Nos. 14-10241, 14-10661, 14-20112, 14-40212

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIVERSITY OF DALLAS, and ROMAN CATHOLIC DIOCESE OF FORT WORTH, *et al.*, and EAST TEXAS BAPTIST UNIVERSITY, *et al.*, and CATHOLIC DIOCESE OF BEAUMONT, *et al.*,

Plaintiffs-Appellees,

WESTMINSTER THEOLOGICAL SEMINARY,

Intervenor Plaintiff-Appellee,

v.

SYLVIA M. BURWELL, in her official capacity as Secretary of Health and Human Services, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Courts for the Northern District of Texas, the Southern District of Texas, and the Eastern District of Texas

BRIEF FOR THE APPELLANTS

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REQUEST FOR ORAL ARGUMENT

These appeals present the question whether the Religious Freedom Restoration Act allows non-profit employers and universities not only to opt out of providing or arranging federally required health coverage for contraceptives, but also to block accommodations that allow women to obtain separate payments for contraceptives from third parties. Because of the importance of the issue, the government respectfully requests oral argument.

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INTRODUCTION

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 without cost sharing.

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 notifying either its insurer or third party administrator or by notifying the Secretary of Health and Human Services (HHS) 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 insurer or third party administrator to provide contraceptive coverage separately for the affected women, at no cost to the eligible organization.

The plaintiffs in these consolidated appeals 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. Although none of the plaintiffs are required to provide contraceptive

coverage, they nevertheless claim that the regulations violate their rights under the Religious Freedom Restoration Act (RFRA).

The implications of plaintiffs' argument are sweeping. It is one thing to urge that the government may not impose a requirement to provide contraceptive coverage on a religious organization that objects on religious grounds. It is quite another thing to urge that the government may not ensure that women have access to separate coverage through third parties after such an organization exercises its option not to provide such coverage. That latter argument, if accepted, would make women's access to contraceptive coverage dependent upon the religious beliefs of their employers.

The theory embraced by the district courts in these cases—that plaintiffs "trigger" the provision of coverage by opting out—is fundamentally mistaken, as two courts of appeals have already ruled. *Mich. Catholic Conference* v. *Burwell*, 755 F.3d 372, 387 (6th Cir. 2014) ("[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"), *reh'g en banc denied*, Nos. 13-2723, 13-6640, ECF No. 63 (Sept. 16, 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 infirmity of plaintiffs' position is further underscored by the Supreme Court's recent decision in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). The Supreme Court in that case 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. *Id.* at 2763. The Court expressly stated that the 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 2759.

The Supreme Court concluded that the opt-out regulations demonstrated that HHS "ha[d] at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs." *Id.* at 2782. 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 2782 (citation omitted). Indeed, "[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*." 134 S. Ct. at 2760 (emphasis added); *see also id.* at 2759 (explaining that the accommodation "ensur[es] 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").

On August 22, 2014, the Departments of Health and Human Services, Labor, and the Treasury (collectively, the Departments) augmented that regulatory accommodation process in light of the Supreme Court's interim order in *Wheaton College*, which identified an alternative form of accommodation that would neither affect "the ability of [Wheaton College's] employees and students to obtain, without cost, the full range of FDA approved contraceptives," nor preclude the government from relying on the notice it receives from Wheaton College "to facilitate the provision of full contraceptive coverage under the Act." *Wheaton Coll.* v. *Burwell*, 134 S. Ct. 2806, 2807 (2014). The accommodation, as originally challenged in *Wheaton College* and in this case, contemplated that an eligible organization would notify its insurer or third party administrator of its decision to opt out. Under the interim final regulations, an organization may opt out by notifying HHS directly of its decision rather than by notifying its insurance carrier or third party administrator. *See Coverage of Certain Preventive Services Under the Affordable Care Act*, 79 Fed. Reg. 51,092 (Aug. 27, 2014). This provides eligible organizations like plaintiffs with an alternative mechanism for opting out of the contraceptive-coverage requirement.

Because plaintiffs in these cases include organizations that are eligible for accommodations they are, in the words of the Supreme Court, "effectively exempt[]," *Hobby Lobby*, 134 S. Ct. at 2763, from the contraceptive coverage requirement. Plaintiffs' argument goes beyond their own exemption from providing contraceptive coverage and would preclude the government from independently ensuring that their employees 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 2759. That argument and the district court decisions on review lack support in precedent and contradict the reasoning of *Hobby Lobby*.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(4), and 1346(a)(2). ROA.14-10241.1018 (GRE32); ROA.14-10661.1019 (GRE72); ROA.14-20112.300 (GRE149); ROA.14-40212.15 (GRE203).

In *East Texas Baptist University*, on December 27, 2013, the district court granted summary judgment for plaintiffs on their RFRA claims and issued a preliminary injunction. ROA.14-20112.2314-2316 (GRE145-147). On January 21, 2014, the district court certified that its preliminary injunction would be permanent and ordered partial final judgment for plaintiffs. ROA.14-20112.2325-2326 (GRE99-100). Defendants filed a timely notice of appeal on February 24, 2014. ROA.14-20112.2333 (GRE96).

University of Dallas and *Roman Catholic Diocese of Fort Worth* arise from the same case. The district court granted the University of Dallas's motion for a preliminary injunction on December 31, 2013, ROA.14-10241.2174-2178 (GRE24-28), and defendants filed a timely notice of appeal on February 24, 2014, ROA.14-2041.2433 (GRE21). The district court granted a preliminary injunction as to remaining plaintiffs on June 5, 2014, ROA.14-10661.2453-2454 (GRE67-68), and defendants filed a timely notice of appeal on June 9, 2014, ROA.14-10661.2455-2456 (GRE64-65).

In *Catholic Diocese of Beaumont*, the district court granted a permanent injunction and entered final judgment on January 3, 2014, ROA.14-40212.1050-1052 (GRE181-183), and defendants filed a timely notice of appeal on February 24, 2014, ROA.14-40212.1053 (GRE178).

