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; LITTLE SISTERS OF THE POOR, BALTIMORE, INC., a Maryland non-profit corporation, by themselves and on behalf of all others similarly situated; CHRISTIAN BROTHERS SERVICES, a New Mexico non-profit corporation; CHRISTIAN BROTHERS EMPLOYEE BENEFIT TRUST,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; THOMAS E. PEREZ, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants-Appellees.

No. 13-1540

OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

INTRODUCTION AND SUMMARY

Plaintiffs are seeking an injunction pending appeal from regulations allowing them to opt out of providing contraceptive coverage. In a case presenting similar issues, *Univ. of Notre Dame* v. *Sebelius*, No. 13-3853 (7th Cir.), the Seventh Circuit has denied a similar emergency motion. Dkt. No. 11 (Dec. 30, 2013). We respectfully urge this Court to do the same.

Plaintiffs are non-profit religious organizations that provide health coverage to their employees through a self-insured church plan.[1] Plaintiffs challenge regulations establishing minimum health coverage requirements under the Affordable Care Act insofar as they include contraceptive coverage as part of required women's preventive health coverage.

Unlike the for-profit corporations that brought suit in *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114 (10th Cir.) (en banc), *cert. granted,* 134 S. Ct. 678 (2013), however, plaintiffs are concededly eligible for religious accommodations set out in the regulations and therefore are not required "to contract, arrange, pay, or refer for contraceptive coverage," 78 Fed. Reg. 39,879, 39,874 (July 2, 2013). They need only self-certify that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, and then they

[1] These organizations' church plan and the third-party administrator that administers that church plan are also plaintiffs. Those plaintiffs have not made any arguments in their motion for an injunction pending appeal that are specific to their role in providing health coverage, however.

must provide a copy of their self-certification to their self-insured group health plan's third-party administrator. *See id.* at 39,874-39,886; *see, e.g.,* 29 C.F.R. § 2590.715-2713A(b).

When eligible organizations opt out of providing contraceptive coverage, their employees generally receive contraceptive coverage through other mechanisms. In general, if an eligible organization opts out, the insurance company that issues the policy to the employer or the third-party administrator that administers its self-insured group health plan assumes responsibility for such coverage and provides or arranges separate payments for contraceptive services. *See* 45 C.F.R. § 147.131(c)(2)(i)(B) and (ii); 29 C.F.R. § 2590.715-2713A(b)(2). Insurance issuers and third-party administrators are prohibited from imposing any premium, fee, or other charge, directly or indirectly, on the eligible organization or its group health plan with respect to contraceptive coverage. 45 C.F.R. § 147.131(c)(2)(ii); 29 C.F.R. § 2590.715-2713A(b)(3). In the case of self-insured group health plans, the costs are borne by the federal government, at the third-party administrator's option. *See* 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50.

Moreover, unlike *Univ. of Notre Dame* v. *Sebelius*, No. 13-3853 (7th Cir.), where today the Seventh Circuit today denied a similar emergency motion, Dkt. No. 11 (Dec. 30, 2013), plaintiffs in this case have made clear that they provide group health coverage through a self-insured "church plan," Compl. ¶ 21, a statutory category of employee benefit plan, *see* 26 U.S.C. § 414(e), that is ordinarily exempt from the Employee

Retirement Income Security Act (ERISA). 29 U.S.C. § 1003(b)(2). *See* Op. 7, 23, 29-30. As the district court in this case explained, there is no statutory authority to regulate a church plan's third-party administrator. Op. 23. Accordingly, the third-party administrator that administers plaintiffs' church plan may choose—but is not required—to assume responsibility for contraceptive coverage and provide separate payments for contraceptive services. *See* 29 C.F.R. § 2590.715-2713A(b)(2). If the third-party administrator of a self-insured church plan chooses not to provide such coverage, it is not subject to penalties. (And, in that scenario, the employer also is not subject to penalties because it has satisfied its regulatory requirement by certifying that it is eligible for the accommodation and providing a copy of the certification to its third-party administrator. *See* 29 C.F.R. § 2590.715-2713A(b)(1)).

