ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 26, 2013

No. 12-1380

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM NEWLAND; PAUL NEWLAND; JAMES NEWLAND; CHRISTINE KETTERHAGEN; ANDREW NEWLAND; and HERCULES INDUSTRIES, INC., a Colorado Corporation,

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 District of Colorado
The Honorable Judge John L. Kane, Jr.
No. 1:12-cv-01123

APPELLEES' SUPPLEMENTAL BRIEF

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INTRODUCTION

In its supplemental brief, the government essentially concedes the futility of this interlocutory appeal. *Hobby Lobby* has resolved the substantive issues of the RFRA claim raised by Plaintiffs-Appellees the Newlands and Hercules (hereinafter "Hercules"). Under *Hobby Lobby*, Hercules, Inc., does exercise religion in challenging this Mandate, the Mandate substantially burdens that exercise, and the government failed to meet its showing under the strict scrutiny test. *Hobby Lobby , Inc. v. Sebelius*, 2013 WL 3216103, at *9–*23 (10th Cir. July 18, 2013). The government by and large restates its disagreement with *Hobby Lobby*. But only the Supreme Court can address that disagreement. *United States v. Spedalieri*, 910 F.2d 707, 710 n.3 (10th Cir. 1990) (panel is bound by Circuit precedent).

The government improperly suggests that other equitable factors could lead to reversal here. But it waived those issues by not raising them at all in its opening brief, instead focusing exclusively on elements of RFRA under the likelihood of success factor. *See Coleman v. B-G Maint. Mgmt. of Colorado, Inc.*, 108 F.3d 1199, 1205 (10th Cir. 1997) (waiver); Hercules' Opening Brief at 58 (arguing waiver). The government cannot use a supplemental brief to revive waived appellate issues. And even if it could, the District Court actually ruled on those factors (unlike in *Hobby Lobby*), and did so decisively in Hercules' favor. *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1295, 1299 (D. Colo. 2012). Five

judges in *Hobby Lobby* expressed either agreement with such findings as a matter of law, *Hobby Lobby*, 2013 WL 3216103 at *26 (plurality), or insisted on highly deferential review, *id*. at 37 (Bacharach, J., concurring).

Finding no real grounds for reversal, the government indicates that it would be content for this Court to allow the District Court's preliminary injunction to persist, under an appellate abeyance, pending its possible appeal in *Hobby Lobby*. But the purpose of an interlocutory appeal of a preliminary injunction is to have it vacated in a timely manner. If there is nothing left for the panel to decide in this appeal, and the government is content to let the preliminary injunction persist for months or longer, this appeal has lost its meaning. The Court should summarily dismiss it. If this Court is to hear an appeal in this case, it should be upon final judgment after remand. It is not clear how the government could object to such an outcome when it has *asked* for the preliminary injunction to persist indefinitely, and *Hobby Lobby* forecloses its success on the merits.

Therefore Plaintiffs-Appellees oppose an appellate abeyance, and suggest instead that the efficient and sensible course of action is to dismiss this appeal,[1]

[1] Hercules was prepared to move for summary disposition in this Court, but on July 11 counsel for the government indicated Defendants' refusal to consent to such a motion. Yet the government has now taken the position that the injunction should persist. Upon the government's refusal to consent, Hercules did not file a contested motion, because it considered such a motion superfluous to the issues already briefed and set for argument in this case, and already briefed and decided in *Hobby*

leaving in place a preliminary injunction that the government has already said it is content to tolerate.

Hercules agrees with the government that the delay of the employer reporting requirements under 26 U.S.C. § 4980H does not undermine Hercules' standing in this case since it does not remove the penalties of the separate Mandate being challenged here. Instead the delay actually strengthens Hercules' claims.

ARGUMENT

The Court's order for supplemental briefing asked the parties to address two issues: the impact of *Hobby Lobby* on this case, and any impact of delay in imposing the employer reporting requirements under 26 U.S.C. § 4980H. The former is dispositive in Hercules' favor, while the latter does nothing to undermine Hercules' claim.