This Court has appellate jurisdiction under 28 U.S.C. §§ 1291, 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the Religious Freedom Restoration Act allows employers and universities not only to opt out of providing federally required health coverage for contraception, but also to block accommodations that allow women to obtain separate payments for contraception from third parties.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. Coverage requirements for women's preventive health services

Congress has long regulated employer-sponsored group health plans. In 2010, the Patient Protection and Affordable Care Act (Affordable Care Act or Act), Pub. L. No. 111-148, 124 Stat. 119,[1] established certain additional minimum standards for group health plans as well as for health insurance issuers that offer coverage in the group and the individual health insurance markets.

The Act requires non-grandfathered group health plans and health insurance issuers offering non-grandfathered health insurance coverage to cover four categories of preventive-health services without cost sharing, that is, without requiring plan participants and beneficiaries to make copayments or pay deductibles or coinsurance. 42 U.S.C. § 300gg-13. As relevant here, these services include preventive care and screenings for women as provided for in comprehensive guidelines supported by the Health Resources and Services Administration (HRSA), a component of HHS. *Id.* § 300gg-13(a)(4); *see Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014).

HHS requested the assistance of the Institute of Medicine (IOM) in developing such comprehensive guidelines for preventive services for women. 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012). Experts, "including specialists in disease prevention, women's

[1] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

health issues, adolescent health issues, and evidence-based guidelines," developed a list of services "shown to improve well-being, and/or decrease the likelihood or delay the onset of a targeted disease or condition." IOM, *Clinical Preventive Services for Women: Closing the Gaps* 2-3 (2011) (IOM Report). These services included the "full range" of "contraceptive methods" approved by the Food and Drug Administration, *id.* at 10; *see id.* at 102-110, which the Institute of Medicine found can greatly decrease the risk of unwanted pregnancies, adverse pregnancy outcomes, and other adverse health consequences, and vastly reduce medical expenses for women. *See id.* at 102-107.

Consistent with those recommendations, the HRSA guidelines include "'[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,' as prescribed" by a health care provider. 77 Fed. Reg. at 8725 (brackets in original; citation omitted); *see Hobby Lobby*, 134 S. Ct. at 2762. The relevant regulations adopted by the three Departments implementing this portion of the Act (HHS, Labor, and Treasury) require coverage of, among other things, preventive services, the contraceptive methods 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).[2]

[2] All citations to the implementing regulations are to those regulations as amended by the August 22, 2014 interim final regulations.

2. The regulatory exemption for religious employers and accommodations for non-profit religious organizations

The implementing regulations authorize an exemption from the contraceptive coverage provision for the group health plans of "religious employer[s]." 45 C.F.R. § 147.131(a). A religious employer is defined as a non-profit organization as described in the Internal Revenue Code provision that refers to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order. *Ibid.* (cross-referencing 26 U.S.C. § 6033(a)(3)(A)(i), (iii)).

The implementing regulations also establish accommodations for non-profit organizations that hold themselves out as religious organizations and that have a religious objection to contraceptive coverage. The accommodations provision was developed by the agencies in response to religious objections raised by some commenters. The agencies stated that they would develop "'changes to these final regulations that would meet two goals'—providing contraceptive coverage without cost-sharing to covered individuals and accommodating the religious objections of [additional] non-profit organizations[.]" *Wheaton Coll.* v. *Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012) (per curiam) (quoting 77 Fed. Reg. at 8727). After notice and comment rulemaking, the Departments published in July 2013 regulations containing accommodations for non-profit religious organizations. *See* 78 Fed. Reg. 39,870, 39,874-39,886 (July 2, 2013); 45 C.F.R. § 147.131(b) (HHS); 29 C.F.R. § 2590.715-

2713A(a) (Labor); 26 C.F.R. § 54.9815-2713A(a) (Treasury). Those regulatory accommodations "devised and implemented a system that 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 other employees. *Hobby Lobby*, 134 S. Ct. at 2759.[3] As discussed below, the Departments recently augmented the existing regulatory accommodations to provide additional accommodations for eligible organizations.

The accommodations are available to group health plans established or maintained by an organization that qualifies as an "eligible organization" (and group health insurance coverage provided in connection with such a plan). An "eligible organization" is an organization that satisfies the following criteria:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.
>
> (2) The organization is organized and operates as a nonprofit entity.
>
> (3) The organization holds itself out as a religious organization.
>
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3)

[3] Student plans are technically not provided by universities but instead are direct contractual relationships between students and health insurance issuers that are arranged by universities. The accommodations apply to student health insurance coverage arranged by eligible organizations and are treated akin to insured group health plans. 45 C.F.R. § 147.131(f).

> of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies.

45 C.F.R. § 147.131(b); *see* 29 C.F.R. § 2590.715-2713A(a); 26 C.F.R. § 54.9815-2713A(a); 78 Fed. Reg. at 39,874-39,875. Under these accommodation regulations, an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874. Under the preexisting regulations, to be relieved of any such obligations, the organization need only "self-certify" that it is an eligible organization that "opposes providing coverage for particular contraceptive services" and provide a copy of that self-certification to its insurance issuer or third party administrator. *Hobby Lobby*, 134 S. Ct. at 2782; *see* 29 C.F.R. § 2590.715-2713A(a)(4), (b)(1), (c)(1).

If an eligible organization opts out, individuals covered under its plan generally will "still have access to insurance coverage without cost sharing for all FDA-approved contraceptives," but without involvement by the objecting organization. *Hobby Lobby*, 134 S. Ct. at 2759. Where the eligible organization is one that offers an insured plan, the insurance issuer is required to "provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries." *Id.* at 2763; *see* 45 C.F.R. § 147.131(c)(2). The issuer must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the . . . plan," 45 C.F.R. § 147.131(c)(2)(i)(A), and "segregate

premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services," 45 C.F.R. § 147.131(c)(2)(ii).[4] This accommodation for insured plans applies not only to coverage offered to an eligible organization's employees, but also "to student health insurance coverage arranged by an eligible organization that is an institution of higher education." 45 C.F.R. § 147.131(f).

