[ORAL ARGUMENT REQUESTED]

No. 13-1540

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.

On Appeal from the United States District Court
for the District of Colorado No. 13-cv-2611 (Martinez, J.)

BRIEF FOR THE APPELLEES

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STATEMENT OF RELATED CASES

This case presents the question whether regulations that allow plaintiffs to opt out of providing contraceptive coverage violate plaintiffs' rights under the Religious Freedom Restoration Act and First Amendment. Substantially the same issues are presently pending before this Court in *S. Nazarene Univ.* v. *Sebelius*, No. 14-6026 (10th Cir.), and *Reaching Souls Int'l* v. *Sebelius*, No. 14-6028 (10th Cir.), and before other courts of appeals in:

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/s/ *Adam C. Jed*
Adam C. Jed

GLOSSARY

ERISA	Employee Retirement Income Security Act
HHS	U.S. Department of Health and Human Services
HRSA	Health Resources and Services Administration, a component of HHS
RLUIPA	Religious Land Use and Institutionalized Persons Act
RFRA	Religious Freedom Restoration Act
TPA	Third party administrator

INTRODUCTION

Plaintiffs challenge regulations that establish minimum health coverage requirements under the Affordable Care Act insofar as they include contraceptive coverage as part of women's preventive-health coverage. Plaintiffs acknowledge, however, that they are not required to provide contraceptive coverage. Plaintiffs are either not subject to any contraceptive coverage requirement or may opt out of the coverage requirement by informing their third party administrator that they are eligible for a religious accommodation set out in the regulations and therefore are not required "to contract, arrange, pay, or refer for contraceptive coverage." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013).

Plaintiffs object, instead, to the fact that after they opt out, federal regulations will authorize the government to reimburse their third party administrator if it chooses to make or arrange separate payments for contraception. Were plaintiffs' third party administrator to do so, the employer plaintiffs would not administer this coverage or bear any direct or indirect costs of this coverage.

Although plaintiffs are thus free to opt out of providing contraceptive coverage, they nevertheless claim that the challenged regulations impermissibly burden their exercise of religion in violation of the Religious Freedom Restoration Act ("RFRA"). But plaintiffs cannot transform their right, as eligible organizations, *not* to provide coverage into a substantial burden by characterizing their decision to opt out as "authorizing," "directing," "incentivizing" or "obligating" others to provide

contraceptive coverage *E.g.,* Pl. Br. 30. Eligible organizations that opt out do not "authorize[]" or "direct[]" third parties to provide contraceptive coverage, just as they do not "authorize[]" or "direct[]" the federal government to reimburse third party administrators for the cost of providing such coverage. If third parties step in and provide coverage, they do so as a result of legal obligations imposed by the government or the availability of reimbursement by the government. Plaintiffs are "free to opt out of providing the coverage [themselves], but [they] can't stop anyone else from providing it." *University of Notre Dame* v. *Sebelius*, _ F. Supp. 2d. _, 2013 WL 6804773, at *1 (N.D. Ind. Dec. 20, 2013), *aff'd*, 743 F.3d. 547 (7th Cir. 2014).

STATEMENT OF JURISDICTION

Plaintiffs invoked the district courts' jurisdiction under 28 U.S.C. §§ 1331, 1361, 2201, 2202 and 42 U.S.C. § 2000bb-1. JA14a. The district court denied plaintiffs' motion for a preliminary injunction on December 27, 2013, JA683a, and plaintiffs filed a timely notice of appeal the same day, JA717a. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether regulations that allow plaintiffs to opt out of providing contraceptive coverage violate plaintiffs' rights under the Religious Freedom Restoration Act.

2. Whether such regulations violate plaintiffs' rights under the First Amendment.

STATEMENT OF THE CASE

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 as well as 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 recommended 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 the Department of Health and Human Services ("HHS")). *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 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 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 (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 provision 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 initial final regulations were issued, the Departments announced, in response to religious objections raised by some commenters, 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 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, challenged here, in July 2013. *See* 78 Fed. Reg. at 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). The regulations provide religion-related accommodations for group health plans established or maintained by "eligible organizations" (and group health insurance coverage provided in connection with such plans). 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.

E.g., 45 C.F.R. § 147.131(b); *see also* 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 these obligations, it need only complete a form stating that it is an eligible organization and provide a copy to its insurance issuer or third party administrator. *See 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 plan's participants and beneficiaries will generally have access to contraceptive coverage without cost sharing through alternative mechanisms established by the regulations.