I. *Hobby Lobby* Requires that the Preliminary Injunction Be Affirmed.

This Circuit's en banc decision in *Hobby Lobby* controls this case and requires that this panel affirm the preliminary injunction granted by the District Court. The reasoning of this en banc Court fully supports the District Court's decision to grant a preliminary injunction, and in fact rejects the government's

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Lobby. But this Court can issue summary disposition upon its own motion under 10th Cir. R. 27.2. If the Court finds reasons not to do so, Hercules continues to request oral argument in this case.

arguments even more fully than the District Court did below. Nothing remains but for this panel to affirm the preliminary injunction.

Though the government spends a large part of its supplemental brief discussing why this Court was wrong in its reasoning in *Hobby Lobby*, its efforts are futile. This panel does not have the authority to overturn circuit precedent. *Spedalieri*, 910 F.2d at 710 n.3 (a three-judge panel cannot overrule circuit precedent); *United States v. Taylor*, 828 F.2d 630, 633 (10th Cir. 1987) (a panel is not authorized to overrule a prior decision of a court of appeals). The Third Circuit's recent panel decision in a similar case likewise provides zero authorization for this panel to diverge from the holdings of *Hobby Lobby*. *Cf. Conestoga Wood Specialties Corp. v. Sec'y of Health & Human Servs.*, No. 13-1144 (3d Cir. July 26, 2013).

A. *Hobby Lobby* demonstrates that Hercules is exercising religion.

Under *Hobby Lobby*, corporations such as Hercules that bring religious objections to this Mandate are "persons exercising religion for purposes of RFRA," requiring this panel to "end the matter here since the plain language of the text encompasses 'corporations'" such as Hercules. *Hobby Lobby,* 2013 WL 3216103 at *9. "[A]s a matter of statutory interpretation [ ] Congress did not exclude for-profit corporations from RFRA's protections." *Id.* Narrower religious employer exemptions found in other statutes, such as Title VII, "rather than providing

contextual support for excluding for-profit corporations from RFRA . . . show that Congress knows how to craft a corporate religious exemption, but chose not to do so in RFRA." *Id.* at *10.

No fact distinguishes Hercules from Hobby Lobby on this point. The only possible distinctive cuts in Hercules' favor (and Hercules believes *Hobby Lobby* was decided correctly notwithstanding this point). Hercules, Inc., is owned directly by the individual Newland family members rather than being owned through a management trust that is religious. Appendix at 23–24.[2]

B. *Hobby Lobby* holds that the Mandate is a substantial burden.

Hobby Lobby requires this panel to find that Hercules' exercise of religion in its objection to the Mandate's application to its health plan "is substantially

[2] The dissent in *Hobby Lobby* opined that "[a]t the hearing on plaintiffs' motion for preliminary injunction, plaintiffs presented no evidence of any kind." *Hobby Lobby,* 2013 WL 3216103 at *42 (Briscoe, C.J., dissenting). A majority of judges in *Hobby Lobby* apparently disagreed with that view; but here, it is clear that Hercules did present evidence—evidence that the government never rebutted—in the form of their verified complaint, which is a sworn affidavit. Appendix at 19–53. The District Court cited this evidence extensively, including detailed evidence about the way religion is imbued in Hercules' structure. *See Newland*, 881 F. Supp. 2d at 1292. Not only did the government not rebut this evidence or challenge it as insufficient, it conceded at the preliminary injunction hearing that the verified complaint sufficed as evidence relating to Hercules' own factual circumstances, and as ample evidence on which the Court could rule. See Transcript at 3–4, *Newland v. Sebelius*, 1:12-cv-01123-JLK, doc. # 34 (D. Colo. filed Aug. 1, 2012); Appellants' "Notice filed that the transcript is already on file in the district court," *Newland v. Sebelius*, No. 12-1380 (10th Cir. filed Oct. 9, 2012).