Where the eligible organization is one that offers a self-insured plan, its third party administrator ordinarily "must 'provide or arrange payments for contraceptive services' for the organization's employees without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries." *Hobby Lobby*, 134 S. Ct. at 2763 n.8 (quoting 78 Fed. Reg. at 39,893); *see* 29 C.F.R. § 2590.715-2713A(b)(2).[5] (As discussed below, these requirements do not apply when the third party administrator is administering a self-insured "church plan"

[4] This accommodation requires the issuer to bear the expense of providing contraceptive coverage, but does not impose any net cost because the additional expense is offset by the cost savings resulting from the coverage of contraceptive services. *Hobby Lobby*, 134 S. Ct. at 2763; *see* 78 Fed. Reg. at 39,877.

[5] An employer has a "self-insured" plan if it bears the financial risk of paying claims. Many self-insured employers use insurance companies or other third parties to administer their plans. These third party administrators perform functions such as developing networks of providers, negotiating payment rates, and processing claims. Employers may be regarded as self-insured even if they purchase a separate insurance policy (known as reinsurance or "stop loss" coverage), which is not a form of health insurance, to protect themselves against unusually high claims costs. *See generally* Congressional Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 6 (2008).

that ERISA does not cover.) The third party administrator may seek reimbursement for payments for contraceptive services from the federal government "through an adjustment to the Federally-facilitated Exchange user fee[s]." *Id.* § 2590.715-2713A(b)(3); *see* 45 C.F.R. § 156.50(d).

In all cases, an eligible organization that opts out of providing contraceptive coverage has no obligation to inform plan participants or enrollees of the availability of these separate payments made by third parties. Instead, health insurance issuers or third party administrators provide such notice and do so "separate from" materials that are distributed in connection with the eligible organization's group health coverage. 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(d). That notice must make clear that the eligible organization is neither administering nor funding the contraceptive benefits. *Ibid.*

In addition, the Departments have further augmented the regulatory accommodation process in light of the Supreme Court's interim order in connection with an application for an injunction in *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014). The interim order provided 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] are enjoined from enforcing against" Wheaton College provisions of the ACA and related regulations "pending final disposition of appellate review." *Id.* at 2807. The order 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 issued regulations that augment the accommodation process in light of *Wheaton College* by "provid[ing] an alternative process for the sponsor of a group health plan or an institution of higher education to provide notice of its religious objection to coverage of all or a subset of contraceptive services." 79 Fed. Reg. at 51,094.

Under the interim final regulations, an organization may elect to opt out by notifying HHS of its decision directly rather than by notifying its insurance carrier or third party administrator. An organization need not use any particular form and need only indicate the basis on which it qualifies for an accommodation and its objection to providing some or all contraceptive services, as well as the type of plan and contact information for the plan's third party administrators and health insurance issuers. 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii); 45 C.F.R. § 147.131(c)(1)(ii).

If a group health plan notifies HHS that it is opting out, the Departments will then make the necessary communications to ensure that health insurance issuers or

third party administrators make or arrange separate payments for contraception. In the case of an "insured" group health plan, HHS "will send a separate notification to each of the plan's health insurance issuers informing the issuer" that HHS "has received a notice" that the group health plan is opting out of providing contraceptive coverage on religious grounds "and describing the obligations of the issuer" under the regulations. 45 C.F.R. § 147.131(c)(1)(ii). An issuer that receives such a notice from HHS will "remain responsible for compliance with the statutory and regulatory requirement to provide coverage for contraceptive services to participants and beneficiaries," but the objecting organization "will not have to contract, arrange, pay, or refer for such coverage." 79 Fed. Reg. at 51,095.

In the case of a "self-insured" group health plan, the Department of Labor will "send a separate notification to each third party administrator of the ERISA plan." *Ibid.* The notice will state that HHS has received a notice that the group health plan is opting out of the contraceptive coverage requirement and will "describe[] the obligations of the third party administrator under" the applicable regulations. 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B). These include the obligation to make or arrange separate payments for contraceptive services. *Id.* § 2590.715-2713A(b)(2). The Department of Labor's communication to the third party administrator(s) will also "designate the relevant third party administrator(s) as plan administrator under section 3(16) of ERISA for those contraceptive benefits that the third party administrator would otherwise manage." 79 Fed. Reg. at 51,095; *see also* 29 C.F.R. § 2510.3-16(b).

As with the preexisting accommodations, in all cases, the eligible organization that opts out of providing contraceptive coverage has no obligation to inform plan participants or enrollees of the availability of these separate payments made by third parties. Instead, the health insurance issuer or third party administrator itself provides this notice, and does so "separate from" materials that are distributed in connection with the eligible organization's group health coverage. 45 C.F.R. § 147.131(d); 29 C.F.R. § 2590.715-2713A(d). Again, that notice must make clear that the eligible organization is neither administering nor funding the contraceptive benefits. *Ibid.*

B. Factual Background and Prior Proceedings

1. This appeal involves three district court cases that have been consolidated for appeal. The plaintiffs-appellees in *East Texas Baptist University* are a college that provides health coverage to its more than 200 employees through a self-insured plan that is administered by Mutual Assurance Administrators, Inc., ROA.14-20112.303, 467-468 (GRE150, GRE159-160), and a university that provides health coverage to its more than 350 employees through a self-insured church plan that is administered by Highmark Blue Cross Blue Shield, ROA.14-20112.304, 525-526, 528 (GRE151, GRE163-164, GRE166). The plaintiff-intervenor is a seminary that provides health coverage to its approximately 60 employees through Independent Blue Cross of Pennsylvania. ROA.14-20112.876 (GRE169).