When an eligible organization that chooses not to provide contraceptive coverage has a "self-insured" plan, the regulations generally require the third party administrator to provide or arrange separate payments for contraceptive services for plan participants and beneficiaries.[1] 29 C.F.R. § 2590.715- 2713A(b)(2). (As

[1] An employer is said to have an "insured" plan if it contracts with an insurance company that bears the financial risk of paying health insurance claims. An employer is said to have 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, performing functions such as developing networks of providers, negotiating payment rates, and processing claims. In that context, the insurance company or other third party is called a third party administrator or TPA. Employers may be regarded as self-insured even if they purchase a separate insurance

Continued on next page.

discussed below, these requirements do not apply when the third party administrator is administering a "church plan" that ERISA does not cover, which is the only type of plan at issue here.) "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 regulations bar the third party administrator 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. *Id.* § 2590.715-2713A(b)(2). The third party administrator may seek reimbursement for payments for contraceptive services from the federal government through an adjustment to federally-facilitated Exchange user fees. *Id.* § 2590.715-2713A(b)(3); *see* 45 C.F.R. § 156.50(d).[2]

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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).

[2] When an eligible organization that chooses not to provide contraceptive coverage has an "insured" plan, the health insurance company that issues the policy for that organization is required by regulation to provide separate payments for contraceptive services for plan participants and beneficiaries. *See* 45 C.F.R. § 147.131(c)(2). The insurance issuer may not impose any premium, fee, or other charge, directly or indirectly, on the eligible organization or the group health plan with respect to the issuer's payments for contraceptive services. *See id.* § 147.131(c)(2)(ii). The insurance issuer must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the . . . plan," *id.* § 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," *id.* § 147.131(c)(2)(ii).

Regardless of the type of plan, an eligible organization that opts out of providing contraceptive coverage has no obligation to inform plan participants and beneficiaries 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). 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. The named plaintiffs are Little Sisters of the Poor Home for the Aged, Denver, Colorado, and Little Sisters of the Poor, Baltimore, Inc. (the "Little Sisters Homes" or "employers"), which each employ more than 50 lay employees (JA130a), and are concededly eligible for the accommodations described above, JA15a-16a; the Christian Brothers Employee Benefit Trust, which states that it is a self-insured church plan that provides health coverage to a number of Catholic organizations, including the Homes, and is not subject to ERISA, JA16a-18a, 130a, 165a; and Christian Brothers Services, a third party administrator that administers the Trust, JA18a-19a. 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. JA16a.

Plaintiffs contend that the religious accommodations set out above violate their rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, 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. Plaintiffs argue that opting out of the coverage requirement substantially burdens their religious exercise because doing so "triggers a TPA's legal obligation to make 'separate payments for contraceptive services directly for plan participants and beneficiaries.'" Pl. Br. 14-15 (citation omitted). Plaintiffs also allege constitutional claims under the First Amendment.

The district court held that plaintiffs have standing insofar as they will expend time reviewing the self-certification, JA 696a, but denied plaintiffs' motion for a preliminary injunction because plaintiffs had not demonstrated a "substantial" burden on their exercise of religion under RFRA, JA698a-716a. 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. 2013) (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 Brothers Services, their third party administrator." JA699a-700a. 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." JA704a.

The court further explained that the regulations likewise impose no obligation to provide coverage on the health plan's third part administrator, Christian Brothers Services. JA705a. The court observed that the statutory authority to regulate third party administrators "arises from ERISA," and the employers' group health plan is a church plan, which is exempt from ERISA. *Ibid.* (citing 78 Fed. Reg. at 39,879-80 and 29 U.S.C. § 1003(b)(2)). Thus, the court explained, the third party administrator is outside the purview of the regulations and not required to provide separate payments for contraceptive services if the employers invoke the accommodation. *Ibid.*

The court rejected plaintiffs' contention that declining to provide coverage is a substantial burden under RFRA on the theory that doing so would "designate or authorize" the third party administrator to provide contraceptive coverage. The court explained that employers need only complete the self-certification form and provide a copy to their third party administrator. JA708a. 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." JA711a.

The court observed, moreover, that in this case the third party administrator administers a church plan that is "categorically exempt from ERISA," JA711a, and is

thus outside the scope of the regulatory authority exercised in the governing regulations. Plaintiffs' third party administrator, the court found, does not currently cover contraceptive services "and it does not intend to do so in the future." JA706a.