Plaintiffs nevertheless ask the Court to treat this case as if it were indistinguishable from *Hobby Lobby*. They suggest that by declining to provide payments for contraceptive services, they would "authorize someone else to provide them[.]" Mot. 9. But exercising their ability to opt out of the contraceptive coverage requirement does not, as plaintiffs suggest, "authoriz[e]" (Mot. 4, 9, 11, 13, 15) or "intentionally facilitate" (Mot. 14) such coverage by a third party. Even if plaintiffs' third-party administrator were to decide to provide contraceptive coverage, employees and their covered dependents would receive such coverage *despite* plaintiffs' religious objections, not *because* of those objections. And, as the district court observed, their third-party administrator "does not intend" to provide payments for contraceptive

services voluntarily. *See* Op. 23-24, 29 (citing 29 U.S.C. § 1003(b)(2)); *see also* Op. 32 (noting that, if plaintiffs certify that they are eligible for the accommodation, "[i]t is clear that these services will not be offered to the[ir] employees").

The district court thus correctly held that plaintiffs have failed to show that these regulations substantially burden their exercise of their religion.

STATEMENT

A. Regulatory Background

1. Congress has long regulated employer-sponsored group health plans. In 2010, the Patient Protection and Affordable Care Act established certain additional minimum standards for group health plans and health insurance issuers that offer coverage in the group and the individual markets. Among other things, the Act requires non-grandfathered group health plans to cover four categories of preventive-health services without requiring plan participants and beneficiaries to make copayments or pay deductibles or coinsurance. 42 U.S.C. § 300gg-13. The four categories are: items or services that have an "A" or "B" rating from the U.S. Preventive Services Task Force, *id.* § 300gg-13(a)(1); immunizations recommended by the Advisory Committee on Immunization Practices, *id.* § 300gg-13(a)(2); preventive care and screenings for infants, children, and adolescents as provided for in comprehensive guidelines supported by the Health Resources and Services Administration ("HRSA") (a component of the Department of Health and Human Services ("HHS")), *id.* §

300gg-13(a)(3); and additional preventive care and screenings for women as provided for in comprehensive guidelines supported by HRSA, *id.* § 300gg-13(a)(4).

HHS requested the assistance of the Institute of Medicine 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 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." Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 2-3 (2011). These 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 found can greatly decrease the risk of unwanted pregnancies, adverse pregnancy outcomes, and other adverse health consequences, and can vastly reduce medical expenses for women. *See id.* at 102-07.

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 provider. 77 Fed. Reg. at 8725 (quoting the guidelines). The relevant regulations adopted by the three Departments implementing this portion of the Act (HHS, Labor, and Treasury) require coverage of, among other preventive services, the contraceptive services recommended in the HRSA guidelines. 45 C.F.R.

§ 147.130(a)(1)(iv) (HHS); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. § 54.9815-2713(a)(1)(iv) (Treasury).

2. The implementing regulations authorize an exemption from the contraceptive-coverage requirement for the group health plan of a "religious employer." 45 C.F.R. § 147.131(a). A religious employer is defined as a non-profit organization 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) and (iii)).

When the Departments first issued final regulations, in response to religious objections by additional employers, the Departments announced that they would develop changes "'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 College* 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 the current regulations which provide religion-related accommodations for group health plans of eligible organizations. The accommodations are available for group health plans established or maintained by "eligible organizations" (and group health insurance coverage provided in connection with such plans). *See* 78 Fed. Reg. 39,874-39,886; 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). 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) 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 also* 29 C.F.R. § 2590.715-2713A(a); 26 C.F.R. § 54.9815-2713A(a); 78 Fed. Reg. at 39,874-75.

Under these 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. To be relieved of any such obligations, an eligible organization need only complete a self-certification form stating that it is an eligible organization, and it then must provide a copy of that self-certification to its insurance issuer or third-party administrator. *Id.* at 39,874-75; *see, e.g.,* 29 C.F.R. § 2590.715-2713A(a)(4), (b)(1), (c)(1).

