Nos. 13-1540, 14-6026, 14-6028

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, a Colorado non-profit corporation, *et al.*,

Plaintiffs-Appellants,

SOUTHERN NAZARENE UNIVERSITY, *et al.*,

Plaintiffs-Appellees,

REACHING SOULS INT'L, INC., an Oklahoma not for profit corporation, *et al.*,

Plaintiffs-Appellees,

v.

SYLVIA MATHEWS BURWELL, Secretary of the United States Department of Health and Human Services, *et al.,*

Defendants-Appellants and Defendants-Appellees.

On Appeal from the United States District Courts
for the District of Colorado, No. 13-cv-2611 (Martinez, J.), and
Western District of Oklahoma, No. 13-cv-1015 (Friot, J.), No. 13-cv-1092 (DeGiusti, J.),

SUPPLEMENTAL BRIEF FOR THE GOVERNMENT

STUART F. DELERY
Assistant Attorney General

SANFORD C. COATS
JOHN F. WALSH
United States Attorneys

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
ADAM C. JED
PATRICK G. NEMEROFF
MEGAN BARBERO
(202) 532-4631
Attorneys, Appellate Staff
Civil Division, Room 7226
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

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GLOSSARY

ERISA	Employee Retirement Income Security Act
HHS	U.S. Department of Health and Human Services
RFRA	Religious Freedom Restoration Act
TPA	Third-party administrator

INTRODUCTION AND SUMMARY

Pursuant to this Court's order of July 1, 2014, the government respectfully submits this supplemental brief to address the impact of *Burwell* v. *Hobby Lobby Stores, Inc.*, __ S. Ct. __, Nos. 13-354, 13-356, 2014 WL 2921709 (June 30, 2014), on the issues raised in these cases.

As discussed in our principal briefs, the Affordable Care Act established additional minimum standards for group health plans, including coverage of certain preventive health services for women without cost sharing. The regulations implementing this provision generally require group health plans to include coverage of contraceptive services as prescribed by a health care provider.

The regulations contain accommodations, however, for plans established by non-profit organizations that hold themselves out as religious organizations and that have a religious objection to contraceptive coverage. Such an organization may opt out of the contraceptive coverage requirement by informing its insurer or third-party administrator that the organization is eligible for an accommodation and is declining to provide contraceptive coverage. When an eligible organization declines to provide such coverage, the regulations generally require the insurance issuer or third-party administrator to provide contraceptive coverage separately for the affected women, at no cost to the eligible organization. These requirements do not apply, however, when, as in *Little Sisters of the Poor Home for the Aged,* the third-party administrator is administering a self-insured "church plan" outside the regulatory scope of ERISA.

The plaintiffs in the three cases on appeal are either eligible for an accommodation or are religious employers (as defined by reference to a provision of the Internal Revenue Code) that are exempt from the contraceptive coverage provision. Thus, none of the plaintiffs is required to provide contraceptive coverage, but they nevertheless claim that the regulations violate their rights under the Religious Freedom Restoration Act (RFRA). Plaintiffs' central argument is that, by opting out of the contraceptive coverage requirement, they "trigger" or "facilitate" the provision of coverage by third parties. Our principal briefs explain that this theory is fundamentally mistaken: "Submitting the self-certification form to the insurance issuer or third-party administrator does not 'trigger' contraceptive coverage; it is federal law that requires the insurance issuer or the third-party administrator to provide this coverage." *Mich. Catholic Conference* v. *Burwell*, __ F.3d __, Nos. 13-2723, 13-6640, 2014 WL 2596753, at *9 (6th Cir. June 11, 2014); *accord Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547, 554 (7th Cir. 2014) ("Federal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services."), *reh'g en banc denied*, No. 13-3853, ECF No. 64 (May 7, 2014).

The Supreme Court's decision in *Hobby Lobby* underscores the infirmity of plaintiffs' position. The Supreme Court held that the contraceptive coverage requirement violated RFRA with respect to closely held for-profit corporations that—unlike the plaintiffs here—could not opt out of the requirement. The existence of the opt-out regulations that plaintiffs challenge here was crucial to the Supreme Court's reasoning. The Court explained that the opt-out regulations "effectively exempt[]" organizations that are eligible for an

accommodation. 2014 WL 2921709, at *9. The Court emphasized that the opt-out regulations "seek[] to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." *Id.* at *6.