2. This Court denied plaintiffs' motion for an injunction pending appeal, observing that "there is no enforceable obligation—through ERISA or otherwise—for any of the Plaintiffs to provide any of the objectionable coverage." JA721a. The Order noted that the plaintiff employers "may opt out from the Mandate" and that "because the Trust is a self-insured 'church plan' exempt from ERISA," the third party administrator would not be required to provide contraceptive coverage after the employers opt out. JA721a.

On January 24, the Supreme Court issued the following order:

> If the employer applicants inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicants the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit. To meet the condition for injunction pending appeal, applicants need not use the form prescribed by the Government and need not send copies to third-party administrators. The Court issues this order based on all of the circumstances of the case, and this order should not be construed as an expression of the Court's views on the merits.

JA725a.

SUMMARY OF ARGUMENT

I. The Little Sisters Homes are not required to provide contraceptive coverage to their employees. As eligible religious organizations, they can opt out of the coverage requirement by completing a form and providing a copy to their third party administrator. Because their third party administrator—Christian Brothers Services—administers a church plan, it is not required to provide contraceptive coverage, and it has already declared that it will not do so.

Plaintiffs insist that Christian Brothers is subject to regulations that require it to make or arrange separate payments for contraception (at government expense), and they argue that it is, in any event, immaterial whether coverage is provided or not. They argue that when the Little Sisters Homes decline to provide coverage to their employees, these employers are, in fact, directing Christian Brothers to provide coverage, and that doing so burdens their practice of religion in violation of RFRA.

Plaintiffs cannot transform their right, as eligible organizations, not to provide coverage into a substantial burden by characterizing their decision to opt out as "authorizing," "directing," "incentivizing" or "obligating" others to provide contraceptive coverage. *E.g.*, Pl. Br. 30. Eligible organizations that opt out do not "authorize[]" or "direct[]" third parties to provide contraceptive coverage, just as they do not "authorize[]" or "direct[]" the federal government to reimburse third party administrators for the cost of providing such coverage. If third parties step in and provide coverage, they do so as a result of legal obligations or offers of payment made

to them. The sweep of plaintiffs' argument is particularly remarkable because it would convert a right to opt out of providing coverage into a burden on their practice of religion even when no entity is required to provide coverage.

II. Plaintiffs' constitutional claims are similarly without merit.

A. The regulations do not favor some churches or denominations over others in violation of the Establishment Clause or Free Exercise Clause. Under the regulations, an organization is a "religious employer" that is automatically exempt from the contraceptive-coverage provision if it "is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.131(a). Other religiously affiliated non-profit organizations may opt out of providing contraceptive coverage by availing themselves of the accommodations.

The cited Internal Revenue Code provisions refer to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order. Although plaintiffs apparently believe that these tax code provisions are unconstitutional, "religious employers, defined as in the cited regulation, have long enjoyed advantages (notably tax advantages) over other entities, 26 U.S.C. §§ 6033(a)(3)(A)(i), (iii), without these advantages being thought to violate the establishment clause." *University of Notre Dame* v. *Sebelius*, 743 F.3d 547, 560 (7th Cir. 2014) (citing *Walz* v. *Tax Comm'n of the City of New York*, 397 U.S. 664, 666 (1970) (upholding property tax exemptions for real property owned by religious

organizations and used exclusively for religious worship)). The fact that some religiously affiliated non-profit organizations, regardless of their denomination, are exempt from the contraceptive-coverage provision, while other religiously affiliated non-profit organizations, regardless of their denomination, may opt out by availing themselves of the accommodations, does not present any constitutional issue.

B. Plaintiffs' contention that the accommodations infringe upon their constitutional right to freedom of speech is similarly wide of the mark. "Nothing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." 78 Fed. Reg. 39,870, 39,880 n.41 (July 2, 2013). Neither the act of opting out nor the possibility that, after plaintiffs opt out, third parties may pay for contraceptive services that include talking, is unconstitutionally compelled speech. *See Rumsfeld* v. *Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 61-63 (2006).

Plaintiffs' contention that the accommodation for self-insured organizations prohibits speech rests on a misunderstanding of the cited provision. The regulations at issue do not refer to speech, and they are not properly interpreted to restrict protected speech or even to apply to these plaintiffs at all. *See Weaver* v. *U.S. Information Agency*, 87 F.3d 1429, 1438 (D.C. Cir. 1996) ("We are, quite simply, reluctant to find burdens on speech that the government eschews any intention to impose.").

