available alternative, the State has no reason to force Plaintiffs to violate their religious beliefs.

Second, the Supreme Court emphasized that the compelling interest test requires the court to "loo[k] beyond broadly formulated interests" and instead focus on "'the asserted harm of granting specific exemptions to particular religious claimants'—in other words, . . . the marginal interest in enforcing the [law]" in the particular case at hand. *Hobby Lobby*, 2014 WL 2921709, at *23 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 431 (2006)). This is true not only under RFRA, but also under the Free Exercise Clause. *See O Centro*, 546 U.S. at 431 (citing Justice O'Connor's concurrence in *Smith* for

the proposition that strict scrutiny "requires a case-by-case determination of the question, sensitive to the facts of each particular claim" (quoting *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 899 (1990)); *id.* at 431-32 (recognizing that this standard applies "[o]utside the Free Exercise area" as strict scrutiny is designed to "take relevant differences into account" (quotations omitted)).

Here, the State has failed to demonstrate any particular "harm" from "granting specific exemptions to particular religious claimants." *Id.* at 431. Indeed, it has stipulated that there is no harm. SER 1619-20. And it is undisputed that none of Plaintiffs customers has ever failed to receive timely access to Plan B or *ella*. ER 61, 82-83. The State cannot meet its burden by citing potential problems associated with *other* hypothetical religious objectors, such as those who might decline to make facilitated referrals. Applying the Regulation to such objectors "may be supported by different [government] interests . . . and may involve different arguments about the least restrictive means" that are not present here. *Hobby Lobby*, 2014 WL 2921709, at *26.

Third, *Hobby Lobby* suggested that the many exceptions to the contraceptive mandate might undermine the government's claim of a compelling interest. Although the Court ultimately rested its decision on other grounds, it suggested in dictum that "there are features of the

[Affordable Care Act] that support th[e] view" that the government's interest was not compelling—namely, "the existence of exceptions" for grandfathered plans and small employers. *Id.* at *23. In particular, the Court noted that "the interest served by one of the biggest exceptions, the exception for grandfathered plans, is simply the interest of employers in avoiding the inconvenience of amending an existing plan." *Id.* It contrasted this "inconvenience" with "weightier consideration[s]," which might justify an exemption. *Id.*

Here, the exemptions from the Regulations are far more extensive than the exemptions from the contraception mandate; indeed, the Regulations exempt every type of referral that occurs in the real world *except* Plaintiffs' conscience-based referrals. Brief for Appellees at 102-03. Many of the permissible referrals rest on nothing more than business convenience. ER 92-96. Thus, the Supreme Court's skepticism about exemptions for business convenience is equally relevant here.

IV. *Hobby Lobby* confirms that the right of free exercise includes the right of full participation in the economic life of the community.

Finally, *Hobby Lobby* confirms that religious freedom includes the right to exercise one's religion as a full participant in the economy. Although the decision was based on RFRA, "RFRA protects First Amendment free-exercise rights." *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir.

2013) *see also Hobby Lobby*, 2014 WL 2921709, at *28 (Kennedy, J., concurring) ("[T]he purpose of [RFRA] . . . is to ensure that interests in religious freedom are protected."). Thus, it is appropriate to give weight to the Court's underlying concerns.

Of prime concern in *Hobby Lobby* was the fact that the federal government's position "would effectively exclude [some] people from full participation in the economic life of the Nation." *Id.* at *25. For example, the Court said that the government's position would permit it "to require all employers to provide coverage for any medical procedure allowed by law in the jurisdiction in question—for instance, third-trimester abortions or assisted suicide." *Id.*

Justice Kennedy's concurrence emphasized the same concern, couched in constitutional (not just RFRA) terms:

> In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. It means too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civil, and economic life of our larger community.

Id. at *28 (Kennedy, J., concurring) (internal citations omitted).

The Regulations in this case, even more than in *Hobby Lobby*, "effec-

tively exclude [Plaintiffs] from full participation in the economic life of the Nation." *Id.* at *25. Indeed, the district court found that the Regulations were designed "primarily (if not solely)" with that intent (ER 43, 18, 144)—a factual finding "of the sort accorded great deference on appeal." *Hernandez v. New York*, 500 U.S. 352, 353 (1991).

But even setting that factual finding aside, it is undisputed that the effect of the Regulations is to force Plaintiffs to choose between their religious exercise and their profession. That is a deeply troubling result in light of *Hobby Lobby*. It is all the more troubling when the State has stipulated that Plaintiff's conduct causes no harm; when there is "an existing, recognized, workable, and already-implemented" alternative that fully meets the State's goals, *Hobby Lobby*, 2014 WL 2921709, at *28 (Kennedy, J., concurring); when the State regularly permits that alternative for a host of non-religious reasons; and when 35 state and national pharmacy associations fully support the use of that alternative for religious reasons.

CONCLUSION

The Supreme Court's analysis in *Hobby Lobby* supports the district court's reasoning and legal conclusions here. For the reasons stated above and in the Brief for Appellees, the judgment of the district court should be affirmed.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation set forth in this Court's Supplemental Briefing Order of June 30, 2014, because this brief is less than fifteen pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This also brief complies with the typeface requirements of Fed. R. App. P 32(a)(5) and the type style requirements of Fed. R. App. P 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-Point Century School-book style.

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CERTIFICATE OF SERVICE

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, 2013.

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