The Supreme Court concluded that the opt-out regulations demonstrate that the Department of Health and Human Services (HHS) has "at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs." *Id.* at *24. The Court reasoned that the accommodations allowed under the regulations "serve[] HHS's stated interests equally well" because "female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to 'face minimal logistical and administrative obstacles'" in obtaining the coverage. *Id.* at *25 (citation omitted).

Plaintiffs here are "effectively exempt[]" (*id.* at *9) from the contraceptive coverage requirement. They seek to preclude the government from independently ensuring that their employees (and students) have the "same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." *Id.* at *6. That argument lacks support in precedent and is irreconcilable with the reasoning of *Hobby Lobby*.

ARGUMENT

The Supreme Court's Reasoning in *Hobby Lobby* Confirms the Validity of the Opt-Out Regulations

1. Plaintiffs in these cases do not dispute that they are eligible for a religious accommodation or are religious employers as defined by reference to the Internal Revenue Code. Their challenge to the accommodations rests on their assertion that, by exercising their right to opt out, they "trigger" or "facilitate" the provision of contraceptive coverage by third parties. *See, e.g.,* Pl. Br. 18, 30, *Southern Nazarene* (characterizing a decision to opt out as "trigger[ing]" or "facilitat[ing]" coverage by others); Pl. Br. 32-37, *Reaching Souls* (characterizing a decision to opt out as "the trigger to obligate, authorize, direct, and incentivize others to provide contraceptives") (emphasis omitted); Pl. Br. 14-15, *Little Sisters of the Poor Home for the Aged* (arguing that opting out of the coverage requirement "triggers a TPA's legal obligation to make 'separate payments for contraceptive services directly for plan participants and beneficiaries'") (citation omitted).

The Supreme Court's decision in *Burwell* v. *Hobby Lobby Stores, Inc.*, __ S. Ct. __, Nos. 13-354, 13-356, 2014 WL 2921709 (June 30, 2014), confirms the validity of the regulatory accommodations, and its reasoning cannot be reconciled with plaintiffs' position here. The Supreme Court held that application of the contraceptive coverage requirement to the plaintiffs in that case—closely held companies that were not eligible for the regulatory opt-out—violated their rights under RFRA. Central to the Court's reasoning was the existence of the opt-out alternative that the Departments afford to organizations such as the plaintiffs here. This accommodation, the Supreme Court explained, "seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities

have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." *Id.* at *6. The Court declared that this accommodation is "an alternative" that "achieves" the aim of seamlessly providing coverage of recommended health services to women "while providing greater respect for religious liberty." *Ibid.*

The Supreme Court did not suggest that employers could (or should be entitled to) prevent their employees from obtaining contraceptive coverage from third parties through the regulatory accommodations. To the contrary, the Court reiterated that "in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'" *Id.* at *24 n.37 (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005)). The free exercise of religion protected by RFRA cannot "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Id.* at *29 (Kennedy, J., concurring).

The Supreme Court thus stressed that "[t]he effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero." *Id.* at *6; *see id.* at *6 & n.1, *25. After employers opt out, employees "would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to face minimal logistical and administrative obstacles because their employers' insurers would be responsible for providing information and coverage." *Id.* at *25 (citation and internal quotation marks omitted). In responding to the dissent, the Court emphasized that the accommodations would not "'[i]mped[e] women's receipt of benefits by "requiring them to take steps to learn

about, and to sign up for, a new government funded and administered health benefit.''''' *Ibid.* (alterations in original, quoting dissent (in turn quoting 78 Fed. Reg. 39,870, 39,888 (July 2, 2013) with alterations)).

2. The Supreme Court thus recognized the religious accommodation as a less burdensome alternative that "d[id] not impinge on the plaintiffs' religious belief that providing insurance coverage for [contraceptives] violates their religion" while still "serv[ing] HHS's stated interests equally well" by generally ensuring that health coverage available to women does not vary according to the religious beliefs of their employers. 2014 WL 2921709, at *25.