STANDARD OF REVIEW

The denial of a request for a preliminary injunction is reviewed for abuse of discretion. *Little* v. *Jones*, 607 F.3d 1245, 1250 (10th Cir. 2010). A district court abuses

its discretion by denying a preliminary injunction based on an error of law. *Westar Energy, Inc.* v. *Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009).

ARGUMENT

I. The Challenged Regulations Do Not Impermissibly Burden Plaintiffs' Exercise of Religion Under RFRA.

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

1. Plaintiffs are either not required to provide contraceptive coverage or permitted to opt out of providing such coverage.

Congress enacted RFRA to restore the state of Free Exercise law that prevailed prior to *Employment Division* v. *Smith*, 494 U.S. 872 (1990). *See* 42 U.S.C. § 2000bb(a)(4), (5), and (b)(1). In *Smith*, the Supreme Court held that the Free Exercise Clause does not require religion-based exemptions from neutral laws of general applicability. *See* 494 U.S. at 876-90. RFRA later "adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006).

The initial version of RFRA prohibited the government from imposing any "burden" on free 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 pre-*Smith* case law. 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); *see ibid.*(statement of Sen. Hatch). *See also Henderson* v.

Kennedy, 253 F.3d 12, 17 (D.C. Cir. 2001) ("[O]nly *substantial* burdens on the exercise of religion trigger the compelling interest requirement.") (emphasis added). 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).

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* 29 C.F.R. § 2590.715-2713A(a), (b)(1). To opt out of this coverage requirement, these plaintiffs need only complete a form stating that they are eligible and provide a copy to their insurance issuer or third party administrator. *See* 78 Fed. Reg. 39,870-01, 39,874-75 (July 2, 2013); *see, e.g.*, 29 C.F.R. § 2590.715-2713A(a)(4), (b)(1), (c)(1).

These plaintiffs need only "attest to [their] religious beliefs and step aside." *Michigan Catholic Conference v. Sebelius*, _ F. Supp. 2d _, 2013 WL 6838707, *7 (W.D. Mich. Dec. 27, 2013), *appeal pending*, No. 13-2723 (6th Cir.). Indeed, they have and presumably would need to inform their third party administrators of their objection even if they were automatically exempt from the coverage requirement, to ensure that they would not be contracting, arranging, paying, or referring for such coverage. *Univ.*

of Notre Dame v. *Sebelius*, _ F. Supp. 2d _, 2013 WL 6804773, *8, *aff'd*, 743 F.3d 547 (7th Cir. 2014).

2. After an eligible organization opts out, contraceptive coverage may be provided independently, by law, without cost to or involvement by the eligible organization.

After the employer plaintiffs, Little Sisters Homes, 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 were plaintiffs' group health plan not a church plan, the responsibilities that the regulations would place on insurance issuers and third party administrators would require no action by any employer. Employers who opt out will not "contract, arrange, pay, or refer" for such coverage, 78 Fed. Reg. at 39,874. The regulations bar insurance issuers and third party administrators from passing along any costs, 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 imposing 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) and (ii) (same for self-insured plans); *see also* 45 C.F.R. § 147.131(c)(2)(i)(A) (separate coverage must be "[e]xpressly exclude[d] . . . from the group health insurance coverage provided in connection with [plaintiffs'] group health

plan[s]"); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(A) ("Obligations of the third party administrator" are imposed by regulation, and the employer does "not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services."). Further, insurance issuers and third party administrators—rather than eligible organizations—must notify plan participants and beneficiaries of the availability of separate payments for contraceptive services, and "[t]he notice must specify that the eligible 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); 29 C.F.R. § 2590.715-2713A(d) (same for self-insured plans).

In this case, moreover, plaintiffs state that they operate a self-insured church plan that is exempt from ERISA. JA16a-18a, 130a, 165a. *See* 29 U.S.C. § 1003(b)(2); *see also* 29 U.S.C. § 1002(33) (definition of church plan). ERISA provides no authority to regulate such a church plan or the plan's third party administrator. Thus, Christian Brothers Services, the third party administrator, will not be obligated to provide contraceptive coverage and "[t]he record is clear that Christian Brothers Services has no intention" of providing separate coverage to the employees "and no intention of contracting with another entity that will provide such services." JA712a; *see id.* at 706a, 713a.