If an eligible organization chooses not to provide contraceptive coverage, the regulations create another mechanism for providing such coverage. In general, if an eligible organization with a self-insured group health plan decides not to provide

contraceptive coverage, its third-party administrator ordinarily must provide or arrange separate payments for contraceptive services if it "agrees to enter into or remain in a contractual relationship with the eligible organization or its plan." 29 C.F.R. § 2590.715-2713A(b)(2). "The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services." *Id.* § 2590.715-2713A(b)(1)(ii)(A). The third-party administrator is prohibited from imposing any premium, fee, or other charge, directly or indirectly, on the eligible organization or the group health plan with respect to payments for contraceptive services. *See* 78 Fed. Reg. at 39,879-80; 29 C.F.R. § 2590.715-2713A(b)(2). Any costs incurred by the third-party administrator will be reimbursed through an adjustment to Federally-facilitated Exchange user fees at the third-party administrator's option. *See* 78 Fed. Reg. at 39,880, 29 C.F.R. § 2590.715-2713A(b)(3). "A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such." 29 C.F.R. § 2590.715-2713A(b)(4).

An eligible organization also has no obligation to inform plan participants and beneficiaries of the availability of these separate payments. Instead, the third-party administrator must itself ordinarily provide such notice and do so "separate from" any materials "distributed in connection with" the eligible organization's group health coverage. *See* 78 Fed. Reg. at 39,880, 39,881; 29 C.F.R. § 2590.715-2713A(d). That

notice must make clear that the eligible organization is neither administering nor funding the contraceptive benefits. *Ibid.*

If the self-insured plan is a church plan (and has not made an election under 26 U.S.C. § 410(d)), however, it is exempt from regulation under ERISA. 29 U.S.C. § 1003(b)(2). Therefore, there is no statutory authority to regulate the third-party administrator of a self-insured church plan and no legal compulsion for that administrator to provide contraceptive coverage where an eligible organization with a self-insured church plan invokes the accommodation.

B. Factual Background and Prior Proceedings

The named plaintiffs are Little Sisters of the Poor, which are related employers that are concededly eligible for the accommodations described above, Compl. ¶¶ 11-15; the Christian Brothers Employee Benefit Trust, a self-insured church plan that provides health coverage to a number of Catholic organizations, including Little Sisters, and is not subject to ERISA, Compl. ¶¶ 17-27; and Christian Brothers Services, a third-party administrator that administers the Trust, Compl. ¶¶ 28-30. Plaintiffs have also sought to certify a class of all present or future employers that provide group health coverage through the Trust church plan and are eligible for a religious accommodation.

The employer plaintiffs urge that certifying that they are eligible for the accommodation would "authoriz[e]" (Mot. 4, 9, 11, 13, 15) or "intentionally facilitate" (Mot. 14) their third-party administrator's providing contraceptive coverage after they decline to do so. On this basis, plaintiffs claim that the regulations violate the Religious

Freedom Restoration Act (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.

The district court held that plaintiffs have standing insofar as they will expend time reviewing the self-certification, Op. 14, but denied plaintiffs' motion for a preliminary injunction because plaintiffs had not demonstrated a substantial burden on their exercise of religion. The court explained that, in contrast to the for-profit employers that brought suit in *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114 (10th Cir.) (en banc), *cert. granted,* 134 S. Ct. 678 (2013), the employers here are eligible for an accommodation and therefore need only "sign[] the self-certification form and provide[] [a copy] to Christian Brother Services, their third party administrator." Op. 17-18. The court explained that, "[u]nder the 'eligible organizations' accommodation in the Final Rules, once [plaintiffs] complete the self-certification form and deliver it to their third party administrator, they have satisfied the Mandate's requirements, and have no further obligations under the Mandate." Op. 22.