burdened within the meaning of RFRA." 2013 WL 3216103 at *17. In fact, the Court cannot "characterize the pressure as anything but substantial." *Id.* at *20. Just as Hobby Lobby and Mardel were substantially burdened by this Mandate, Hercules is presented with the same "Hobson's choice" of suffering the Mandate's penalties or the violation of its religious policies. *Id.* at *20. Appellees can discern no difference between Hercules' claim and Hobby Lobby's claim that the Mandate forces them to choose between their religious objection and the Mandate's penalties. Under *Hobby Lobby*, Hercules has "established a substantial burden as a matter of law." *Id.* at *21.

C. *Hobby Lobby* holds that the Mandate fails under strict scrutiny.

Hobby Lobby requires this panel to conclude that the government has failed to assert a compelling interest in coercing Hercules to comply with the Mandate. Just as in *Hobby Lobby*, "[t]he interest here cannot be compelling because the contraceptive-coverage requirement does not apply to tens of millions of people." *Id.* at *23. "[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 527 (1993)).

The holding that this Mandate has no compelling interest resolves Hercules' claim without any recourse to the least restrictive means prong of RFRA. Under

strict scrutiny, the government loses if it fails to satisfy either its compelling interest burden or its least restrictive means burden. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429, 439 (2006) (ruling that the government has the burden to show both strict scrutiny factors, and rendering judgment in the claimant's favor because "the Government failed to demonstrate . . . a compelling interest"). Nevertheless, it remains true that the government's already massive provision and subsidy of family planning to women who actually need help obtaining those items represent ample alternative means to achieve its interests without coercing Hercules. *See* Hercules' Opening Brief at 47–51.

Again there are no grounds to distinguish this case from *Hobby Lobby*. The en banc Court held that the Mandate is not justified by any compelling interest due to the government's decision not to apply the Mandate to tens of millions of women. The same is necessarily true in this case because the same Mandate is similarly inapplicable to tens of millions of women. The government makes arguments in its supplemental brief about the grandfathering exclusion and how it should be considered in relation to Hercules, Gov. Supp. Br. at 8–9, but that argument is nothing more than a disagreement with *Hobby Lobby* that the grandfathering exclusion demolishes the government's alleged compelling interest. *Hobby Lobby* notes that the plaintiffs in that case likewise were no longer eligible for the grandfathering exclusion because of unrelated changes made to their plan.

Hobby Lobby, 2013 WL 3216103 at *4. That indistinguishable fact made no difference in *Hobby Lobby* and can make no difference here.

If the government's "supposedly vital" health and equality interests in providing the mandated items were really "grave" and "paramount," as they must be under strict scrutiny, *Thomas v. Collins*, 323 U.S. 516, 530 (1945), the government could not be content to impose this Mandate in such a massively inapplicable or a haphazard way. This Mandate is simply not a concern that the government treats as "compelling," except when religious people object.

D. *Hobby Lobby* resolves any questions about the injunction standard.

Although the district court appeared to use a "relaxed" standard to satisfy the success-on-the-merits prong of the preliminary injunction test for Hercules,[3] *Hobby Lobby* ruled that plaintiffs such as Hercules raising a RFRA claim against this Mandate "satisf[y] the likelihood-of-success prong under the traditional standard." 2013 WL 3216103 at *8. Satisfaction of the likelihood of success standard necessarily also satisfies the relaxed standard. Therefore the District Court's use of the latter cannot be a basis for reversal.

[3] As argued in Hercules' opening brief, despite the District Court's preliminary recitation of the relaxed standard, its actual holdings under each element of RFRA go beyond raising mere "serious questions" and effectively find a likelihood of success on the merits. Hercules' Opening Brief at 10–11. The one arguable exception is where the District Court expressed uncertainty about whether Hercules or its owners can exercise religion. *Hobby Lobby* has now resolved that question in Hercules' favor as matter of law.