The plaintiffs-appellees in *University of Dallas* and *Roman Catholic Diocese of Fort Worth*, which arise from the same case, are the Catholic Diocese of Fort Worth, which is a religious employer that is exempt from the contraceptive coverage requirement, ROA.14-10661.1017, 1024 (GRE71, GRE73); the University of Dallas, a university that arranges health coverage for its more than 2,600 students primarily through AETNA, ROA.14-10241.1028, 1031 (GRE33, GRE35), and provides health coverage to more than 350 employees through a self-insured plan, which is administered by third party administrators Blue Cross/Blue Shield of Texas (medical benefits) and Express Scripts (prescription drug benefits), ROA.14-10241.1016, 1028, 1030 (GRE31, 33-34); Our Lady of Victory Catholic School, a school that has 23 employees and provides health coverage through the Diocese's church plan, ROA.14-10661.1017, 1024-1026 (GRE71, GRE73-75); and Catholic Charities, a social services provider with 332 employees that offers health insurance through CIGNA, ROA.14-10661.1026-1027 (GRE75-76).

The plaintiffs-appellees in *Catholic Diocese of Beaumont* are the Catholic Diocese of Beaumont, which is a religious employer that is exempt from the contraceptive coverage requirement, ROA.14-40212.18 (GRE204), and Catholic Charities, a social services provider that states it provides health coverage to its employees through a self-insured church plan that is exempt from ERISA, ROA.14-40212.18-20 (GRE204-206).

All of the plaintiffs are either exempt from the contraceptive coverage provision or concededly eligible for the accommodations described above. ROA.14-10241.1013 (GRE30); ROA.14-10661.1014 (GRE70); ROA.14-20112.471, 528, 878 (GRE161, GRE166, GRE171); ROA.14-40212.32-33, 36 (GRE207-209). Plaintiffs contend that the religious accommodations set out above violate their rights under RFRA, which provides that the government "shall not substantially burden a person's exercise of religion" unless the application of that burden is the least restrictive means to advance a compelling governmental interest. 42 U.S.C. § 2000bb-1(a), (b). Plaintiffs argue that opting out of the contraceptive coverage requirement substantially burdens their religious exercise because doing so "triggers" other parties providing such coverage in their stead, ROA.14-10241.1013, 1044 (GRE30, GRE38); ROA.14-40212.33 (GRE208), and thus "facilitate[s] the use" of contraceptives to which plaintiffs object. ROA.14-20112.432 (GRE154); *see also, e.g.,* ROA. 14-10241.1013, 1130, 1132 (GRE30, GRE40-41); ROA.14-40212.73-74, 78, 80-81 (GRE212-216).

2. In *East Texas Baptist University*, the district court granted plaintiffs' motion for summary judgment on their RFRA claims and entered a permanent injunction and partial final judgment against defendants. ROA.14-20112.2325 (GRE99).[6] The court ruled that the accommodations are substantial burdens under RFRA because "the

[6] The district court stayed plaintiffs' remaining claims, including various constitutional and statutory claims. ROA.14-20112.2326 (GRE100).

self-certification form the employer completes and provides the issuer or TPA [third party administrator]. . . enable[s] the employees to obtain the free access to the contraceptive devices that the plaintiffs find religiously offensive." ROA.14-20112.2309 (GRE140). The court further ruled that the government failed to show a compelling interest in ensuring women's access to contraceptive coverage. ROA.14-20112.2310 (GRE141). And the court concluded that, even assuming such an interest, the government had not shown that the accommodations are the least restrictive means available to achieve that interest. ROA.14-20112.2311-2312 (GRE142-143).

In *Roman Catholic Diocese of Fort Worth*, the district court granted the University of Dallas's motion for a preliminary injunction and expressly adopted the *East Texas Baptist University* court's analysis. ROA.14-10241.2177-2178 (GRE27-28). Several months later, the district court granted a preliminary injunction in favor of the remaining plaintiffs, by reference to its earlier order. ROA.14-10661.2453-2454 (GRE67-68).

Similarly, in *Catholic Diocese of Beaumont*, the district court described its "analysis and conclusions" as "in line with" the decision in *East Texas Baptist University*. ROA.14-40212.1034 (GRE186). The court concluded that the accommodations are substantial burdens under RFRA because opting out "enable[d] the exact harm that Plaintiffs seek to avoid," *i.e.*, coverage of contraception. ROA.14-40212.1047 (GRE199). The court ruled that there was no compelling government interest in

providing women access to contraceptive coverage and that, even assuming such an interest, the accommodations are not the least restrictive alternative. ROA.14-40212.1047-1048 (GRE199-200). The court dismissed plaintiffs' remaining statutory claim and entered final judgment. ROA.14-40212.1047-1048, 1050-1052 (GRE199-200, GRE181-183).

SUMMARY OF ARGUMENT

The regulations implementing the Affordable Care Act generally require that group health plans include coverage for FDA-approved contraceptives as prescribed by a health service provider without cost sharing. The regulations also provide, however, that non-profit religious organizations can opt out of the contraceptive coverage requirement, and it is not controverted that plaintiffs in these cases are either eligible to opt out or are exempt automatically because they are religious employers as defined by reference to a provision of the Internal Revenue Code.