Further, the court explained that, under the regulatory scheme, the third-party administrator of the plan at issue in this case (also a plaintiff here) is not required "to contract, arrange for, or otherwise facilitate" contraceptive coverage. Op. 23. The court observed that although the regulations state that third-party administrators will provide separate payments for contraceptive services if an eligible organization opts out, of doing so, the statutory authority "arises from ERISA," which exempts church

plans, like the plan at issue here. *Ibid.* (citing 78 Fed. Reg. at 39,879-80 and 29 U.S.C. § 1003(b)(2)). Thus, the court explained, plaintiffs' third-party administrator is not required to provide separate payments for contraceptive services if plaintiffs invoke the accommodation. *Ibid.*

The court rejected plaintiffs' contention that opting out is nonetheless a substantial burden on their exercise of religion because doing so would "designate or authorize" their third-party administrator to provide contraceptive coverage. The court explained that the employers must only complete the self-certification form and provide a copy to their third-party administrator. Op. 26. The court stated that the form itself "requires only that the individual signing it certify that her organization opposes providing contraceptive coverage and otherwise qualifies as an eligible organization" and that "nothing on the face of the Form expressly authorizes the provision of contraceptive care, particularly with regard to church plans." Op. 29.[2]

[2] The court observed that the form itself states that it is "'to be used to certify the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services'" and requires only the organization's name, "the name and title of the person authorized to make the certification on behalf of the organization," "identifying information for the person completing the certification," and a signature certifying that the organization meets the requirements for the accommodation. Op. 27-28 (quoting the form). The court noted that on the back of the form are statements that, for self-insured plans, eligible organizations "'will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services'" and "[t]he obligations of the third party administrator are set forth in [two regulations].'" Op. 28.

Further, the court observed that "an eligible organization satisfies the Mandate by providing the self-certification form to their third party administrator, irrespective of whether that third party administrator is governed by ERISA, will act as a plan and claims administrator for contraceptive care, or will provide payments for contraceptive services." Op. 25.

The court explained that plaintiffs' third-party administrator administers a church plan that is "categorically exempt from ERISA," Op. 29, and is thus outside the scope of the regulatory authority exercised in the governing regulations. Accordingly, although the third-party administrator can choose to provide contraceptive coverage in the manner set out in the regulations, it is not required to do so. Plaintiffs' third-party administrator, the court noted, does not currently cover contraceptive services "and it does not intend to do so in the future." Op. 24. Accordingly, if plaintiffs determine not to offer contraceptive coverage, their plan's participants and beneficiaries will not have the benefit of payments for contraceptive services. Op. 29.

ARGUMENT

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. In a case presenting similar issues, *Univ. of Notre*

Dame v. *Sebelius*, the Seventh Circuit found that the plaintiffs had not met the requirements for an injunction pending appeal. No. 13-3853 (7th Cir.), Dkt. No. 11 (Dec. 30, 2013). We respectfully urge this Court to do the same.

Plaintiffs' asserted harm—an alleged substantial burden on their religious exercise—turns on a likelihood of success on the merits, *see Kikumura* v. *Hurley,* 242 F.3d 950, 963 (10th Cir. 2001), which they cannot demonstrate for reasons discussed below. Indeed, unlike *Notre Dame*, plaintiffs' request for extraordinary relief is particularly anomalous because they have made clear that they have a self-insured church plan that is categorically exempt from regulation under ERISA. Their third-party administrator is thus outside the scope of the challenged regulations' authority. The third-party administrator is not required to provide separate payments for contraceptive services and, moreover, "does not intend to do so." Op. 24. Therefore, "[i]t is clear" that plan participants and beneficiaries will not receive contraceptive coverage if plaintiffs certify that they are eligible for the accommodation. Op. 32. (And once plaintiffs certify that they are eligible for the accommodation, they are not subject to any penalties, regardless of whether the third-party administrator provides contraceptive coverage).