E. The government waived its challenge of other injunction factors.

The government suggests that the Court should reverse, not because it can somehow show Hercules does not have a likelihood of success on the merits, but by reference to the balance of harms and public interest equitable factors. But the government's arguments are foreclosed, for three reasons.

First, the government waived any argument for reversal based on the balance of harms and public interest equitable factors when it completely failed to raise them in its opening brief. That brief instead focused exclusively on the elements of RFRA under the likelihood of success factor. *See Coleman*, 108 F.3d at 1205 (waiver); Hercules' Opening Brief at 58 (arguing waiver). The government cannot use a supplemental brief to revive waived appellate issues.

Second, the procedural posture in this case is more favorable to Hercules than it was to Hobby Lobby. The District Court actually ruled on these equitable factors, and it did so decisively in Hercules' favor. The District Court explicitly identified these factors, declaring that the equitable harm that the government alleges "pales in comparison" to Hercules' harm on the balancing of equities prong, and that the public interest "strongly favor[s]" relief to Hercules. *Newland*, 881 F. Supp. 2d at 1295, 1299.

The government's supplemental brief falsely declares that the District Court did not consider the alleged "harm that a preliminary injunction would cause to

Hercules Industries employees and their family members." Gov. Supp. Br. at 8. But this entire case is about whether mandated coverage will be given to "employees" and plan participants, *Newland*, 881 F. Supp. 2d. at *passim*. And the District Court explicitly considered, under these equitable factors, the issue of whether the Mandate is needed *against Hercules* as a means "of improving the health of women and children and equalizing the coverage of preventive services for women." *Id.* at 1294–95. The government's argument on this point was not ignored. It was rejected.

Third, it is not possible under the standard of review to reverse these equitable findings. The standard of review is abuse of discretion, especially on the public interest and balance of harms findings. *Hobby Lobby*, 2013 WL 3216103 at *8. A majority of judges in *Hobby Lobby* expressed either agreement with such findings in plaintiffs' favor as a matter of law, *id.*at *26 (four-judge plurality), or insisted on highly deferential review of these specific findings, *id*. at 37 (Bacharach, J., concurring).

II. Hercules' Claims Are Not Undermined by the Delay in Employer Reporting Requirements.

The executive branch's unilateral decision to delay the impact of the employer reporting requirements under 26 U.S.C. § 4980H has no effect on Hercules' claims. The government agrees. *See* Gov. Supp. Brief at 9.

Though the employer reporting requirements have been delayed until

January 2015, the preventive services mandate, under which the abortifacient, contraception and sterilization Mandate challenged here falls, has not been delayed. Instead, this Mandate already went into effect on Hercules in its first health plan after August 1, 2012, triggering fines and lawsuits that were never delayed (except by the preliminary injunction). *See* 77 Fed. Reg. 8725, 8725–26 (finalizing the rule imposing this Mandate as of the first plan year starting after August 1, 2012). The government therefore admitted that this Mandate would have applied to Hercules in November 2012, absent the injunction. *See* Gov. Am. Opp. to MPI at 47–48, *Newland v. Sebelius*,1:12-cv-01123-JLK, doc. # 26 (D. Colo. filed July 13, 2012, 2012).

The Mandate challenged here triggers several penalties that are independent of the employer reporting requirements under 26 U.S.C. § 4980H, and which have not been delayed. If Hercules continues to provide its employees with their health insurance plan and continues to omit the Mandated items for which it has a religious objection, it will imminently be subject both to fines under and 26 U.S.C. § 4980D of possibly $100 / applicable person / day, and lawsuits by the government under 29 U.S.C. § 1132. The government's position, set forth in its supplemental brief, that the delay in the employer reporting requirements does not undermine Hercules' claims, further signifies the government's intent to fully enforce the present Mandate against Hercules in the absence of their injunction.