Assuming that plaintiffs nevertheless pursue this litigation, they will presumably urge that RFRA requires the government to provide another alternative to the existing right to opt out. As noted, the linchpin of plaintiffs' reasoning is the mistaken view that their opting out of providing contraceptive coverage "triggers" or "facilitates" provision of such coverage by third parties, because only if employers or universities opt out does the government require or offer to pay third-parties to make or arrange separate payments for contraception instead. The Sixth and Seventh Circuits have correctly rejected this argument, explaining that "[s]ubmitting the self-certification form to the insurance issuer or third-party administrator does not 'trigger' contraceptive coverage; it is federal law that requires the insurance issuer or the third-party administrator to provide this coverage." *Mich. Catholic Conference* v. *Burwell*, __ F.3d __, Nos. 13-2723, 13-6640, 2014 WL 2596753, at *9 (6th Cir. June 11, 2014); *accord Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547, 554 (7th Cir. 2014), *reh'g en banc denied*, No. 13-3853, ECF No. 64 (May 7, 2014).

Plaintiffs' view about what types of action (or inaction) can be said to "trigger" contraceptive coverage—and thereby, in their view, impose a "substantial burden" for purposes of their RFRA claim—makes it difficult to assess how one accommodation might be less restrictive than another under their theory of the case. For example, some of the plaintiffs state that they offer health coverage through self-insured church plans that are exempt from ERISA, which thus provides no authority to regulate third-party administrators that administer these self-insured church plans. *See* 29 U.S.C. § 1003(b)(2); *see also* 29 U.S.C. § 1002(33) (definition of church plan). The Internal Revenue Code, which provides no authority to regulate third-party administrators, likewise does not bring third-party administrators that administer self-insured church plans within the ambit of the contraceptive coverage requirement. *See generally* 26 U.S.C. §§ 9815, 4980D. Thus, in the case of the plaintiffs that offer coverage through a self-insured church plan, the act of opting out cannot, even by plaintiffs' lights, be thought to "trigger" a third party's obligation to provide coverage. Any provision of coverage by these third-party administrators would be entirely voluntary. *See* 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50(d). Nonetheless, even as to such organizations, plaintiffs insist that the Departments must adopt some less restrictive alternative.[1]

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[1] In *Little Sisters of the Poor Home for the Aged* v. *Sebelius,* the Supreme Court enjoined enforcement of the challenged regulations on the condition that "the employer applicants inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services[.]" 134 S. Ct. 1022, 1022 (2014) (mem.). The Court noted that it "issues this order based on all of the circumstances of the case," which included the circumstances that the TPA administered a church plan, was therefore not subject to the regulation's requirements, and had already declared that it would not voluntarily provide

Continued on next page.

Generalized statements by plaintiffs that the government can work with third parties to provide contraceptive coverage to women who work for objecting employers, ignore the fact that, in the regulations at issue here, the government *is* working with third parties to provide contraceptive coverage, and the government *is* offering to pay third-party administrators of self-insured plans for providing or arranging such coverage. Plaintiffs' contentions that the Departments should "directly provide" contraceptives to women, "offer grants to entities that already provide contraceptive services at free or subsidized rates," or provide tax credits to women who pay for contraception out-of-pocket themselves, JA53a, *Little Sisters of the Poor Home for the Aged* (complaint); *accord* Pl. Br. 48 n.10, *Reaching Souls*, *Int'l*, would not "equally further[] the Government's interest," *Hobby Lobby*, 2014 WL 2921709, at *29 (Kennedy, J., concurring), by ensuring that women can seamlessly obtain contraceptive coverage without additional burden—the very point of requiring that health coverage include coverage of contraceptives without cost sharing. *See* 78 Fed. Reg. at 39,888; *see also, e.g.,* Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 18-19 (2011) (IOM Report).

For example, plaintiffs appear to suggest that the Departments could fund contraceptive coverage through Title X of the Public Health Service Act. Pl. Br. 48 n.10, *Reaching Souls*, *Int'l.*; JA135a, *Little Sisters of the Poor Home for the Aged* (Mot. for Prelim. Injunction). But unlike employer-based coverage, Title X grantees provide services directly, not through reimbursement to third-party providers. By statute, moreover, priority for

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independent coverage. *Ibid.* The Court also made explicit that "this order should not be construed as an expression of the Court's views on the merits." *Ibid.*

services must be given to "low-income families." 42 U.S.C. § 300a-4(c). Consistent with this requirement, patients whose income exceeds 250% of the federal poverty level must pay the reasonable cost of any services they receive. 42 C.F.R. § 59.5(a)(8). And in any event, providing contraceptive coverage through Title X—or, for that matter, some other existing or potential government program—would not effectively implement Congress's objective of "providing coverage of recommended preventive services through the existing employer-based system of health coverage so that women face minimal logistical and administrative obstacles." 78 Fed. Reg. at 39,888. To the contrary, "[i]mposing additional barriers to women receiving the intended coverage . . . by requiring them to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women." *Ibid.*