Because Appellants Can Concededly Opt Out of Providing Contraceptive Coverage, the Regulations Impose No Substantial Burden on Their Exercise of Religion

RFRA requires a plaintiff to show, as a threshold matter, that a challenged regulation "substantially burden[s] [the plaintiff's] exercise of religion." 42 U.S.C. § 2000bb-1(a). "[O]nly *substantial* burdens on the exercise of religion trigger the

compelling interest requirement." *Henderson* v. *Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001) (emphasis added). "An inconsequential or *de minimis* burden on religious practice does not rise to this level." *Kaemmerling* v. *Lappin*, 553 F.3d 669, 673 (D.C. Cir. 2008); *see also Braunfeld* v. *Brown*, 366 U.S. 599, 606 (1961). Whether a burden is "substantial" is a question of law, not a "question[] of fact, proven by the credibility of the claimant." *Mahoney* v. *Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011); *see, e.g., 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"); *Kaemmerling*, 553 F.3d at 679 ("[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").

A. To opt out of providing contraceptive coverage, Little Sisters need only certify that they are non-profit organizations that hold themselves out as religious and that, because of religious objections, they are opposed to providing coverage for some or all contraceptive services. Plaintiffs acknowledge that they can avail themselves of a religious accommodation. Thus, plaintiffs "need not place contraceptive coverage into 'the basket of goods and services that constitute [their] healthcare plan,' nor must [they] even permit, much less 'approve and endorse' such coverage in i[their] plan," *Priests for Life*, v. *U.S. Dep't of Health & Human Servs.*, __ F. Supp. 2d __, No. 13-cv-1261, 2013 WL 6672400, at *10 (D.D.C. Dec. 19, 2013) (quoting *Gilardi* v. *U.S. Dep't of Health and Human Servs.*, 733 F.3d 1208, 1217 (D.C. Cir. 2013)).

After plaintiffs decline to offer contraceptive coverage, the third-party administrator that administers their self-insured church plan may choose—but is not required—to provide such coverage. Even if the third-party administrator did so, the regulations bar it from charging the eligible organizations any premium, fee, or other charge, directly or indirectly, with respect to payments for contraceptive services. *See* 78 Fed. Reg. at 39,874, 39,879-80; 29 C.F.R. § 2590.715-2713A(b)(2).

In this case, moreover, not only do the employers *not* have to provide contraceptive coverage to their employees, but the district court found that the third-party administrator is not required to do so and will not step in and provide such coverage in their stead. Plaintiffs' group health plan is a self-insured church plan and, as the district court explained, the plan is therefore not subject to regulation under ERISA. Accordingly, although the third-party administrator could elect to provide contraceptive coverage under the mechanism established by the regulations, it is not required to do so. And, it is not disputed that, as the district court declared, the third-party administrator here "does not intend" to provide payments for contraceptive services voluntarily. *See* Op. 23-24, 29 (citing 29 U.S.C. § 1003(b)(2)). Thus, if Little Sisters avail themselves of the religious accommodation and opt out of providing contraceptive coverage, "these services will not be offered to the[ir] employees." Op. 32.

B. The regulations merely require plaintiffs to inform their third-party administrator that they are eligible for the accommodation. Plaintiffs do not object to

declaring that they meet the criteria for the accommodation. Indeed, they have done so many times in this litigation. Nor do plaintiffs object, as a general matter, to informing a third-party administrator that they are not legally required to provide contraceptive coverage and do not wish to pay for such services. Plaintiffs have presumably done so in the past and would need to do so if they obtained the extraordinary injunction that they are seeking here. The regulations thus do not require plaintiffs to "modify [their] behavior," *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717 (1981). A law cannot be a substantial burden on religious exercise when "it involves no action or forbearance on [plaintiffs'] part, nor . . . otherwise interfere[s] with any religious act in which [plaintiffs] engage[]." *Kaemmerling*, 553 F.3d at 679.

Plaintiffs instead object to the possibility of "subsequent actions of third parties—[the] provision of contraceptive services, in which [they] play[] no role," *Priests for Life*, 2013 WL 6672400, at *9. This reasoning would fail to establish a substantial burden on their practice of religion even if there were any doubt as to the intended conduct of the third-party administrator in this case (which, on the record in this case, there is not).