Plaintiffs thus do not challenge any obligation to provide contraceptive coverage because they have none. If they opt out of the coverage requirement, their insurers and third party administrators will be independently required under federal law to make or arrange separate payments for contraceptive coverage. Plaintiffs argue, however, that by declining to provide coverage themselves they "trigger" the independent provision of contraceptive coverage, and that is what violates RFRA in their view. But the Sixth and Seventh Circuits have explained, in rejecting this contention, 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*, 755 F.3d 372, 387 (6th Cir. 2014), *reh'g en banc denied*, Nos. 13-2723, 13-6640, ECF No. 63 (Sept. 16, 2014); *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). The Supreme Court has also suggested that the government may "rely[] on" a notice from objecting parties to "facilitate the provision of full contraceptive coverage under the Act." *Wheaton Coll.* v. *Burwell*, 134 S. Ct. 2806, 2807 (2014). And in that scenario, plaintiffs' "health insurance issuer[s] and third-party administrator[s]" would be "required by *federal law* to provide full contraceptive coverage." *Ibid.* (emphasis added). The interim final regulations provide alternative accommodations that allow eligible organizations to opt out by notifying HHS rather than their insurers or third party administrators. As with the preexisting regulations, after an organization informs HHS that it is opting out, federal law independently obligates the insurer or third party administrator to provide such coverage.

Plaintiffs would transform RFRA from a shield into a sword by invoking their own religious beliefs to preclude women from receiving health coverage for recommended preventive health care services from third parties. That position finds no support in precedent and is sharply at odds with the Supreme Court's analysis in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). There, the Supreme Court addressed a different group of employers not at issue in this case, *i.e.* for-profit

employers not eligible for the accommodations, and contrasted their obligations to those of non-profit religious organizations such as the plaintiffs here. The Court explained that the opt-out regulations "effectively exempt[]" eligible non-profit religious organizations, *id.* at 2763, and do so by "seek[ing] 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 2759.

The regulations provide opt-out mechanisms that respect religious liberty while allowing the government to achieve its "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." *Id.* at 2785-2786 (Kennedy, J., concurring); *accord id.* at 2800 & n.23 (Ginsburg, J., dissenting). They offer an administrable way for organizations to state that they object and opt out—including without contacting their insurers or third party administrators directly—while ensuring that the government has the information needed to implement the independent obligation that third parties provide contraceptive coverage so that participants and beneficiaries can "obtain, without cost, the full range of FDA approved contraceptives." *Wheaton Coll.*, 134 S. Ct. at 2807. As the Supreme Court emphasized in *Hobby Lobby*, "[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*." 134 S. Ct. at 2760 (emphasis added).

Plaintiffs' position ignores the Supreme Court's repeated admonition that "in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'" *Id.* at 2781 n.37 (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005)); *see also id.* at 2787 (Kennedy, J., concurring) (explaining that 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"). The decisions on review depart from the fundamental principles that inform the proper interpretation of the statute and should be reversed.

STANDARD OF REVIEW

This Court reviews an award of summary judgment *de novo*. *LaBarge Pipe & Steel Co.* v. *First Bank*, 550 F.3d 442, 449 (5th Cir. 2008). This Court reviews the grant of a preliminary or permanent injunction for abuse of discretion. *Villas at Parkside Partners* v. *City of Farmers Branch*, 726 F.3d 524, 528 (5th Cir. 2013) (en banc) (permanent injunction); *Lake Charles Diesel, Inc.* v. *Gen. Motors Corp.*, 328 F.3d 192, 195 (5th Cir. 2003) (preliminary injunction). "Even though the ultimate decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, a decision grounded in erroneous legal principles is reviewed *de novo*." *Lake Charles Diesel, Inc.*, 328 F.3d at 195 (internal quotation marks omitted); *accord Villas at Parkside Partners*, 726 F.3d at 528.

ARGUMENT

The Opt-Out Regulations Accommodate The Religious Liberty Of The Plaintiff Organizations While Ensuring That Women Who Participate In The Plans Of These Organizations Have Access To Contraceptive Coverage

A. The Supreme Court's Decision in *Hobby Lobby* and Order in *Wheaton College* Confirm the Validity of the Accommodations.

The Affordable Care Act generally requires group health plans to cover recommended women's preventive health services without cost sharing. Under the regulations implementing that requirement, group health plans generally must cover FDA-approved contraceptives as prescribed by a health care provider without cost sharing. The regulations automatically exempt from the contraceptive coverage requirement all religious employers as defined by reference to a provision of the Internal Revenue Code, and also provide accommodations for non-profit religious organizations that meet criteria set forth in the regulations such that they also are relieved of the requirement to provide contraceptive coverage.

To opt out of the contraceptive coverage requirement, an organization need only provide to its insurance issuer or third party administrator a copy of a form stating that it is an eligible organization, *see* 78 Fed. Reg. 39,870, 39,874-39,875 (July 2, 2013); *see also, e.g.*, 29 C.F.R. § 2590.715-2713A(a)(4), (b)(1), (c)(1), or notify HHS of its objection, the plan name and type, and the name and contact information of the insurance issuer(s) or third party administrator(s), *see, e.g.,* 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii).

If an eligible organization declines to provide contraceptive coverage, the regulations require the insurance issuer or third party administrator to make or arrange separate payments for contraceptive services for the plan participants and beneficiaries. *See, e.g.,* 29 C.F.R. § 2590.715-2713A(c). The regulations bar the insurance issuer or third party administrator from charging the eligible organization, directly or indirectly, with respect to payments for contraceptive services. *See* 45 C.F.R. § 147.131(c)(2)(ii) (insured plans) ("With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries."); 29 C.F.R. § 2590.715-2713A(b)(2)(i), (ii) (same for self-insured plans).

The insurance issuer or third party administrator—and not the eligible organization—must notify plan participants and beneficiaries of the availability of separate payments for contraceptive services, and "[t]he notice must specify that the [organization] does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services[.]" 45 C.F.R. § 147.131(d) (insured plans); *accord* 29 C.F.R. § 2590.715-2713A(d) (same for self-insured plans).

All of the plaintiffs here are either exempt religious employers or organizations eligible to opt out of the contraceptive coverage requirement. They urge, however, that it is insufficient that they are free to decline to provide such coverage, and that

the government may not require third parties to provide the coverage that they decline to provide themselves.