By contrast, the Supreme Court repeatedly stressed in *Hobby Lobby* that the existing regulatory accommodations "ensur[e] that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." 2014 WL 2921709, at *6; *see also*, *e.g.*, *ibid.* (effect of the accommodations on employees is "precisely zero"); *id.* at *25 (accommodations will not "'[i]mped[e] women's receipt of benefits by 'requiring them to take steps to learn about, and to sign up for, a new government funded and administered health benefit'") (alterations in original, quoting dissent (in turn quoting 78 Fed. Reg. at 39,888 with alterations).

Moreover, RFRA does not require the government to create entirely new programs to accommodate religious objections. *See Hobby Lobby*, 2014 WL 2921709, at *29 (Kennedy,

J., concurring) ("[T]he Court does not address whether the proper response to a legitimate claim for freedom in the health care arena is for the Government to create an additional program. The Court properly does not resolve whether one freedom should be protected by creating incentives for additional government constraints. In these cases, it is the Court's understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government.").

The Supreme Court also issued an interim order a few days later in connection with an application for an injunction in *Wheaton College* v. *Burwell*, No. 13A1284, 2014 WL 3020426 (July 3, 2014). The interim order provides that, "[i]f [Wheaton College] informs the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services, the [Departments of Health and Human Services, Labor, and the Treasury] are enjoined from enforcing against" Wheaton College provisions of the Affordable Care Act and related regulations requiring coverage without cost-sharing of certain contraceptive services "pending final disposition of appellate review." *Id.* at *1. The order stated that Wheaton College need not use the self-certification form prescribed by the government or send a copy of the executed form to its health insurance issuers or third-party administrators to meet the condition for this injunctive relief. The order also stated that this relief neither affected "the ability of [Wheaton College's] employees and students to obtain, without cost, the full range of FDA approved contraceptives," nor precluded the government from relying on the notice it receives from Wheaton College "to facilitate the provision of full contraceptive coverage under the Act." *Ibid.*

The *Wheaton College* injunction does not reflect a final Supreme Court determination that RFRA requires the government to apply the accommodations in this manner. Nevertheless, the Departments responsible for implementing the accommodations have informed us that they have determined to augment the regulatory accommodation process in light of the *Wheaton College* injunction and that they plan to issue interim final rules within a month. We will inform the Court when the rules are issued.

3. In *Hobby Lobby*, five members of the Court endorsed the position that providing contraceptive coverage to employees "serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee." 2014 WL 2921709, at *28 (Kennedy, J., concurring); *accord id.* at *40-41 & n.23 (Ginsburg, J., dissenting). The remaining Justices assumed without deciding that the contraceptive coverage requirement furthers compelling interests, *id.* at *23, and emphasized that, under the accommodations for eligible non-profit organizations, employees "would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to face minimal logistical and administrative obstacles because their employers' insurers would be responsible for providing information and coverage," *id.* at *25 (citation and internal quotation marks omitted). In responding to the dissent, the majority stressed that the accommodations would not "'[i]mped[e] women's receipt of benefits by 'requiring them to take steps to learn about, and to sign up for, a new government funded and administered health benefit.'" *Ibid.* (alterations in original, quoting dissent (in turn quoting 78 Fed. Reg. at 39,888 with alterations).

The challenged accommodations serve a number of interrelated and compelling interests, as the Supreme Court acknowledged in *Hobby Lobby*. As an initial matter, the government's ability to accommodate religious concerns in this and other areas depends on the government's ability to fill the gaps created by the accommodations. Plaintiffs, by contrast, assert that it is insufficient to permit an objector to opt out of an objectionable requirement; in their view, the government may not shift plaintiffs' obligations to a third party but must instead fundamentally restructure its operations. Under that view, any effort by the government to fill a gap created by an accommodation would, itself, be subject to RFRA's compelling interest test.

Hobby Lobby confirms that, when religious objectors opt out of their legal obligations, the government may fill those gaps and do so as seamlessly as possible. 2014 WL 2921709, at *25. In our diverse Nation, many requirements may be the object of religious objections. But national systems of health and welfare cannot vary from point to point or be based around what, if any, method of provision of medical coverage can be agreed upon by all parties, including those who object. The challenged accommodations provide an administrable way for organizations to state that they object and opt out, and for the government to require third parties to provide contraceptive coverage. The Supreme Court admonished in its pre-*Smith* decisions that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen* v. *Roy*, 476 U.S. 693, 699 (1986).