Plaintiffs cannot collapse the possible provision of contraceptive coverage by third-parties with their own decision *not* to provide such coverage, by characterizing their own decision *not* to provide such coverage as an "authoriz[ation]" (Mot. 4, 9, 11, 13, 15) or "facilit[ation]" (Mot. 9, 14) of contraception. *See, e.g.,* Compl. ¶¶ 120, 130,

171, 275 (urging that self-certification "triggers coverage" of contraception by third-parties). Plaintiffs' argument reduces to an assertion that their exercise of their religion will be substantially burdened because, in theory, a third party could provide contraceptive coverage after they decline to do so.

Plaintiffs misunderstand the nature of the regulations when they urge that opting out is "participating in a[] system that could involve the provision" of contraceptive coverage (Mot. 9), and that they are thus forced to "participate in the Mandate" (Mot. 2), to "participate in the Departments' delivery scheme" (Mot. 9), or to "participate in this coverage scheme" (Mot 13). Plaintiffs' action under the regulations consists solely of their declaration that they will *not* participate in such coverage. *See Univ. of Notre Dame* v. *Sebelius*, No. 13-cv-01276 (N.D. Ind. Dec. 20, 2013, slip op. at 2 ("If Notre Dame opts out of providing contraceptive coverage, . . . it is *the government* who will authorize the third party to pay for contraception. The government isn't violating Notre Dame's right to free exercise of religion by letting it opt out, or by arranging for third party contraceptive coverage.") (emphasis in original).

The breadth of plaintiffs' argument is remarkable, and their position lacks any discernible limiting principle. Their contentions would transform RFRA from a shield into a sword. A plaintiff could essentially veto any conduct by others on the ground that it would transform the plaintiff's opt out or other prior action into "authoriz[ation]" (Mot. 4, 9, 11, 13, 15) or "facilit[ation]" (Mot. 9, 14) of the conduct to which the plaintiff objects. Under plaintiffs' view of the law, it is not sufficient that

they can decline to provide contraceptive coverage. It must also be impossible, as a matter of law, for a third-party to separately provide contraceptive coverage to the individuals who are plan participants and beneficiaries if the plaintiffs decline to do so. In any event, as discussed, a church plan is not subject to regulation under ERISA and is thus outside the scope of the regulations. Accordingly, even plaintiffs' third-party administrator need not provide benefits for contraceptive services if plaintiffs invoke the accommodation, and the third-party administrator has made clear that it will not voluntarily do so. Whatever the scope of an employer's own protections under RFRA, it does not give the employer a right to control the actions of third parties, such as a third-party administrator or private individuals who happen to be participants or beneficiaries in a plan sponsored the employer.

In sum, the district court correctly concluded that plaintiffs could not demonstrate a substantial burden on their exercise of religion and accordingly denied injunctive relief. This Court should do the same.[3]

[3] The government believes that, even if the regulations were found to impose more than *de minimis* burden on the exercise of religion, any such burden would be too attenuated to be "substantial" under RFRA, and, in any event, that the regulatory scheme to which they object "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest," 42 U.S.C. § 2000bb-1(b). In light of this Court's decision in *Hobby Lobby Stores, Inc.*, 723 F.3d 1114, *cert. granted,* 134 S. Ct. 678 (2013), however, we have not made those arguments here. The government does, however, reserve its right to make such arguments in further appellate proceedings.

CONCLUSION

Plaintiffs' motion for an injunction pending appeal should be denied.

Respectfully submitted,

MARK B. STERN
ALISA B. KLEIN
s/ Adam Jed
ADAM C. JED
(202) 514-8280
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., NW, Rm. 7240
Washington, DC 20530

DECEMBER 2013

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2013, I electronically filed the foregoing document with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Adam Jed
Adam C. Jed

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Microsoft Forefront Endpoint Protection 2010 (definitions up to date), and according to the program are free of viruses.

s/ Adam Jed

{signature of counsel}