The Supreme Court's decision in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (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. The Court explained that the opt-out regulations "effectively exempt[]" organizations that are eligible for an accommodation. *Id.* at 2763. 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 2759. 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 2781 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 2787 (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 2760; *see id.* at 2782-2783. 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 2782 (citation and internal quotation marks omitted); *see id.* at 2786 (Kennedy, J., concurring) (explaining that the accommodation "works by requiring insurance companies" to provide contraceptive coverage and "equally furthers the Government's interest"). 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.'"" *Id.* at 2783 (alterations in original, quoting dissent (in turn quoting 78 Fed. Reg. at 39,888 (with alterations)).

The Supreme Court's interim order in connection with an application for an injunction in *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014), underscores the validity of the alternative method of opting out promulgated in the interim final regulations. The Supreme Court's interim order provided 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] 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 2807. 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 have augmented the existing accommodations and plaintiffs now have an alternative means by which they may opt

out of providing contraceptive coverage, and one that, like the Supreme Court's *Wheaton College* interim order, provides for notice to the government, rather than to the insurer or third party administrator.

B. The Challenged Accommodations, Which Allow Plaintiffs to Opt Out of Providing Contraceptive Coverage, Do Not Substantially Burden Plaintiffs' Religious Exercise Under RFRA.

RFRA's compelling interest test applies only where government action "substantially burden[s]" a person's exercise of religion. *See* 42 U.S.C. § 2000bb-1(a). The initial version of RFRA applied where government action resulted in any "burden" on religious exercise. Congress added the word "substantially" "to make it clear that the compelling interest standards set forth in the act" apply "only to Government actions [that] place a substantial burden on the exercise of" religion, as contemplated by the case law leading up to *Employment Division* v. *Smith*, 494 U.S. 872 (1990). *See* 139 Cong. Rec. S14350, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); *ibid.* (statement of Sen. Hatch). Consistent with RFRA's restorative purpose, Congress expected courts considering RFRA claims to "look to free exercise cases decided prior to *Smith* for guidance." S. Rep. No. 111, 103d Cong., 1st Sess. 8-9 (1993) (Senate Report); *see* H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993) (same); *see also* 146 Cong. Rec. S7774, S7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy) (explaining that, for purposes of the Religious Land Use and Institutionalized Persons Act of 2000, which was modeled on RFRA, "[t]he term 'substantial burden' . . . is not intended to be given any broader interpretation than the

Supreme Court's articulation of the concept of substantial burden or religious exercise").

Whether a burden is "substantial" under RFRA is a question of law, not a "question[] of fact, proven by the credibility of the claimant." *Mich. Catholic Conference* v. *Burwell*, 755 F.3d 372, 385 (6th Cir. 2014) (quoting *Mahoney* v. *Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011)), *reh'g en banc denied*, Nos. 13-2723, 13-6640, ECF No. 63 (Sept. 16, 2014); *accord Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547, 558 (7th Cir. 2014) ("substantiality—like compelling governmental interest—is for the court to decide"), *reh'g en banc denied*, No. 13-3853, ECF No. 64 (May 7, 2014); *Kaemmerling* v. *Lappin*, 553 F.3d 669, 673-674, 678-679 (D.C. Cir. 2008) ("[a]ccepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened"); *see also Bowen* v. *Roy*, 476 U.S. 693, 701 n.6 (1986) ("Roy's religious views may not accept this distinction between individual and governmental conduct," but the law "recognize[s] such a distinction."); *Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448 (1988) (similar).

As noted, none of the plaintiffs here is required to provide contraceptive coverage. The only plaintiffs that are subject to the contraceptive coverage requirement concede that they satisfy the criteria for the religious accommodations under which they do not have to provide contraceptive coverage. *See* 45 C.F.R. § 147.131(b), (c)(1); 29 C.F.R. § 2590.715-2713A(a), (b)(1). To opt out of this

coverage requirement, those plaintiffs need only complete a form stating that they are eligible and provide a copy to their third party administrators, *see* 78 Fed. Reg. at 39,874, 39,875; *see, e.g.*, 45 C.F.R. § 147.131(c)(1)(i); 29 C.F.R. § 2590.715-2713A(a)(4), (b)(1)(ii)(A), (c), or notify the government in writing of their religious objection, the plan name and type, and the name and contact information of the insurance issuer(s) or third party administrator(s), *see, e.g.*, 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii).

Plaintiffs do not object to declaring their intention to exclude contraceptive coverage from their plans. They have done so in the past and would presumably continue to do so even if they obtained the injunctions that they seek. Nor do plaintiffs claim that they are required in any way to subsidize the provision of contraceptive coverage under the accommodations. The regulations bar an insurance issuer or third party administrator from charging the eligible organization, directly or indirectly, with respect to payments for contraceptive services. *See* 45 C.F.R. § 147.131(c)(2)(ii) (insured plans) ("With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries."); 29 C.F.R. § 2590.715-2713A(b)(2)(i), (ii) (same for self-insured plans). The insurance issuer or third party administrator must also notify plan participants and beneficiaries of the availability of

separate payments for contraceptive services, and "[t]he notice must specify that the [organization] does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services[.]" 45 C.F.R. § 147.131(d) (insured plans); *accord* 29 C.F.R. § 2590.715-2713A(d) (same for self-insured plans).

Plaintiffs object instead to the fact that after they opt out of providing contraceptive coverage, the government generally requires the insurance issuer or third party administrator to make or arrange separate payments for contraceptive services for the plan participants and beneficiaries. The crux of plaintiffs' theory, accepted by the district courts below, is that opting out of the coverage requirement "triggers" or "facilitates" the provision of contraceptive 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. *See* ROA.14-10241.1013, 1043-1044 (GRE30, GRE37-38); ROA.14-40212.33 (GRE208); ROA.14-20112.432 (GRE154); *see also* ROA.14-10241.1013, 1130, 1132 (GRE30, GRE40-41); ROA.14-40212.74, 80 (GRE213, 215). The Seventh Circuit observed in *University of Notre Dame* v. *Sebelius* that the "novelty" of this claim "deserves emphasis." 743 F.3d at 557. The court explained that "United States law and public policy have a history of accommodating religious beliefs, as by allowing conscientious objection to the military draft—and now exempting churches and religious institutions from the Affordable Care Act's requirements of coverage of contraceptive services." *Ibid.* The court stressed that "[w]hat makes this case and others like it involving the

contraception exemption paradoxical and virtually unprecedented is that the beneficiaries of the religious exemption are claiming that the exemption process itself imposes a substantial burden on their religious faiths." *Ibid.* Indeed, plaintiffs are "effectively exempt[]" from the contraceptive coverage requirement. *Hobby Lobby*, 134 S. Ct. at 2763.