The delay of the employer reporting requirements also does not affect this case because the requirements were only delayed until January 2015. When Hercules filed this lawsuit on April 30, 2012, the employer reporting requirements were not set to go into effect until January 2014: 20 months distant. The threatened harm to Hercules from the delayed requirements is more imminent now than it was in April of 2012, being less than 17 months distant. The government in this case never claimed, in 2012, that the year-and-a-half distant beginning of the employer reporting requirements undermined the case's ripeness.

Even if the employer reporting requirements were the only source of harm (and all parties agree they are not), their mere delay until 2015 does not undermine ripeness. "[I]injury is imminent even though the employer mandate will not go into effect until January 1, 2015, as [plaintiff] must take measures to ensure compliance in advance of that date." *Liberty University, Inc. v. Lew*, 2013 WL 3470532, at *7 (4th Cir. July 11, 2013) (citing *Virginia v. Am. Booksellers Ass'n.*, 484 U.S. 383, 392–93 (1988)); *see also Thomas More Law Center v. Obama*, 651 F.3d 529, 538 (6th Cir. 2011) ("In view of the probability, indeed virtual certainty, that the minimum coverage provision will apply to the plaintiffs on January 1, 2014, no function of standing law is advanced by requiring plaintiffs to wait until six months or one year before the effective date to file this lawsuit."), *abrogated on other grounds by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

If someone were to say that the delay of the employer reporting requirements undermines Hercules' claims, it would be like saying that no harm would come if Hercules dumped its employees from their health plan today and until 2015. Not only would that obviously harm Hercules' employees, it would harm Hercules' ability to attract and keep good employees and Hercules' ability to work together with their team of employees in a harmonious way.

Finally, the delay of the employer reporting requirements does demonstrate one thing in this case: it shows another glaring way in which the government is choosing not to give women the benefits of the Mandate being challenged here. The Congressional Budget Office estimates that as a direct result of the delay of employer reporting requirements: 1 million people will lose employer-based health insurance in 2014; almost half of those people will go uninsured altogether; and the government's one year cost is over $10 billion.[4] Thus the government is content to allow hundreds of thousands of additional women to not receive Mandated abortifacient and contraception coverage *at all* in 2014 because they will be uninsured. It leaves hundreds of thousands more women not receiving that coverage from their *employers*, showing that the Mandate here can be achieved

[4] Sarah Kliff, "Obamacare mandate delay costs $12 billion, cuts insurance coverage," *Wash. Post*, July 30, 2013, *available at* http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/30/obamacare-mandate-delay-costs-12-billion-cuts-insurance-coverage/ (last visited Aug. 5, 2013).

through means other than coercing the employer. And the government is spending $10 billion on this single delay, but claims it cannot tolerate paying a much smaller amount for Mandated abortifacient and contraceptive coverage itself, merely for the women who want it and whose employers are exempt under RFRA, rather than coercing those religiously objecting employers. This further supports the preliminary injunction. *See also Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) ("Delayed implementation of a measure that does not appear to address any immediate problem will generally not cause material harm, even if the measure were eventually found to be constitutional and enforceable.").

CONCLUSION

For the reasons explained above, *Hobby Lobby* resolves this appeal entirely in Hercules' favor, and the delay in employer reporting requirements strengthens rather than undermines Hercules' claims. Hercules opposes the government's suggestion to issue an abeyance, and suggests rather that since the government would be satisfied by an abeyance, this interlocutory appeal is unnecessary and should be dismissed.

Respectfully submitted this 5th day of August, 2013.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of Plaintiffs-Appellees has been produced using proportionately spaced 14-point Times New Roman typeface. According to the "word count" feature in the Microsoft Word 2007 software, this brief complies with the Court's order for supplemental briefing because it contains 3,389 words in the relevant sections.

s/ Matthew S. Bowman
Matthew S. Bowman

CERTIFICATE OF SERVICE

I certify that on August 5, 2013, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system and caused seven hard copies of the brief to be sent to this Court by Federal Express, overnight delivery. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system..

s/ Matthew S. Bowman
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