The contraceptive coverage requirement in particular furthers compelling interests by directly and substantially reducing the incidence of unintended pregnancies, improving birth spacing, protecting women with certain health conditions for whom pregnancy is contraindicated, and otherwise preventing adverse health conditions. *See* 78 Fed. Reg. at 39,872; IOM Report 103-107; *see also Hobby Lobby*, 2014 WL 2921709, at *28 (Kennedy, J., concurring) ("There are many medical conditions for which pregnancy is contraindicated," and "[i]t is important to confirm that a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees.").

Physician and public health organizations, such as the American Medical Association, the American Academy of Pediatrics, and the March of Dimes accordingly "recommend the use of family planning services as part of preventive care for women." IOM Report 104. This is not a "broadly formulated interest[] justifying the general applicability of government mandates," *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006), but rather a concrete and specific one, supported by a wealth of empirical evidence.

Use of contraceptives reduces the incidence of unintended pregnancies. IOM Report 102-03. Unintended pregnancies pose special health risks because a woman with an unintended pregnancy "may not immediately be aware that [she is] pregnant, and thus delay prenatal care." 78 Fed. Reg. at 39,872; *see* IOM Report 103. A woman who does not know she is pregnant is also more likely to engage in "behaviors during pregnancy, such as smoking and consumption of alcohol, that pose pregnancy-related risks." 78 Fed. Reg. at 39,872; *see* IOM Report 103. As a result, "[s]tudies show a greater risk of preterm birth and

low birth weight among unintended pregnancies." 78 Fed. Reg. at 39,872; *see* IOM Report 103. And, because contraceptives reduce the number of unintended pregnancies, they "reduce the number of women seeking abortions." 78 Fed. Reg. at 39,872.

The contraceptive coverage regulations, including the religious accommodations, also advance the government's related compelling interest in assuring that women have equal access to recommended health care services. 78 Fed. Reg. at 39,872, 39,887. Congress enacted the women's preventive-services coverage provision because "women have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. 29,070 (2009) (statement of Sen. Feinstein); *see* IOM Report 18. Prior to the Affordable Care Act, "[w]omen of childbearing age spen[t] 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. at 29,070 (statement of Sen. Feinstein); *see* Ctrs. for Medicare & Medicaid Servs., *National Health Care Spending By Gender and Age: 2004 Highlights*, ("Females 19-44 years old spent 73 percent more per capita [on health care expenses] than did males of the same age."). These disproportionately high costs had a tangible impact: Women often found that copayments and other cost sharing for important preventive services "[were] so high that they avoid[ed] getting [the services] in the first place." 155 Cong. Rec. at 29,302 (statement of Sen. Mikulski); *see* IOM Report 19 ("[W]omen are consistently more likely than men to report a wide range of cost-related barriers to receiving or delaying medical tests and treatments and to filling prescriptions for themselves and their families."). Studies have demonstrated that "even moderate copayments for preventive services" can "deter patients from receiving those services." IOM Report 19.

CONCLUSION

The decision of the district court in *Little Sisters of the Poor Home for the Aged* should be affirmed, and the decisions of the district courts in *Southern Nazarene University* and *Reaching Souls* should be reversed.

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General
SANFORD C. COATS
JOHN F. WALSH
United States Attorneys
BETH S. BRINKMANN
Deputy Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
ADAM C. JED
PATRICK G. NEMEROFF
MEGAN BARBERO
(202) 532-4631
Attorneys, Appellate Staff
Civil Division, Room 7226
U.S. Department of Justice
950 Pennsylvania Ave., N.W
Washington, D.C. 20530

JULY 2014

CERTIFICATIONS OF COMPLIANCE

I hereby certify this brief complies with this Court's order of July 1, 2014, because it is no longer than 15 pages long in a 13 point font.

I further certify that (1) all required privacy redactions have been made; (2) the required paper copies are exact versions of the document filed electronically; and (3) that the electronic submission was scanned for viruses and found to be virus-free.

/s/ Adam C. Jed
Adam C. Jed

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system and caused seven hard copies to be delivered within two business days. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Adam C. Jed
Adam C. Jed