The Seventh Circuit in *Notre Dame* specifically addressed the *East Texas Baptist University* district court opinion, observing "the '*trigger*' theory was stated clearly, which is not to say convincingly, in a recent district court decision where we read that 'the self-certification form requires the [religious] organizations to do much more than simply protest or object. The purpose of the form is to enable the provision of the very contraceptive services to the organization's employees that the organization finds abhorrent.'" *Notre Dame*, 743 F.3d at 554 (alteration in original) (quoting *E. Tex. Baptist Univ.* v. *Sebelius*, No. 12-3009, 2013 WL 6838893, at *20 (Dec. 27, 2013) (ROA.14-20112.2306 (GRE137))). The *Notre Dame* court explained that "[f]ederal 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." *Ibid*; *see Mich. Catholic Conference*, 755 F.3d at 387 ("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.").

As noted, following the Supreme Court's issuance of a temporary injunction in *Wheaton College*, the Departments provided an additional means by which an eligible organization may opt out. If it prefers not to notify its insurer or third party administrator of its decision, it may instead notify the government. This additional provision underscores that an eligible organization does not "facilitate" the provision of contraceptive coverage. It merely informs HHS that it is opting out, at which point the government will send a separate notification to the insurer or third party administrator notifying them that they are independently obligated to provide such coverage.

Plaintiffs' view that their opt out can constitute a "substantial burden" under RFRA is at odds with our Nation's long history of allowing religious objectors to opt out and the government then requiring others to fill the objectors' shoes. *See, e.g., Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716-718 (1981); *cf.* EEOC Compliance Manual § 12-IV.C. (Example 43) (July 22, 2008), *available at* http://www.eeoc.gov/policy/docs/religion.html#_Toc203359529 (explaining that reasonable accommodations of workplace religious objections can include requiring the objecting employee to transfer objectionable tasks to co-workers). On plaintiffs' reasoning, a conscientious objector could object not only to his own military service, but also to opting out, on the theory that his opt-out would "'trigger' the drafting of a replacement who was not a conscientious objector." *Notre Dame*, 743 F.3d at 556. Similarly, the claimant in *Thomas*, could have demanded not only that he not make

weapons but also that he not be required to *opt out* of doing so, because his opt out would cause someone else to take his place on the assembly line. Thus, as the Seventh Circuit explained in *Notre Dame*, plaintiffs like Notre Dame and plaintiffs here "can derive no support from" decisions like *Hobby Lobby* because the accommodations authorize non-profit religious employers to refuse to comply with the contraceptive regulation. 743 F.3d at 558.

The breadth of plaintiffs' theory is underscored by the fact that several plaintiffs state that they offer health coverage through self-insured church plans that are exempt from ERISA. *E.g.,* ROA.14-40212.18, 20 (GRE204, GRE206); *see* 29 U.S.C. § 1003(b)(2) (ERISA exemption for church plans). ERISA provides no authority to regulate such church plans or, as directly relevant to plaintiffs' argument, the third party administrators that administer the plans. And no such authority can be derived from the Internal Revenue Code, which confers authority to regulate group health plans but confers no authority to regulate third party administrators. *See generally* 26 U.S.C. §§ 9815, 4980D. The authority to regulate third party administrators comes only from ERISA. *See generally* 29 U.S.C. §§ 1135, 1002(16). Thus, after the eligible plaintiffs opt out of providing contraceptive coverage, the third party administrators that administer these plans will not be required to provide such coverage. Rather, the regulations provide that the government will indirectly pay them if they voluntarily provide such coverage. *See* 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50(d).

In sum, plaintiffs are "effectively exempt[]," *Hobby Lobby*, 134 S. Ct. at 2763, and their attempt to collapse the provision of contraceptive coverage by third parties with their own decision not to provide such coverage fails. If the employees or students of organizations that have opted out of providing contraceptive coverage nonetheless receive contraceptive coverage, they will do so "'*despite* plaintiffs' religious objections, not *because* of them.'" *Mich. Catholic Conference*, 755 F.3d at 389 (emphases added; citation omitted).

C. Plaintiffs' Reasoning Would Deprive the Government of Reasonable Means to Advance its Compelling Interests in Seamlessly Providing Contraceptive Coverage.

Plaintiffs' claims would fail even if the accommodations were subject to RFRA's compelling interest test. The challenged accommodations serve a number of interrelated and compelling interests, as the Supreme Court acknowledged in *Hobby Lobby*.

1. 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." 134 S. Ct. at 2785-2786 (Kennedy, J., concurring); *accord id.* at 2799-2800 & n.23 (Ginsburg, J., dissenting). The remaining Justices assumed without deciding that the contraceptive coverage requirement furthers compelling interests, *id.* at 2780, 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 2782 (citation and internal quotation marks omitted); *see id.* at 2760 (stressing 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 2783 (emphasizing 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"'") (alterations in original, quoting dissent (in turn quoting 78 Fed. Reg. at 39,888 with alterations)); *id.* at 2786 (Kennedy, J., concurring) (explaining that the accommodation "works by requiring insurance companies" to provide contraceptive coverage and "equally furthers the Government's interest").

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's filling each gap must itself be subject to compelling-interest analysis and thus the government often may not shift plaintiffs' obligations to a third party but must instead fundamentally restructure its operations.

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. *See* 134 S. Ct. at 2782-2783. In our diverse Nation, many requirements may be the object of religious objections. But government programs, and particularly national systems of health and welfare, need not vary from point to point or, for example, 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*, 476 U.S. at 699.

The government's requirement (or, for church plans, the government's financial incentives) that insurance issuers and third party administrators provide contraceptive coverage after employers and universities decline to do so 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*, 134 S. Ct. at 2786 (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 102-104. 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" and engage in behaviors 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." *Ibid.* 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*, *available at* http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/downloads/2004GenderandAgeHighlights.pdf. 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). Studies have demonstrated that "even moderate copayments for preventive services" can "deter patients from receiving those services." IOM Report 19.

The district courts identified no sound reason to doubt that these interests are compelling. The court in *Catholic Diocese of Beaumont* mistakenly suggested (ROA.14-40212.1047-1048 (GRE199-200)) that these interests are not compelling because, when employers with self-insured church plans opt out of providing contraceptive coverage, the government cannot require third-party administrators to provide such

coverage. The Departments are constrained by preexisting limits on their authority to regulate third-party administrators in this circumstance, and have offered to pay third-party administrators to make or arrange separate payments for contraception in those situations. *See* 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50(d). It is because the interests at stake are so compelling that the government is working to provide contraceptive coverage in this manner.

2. Plaintiffs' view about what types of action (or inaction) can be said to "trigger" or "facilitate" 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, as noted, some of the plaintiffs state that they offer health coverage through self-insured church plans that are exempt from ERISA. After those plaintiffs opt out, any provision of coverage by these third-party administrators would be entirely voluntary and would be eligible for reimbursement by the government. *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—an alternative to a scheme under which neither they nor any third party must provide the objectionable coverage.

As the Supreme Court emphasized, the accommodations ensure than women "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," *Hobby Lobby*, 134 S. Ct. at 2782 (citation and internal quotation marks omitted); *see also id.* at 2760 (stressing 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 2783 (emphasizing 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"'") (alterations in original, quoting dissent (in turn quoting 78 Fed. Reg. at 39,888 with alterations)); *id.* at 2786 (Kennedy, J., concurring) (explaining that the accommodation "works by requiring insurance companies" to provide contraceptive coverage and "equally furthers the Government's interest").

The initial accommodations offer plaintiffs a way to opt out by notifying insurance issuers and third party administrators that they do not wish to provide contraceptive coverage, while requiring or encouraging third parties to make or arrange separate payments for contraception where employers have opted out. The augmented regulatory accommodation process offers plaintiffs an alternative but still administrable way to state that they object and opt out—without contacting their insurers or third party administrators—while providing the government with the information needed to implement the requirement that third parties provide contraceptive coverage so that participants and beneficiaries can "obtain, without

cost, the full range of FDA approved contraceptives," *Wheaton Coll.*, 134 S. Ct. at 2807.[7] Under both methods of opting out, the effect on participants and beneficiaries is "precisely zero," *Hobby Lobby*, 134 S. Ct. at 2760.

Other means of providing contraceptive coverage posited by plaintiffs and the district courts give no indication as to the nature of any burden that ostensibly results from the opportunity to opt out of providing coverage. The generalized statements by plaintiffs and the district courts that the government can work with third parties to provide contraceptive coverage to women who work for objecting employers (*e.g.,* ROA.14-10241.1142 (GRE42); ROA.14-20112.438 (GRE156); ROA.14-40212.42 (GRE210)) ignore the fact that, in the regulations at issue here, the government *is* working with third parties to provide contraceptive coverage, and it offers to pay third-party administrators of self-insured plans for providing or arranging such coverage.

Plaintiffs suggest that the government should "directly provide" contraceptives to women, *e.g.,* ROA.14-10241.1142 (GRE42), "empower willing actors" such as "pharmaceutical companies, or various interest groups" to provide contraceptives, ROA.14-20112.438 (GRE156), or provide tax credits to women who pay for

[7] Under the augmented accommodation whereby plaintiffs may notify HHS, "[t]he content required for the notice represents the minimum information necessary for the Departments to determine which entities are covered by the accommodation, to administer the accommodation, and to implement the policies in the July 2013 final regulations." 79 Fed. Reg. at 51,095.

contraception out-of-pocket themselves, *e.g.*, ROA.14-10241.1142 (GRE42). But RFRA does not require the government to create entirely new programs to accommodate religious objections. *See, e.g., Hobby Lobby*, 134 S. Ct. at 2786 (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.").

Moreover, whereas "[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 2760, plaintiffs' schemes would not "equally further[] the Government's interest," *id.* at 2786 (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; IOM Report 18-19. *See generally Reno* v. *Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997) (question under free speech strict scrutiny is whether "less restrictive alternatives would be *at least as effective* in achieving the legitimate purpose that the statute was enacted to serve") (emphasis added).

The Supreme Court repeatedly explained in *Hobby Lobby* that the regulatory accommodations challenged by plaintiffs here "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." 134 S. Ct. at 2759; *id.* at 2760; *id.* at 2783 (emphasizing 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'"") (alterations in original, quoting dissent (in turn quoting 78 Fed. Reg. at 39,888 with alterations)); *id.* at 2786 (Kennedy, J., concurring) (explaining that the accommodation "works by requiring insurance companies" to provide contraceptive coverage and "equally furthers the Government's interest"). The regulatory accommodation process is the least restrictive means of ensuring that women seamlessly obtain coverage for contraception alongside their remaining health coverage.

CONCLUSION

The judgments of the district courts should be reversed.

Respectfully submitted,

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CERTIFICATIONS OF COMPLIANCE

I hereby certify this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 10,498 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

I certify that pursuant to Fifth Circuit Rule 25.2.13, I have complied with this Court's privacy redaction requirements. I further certify that this document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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