Plaintiffs mistakenly argue that although their church plan is not obligated under Department of Labor regulations to make or arrange separate payments for

contraception, the third party administrator is required to do so under Treasury regulations. *See* Pl. Br. 37. The Internal Revenue Code confers authority to regulate group health plans, but it confers no authority separately to regulate third party administrators. *See generally* 26 U.S.C. §§ 9815, 4980D. That authority derives only from ERISA. *See generally* 29 U.S.C. §§ 1135, 1002(16). And, as noted, with respect to exempt church plans, there is no such authority under ERISA. Indeed, as plaintiffs elsewhere acknowledge in their brief (Pl. Br. 43-44), the government has repeatedly made clear that it "lack[s] authority to require the TPAs [third party administrators] of self-insured church plans . . . to make the separate payments for contraceptive services for participants and beneficiaries in such plans under the accommodation." JA283a.[3]

[3] Plaintiffs' brief additionally refers to Express Scripts, Inc., which provides "pharmaceutical claim administrative services," and which plaintiffs now appear to suggest may also be a third party administrator. Pl. Br. 22, 40-41. Plaintiffs made no reference to Express Scripts in their complaint or in their preliminary injunction filings, and allegations about this organization cannot be a basis for challenging the court's denial of the preliminary injunction. (Plaintiffs point only to a passing reference in a second supplemental declaration contained within the hundreds of pages of exhibits attached to its motion for summary judgment, on which the district court has not yet ruled. JA495a.) Moreover, plaintiffs bear the burden of establishing their entitlement to injunctive relief, which they have wholly failed to do with respect to any possible coverage by Express Scripts. (For the first time, plaintiffs draw on their free speech challenge to the "influence" regulation as a reason that third party administrators will make or arrange separate payments for contraception. *See* Pl. Br. 21, 40-41. As explained *infra*, however, plaintiffs have misinterpreted that provision. *See* pp. 35-37 *infra*). The critical point, in any event, is that none of the plaintiffs is required to provide contraceptive coverage. The possibility that a third party may choose to provide such coverage does not constitute a "substantial" burden under RFRA.

3. Plaintiffs do not object to requirements placed on themselves but instead to the possibility that the government will pay third parties, to provide contraceptive coverage.

a. Plaintiffs do not contend that their religious exercise is burdened by completing a form that states that they are religious non-profit organizations with religious objections to providing contraceptive coverage. Their objection is instead that after they opt out, federal law requires insurers and third party administrators (other than those administering exempt church plans) to provide coverage independently.

Plaintiffs' attempt to collapse the provision of contraceptive coverage by third parties with their own decision not to provide such coverage fails. Plaintiffs mistakenly characterize their decision to opt out as "authorizing," "directing," "incentivizing" and "obligating" others to provide contraceptive coverage. *E.g.,* Pl. Br. 30-31. *See, e.g.,* JA36a, 38a, 47a-48a, 64a (Compl. ¶¶ 120, 130, 171, 275) (urging that opting out "triggers coverage" of contraception by third parties); Pl. Br. 14-15 (similar). Employers who decline to provide coverage do not direct or authorize insurers or third party administrators to provide coverage. Ordinarily, health insurance issuers and third party administrators make payments for all covered health services. If, after an eligible employer opts out, a third party administrator makes separate payments due to an obligation imposed by the government or the availability of reimbursement by the government, employees and covered dependents will receive coverage for contraceptive services *despite* plaintiffs' religious objections, not *because* of

them. Plaintiffs' argument is particularly anomalous because, as discussed, the third party administrator in this case is not required to provide coverage and has made clear that it will not do so.

In plaintiffs' view, it is thus immaterial whether they are required to offer and pay for contraceptive coverage or whether they may decline to do so. On this 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. "That seems a fantastic suggestion," yet, "confronted with this hypothetical at the oral argument" in *Notre Dame*, the plaintiff's counsel "acknowledged its applicability and said that drafting a replacement indeed would substantially burden the [conscientious objector's] religion." *Ibid.*[4] Indeed, on plaintiffs' theory here, a conscientious objector

[4] Instead of opting out of contraceptive coverage, the employer plaintiffs also could choose to discontinue offering health coverage. In that scenario, the employees could purchase health insurance, which covers all essential health benefits including contraceptive benefits, on exchanges where many may qualify for subsidies. *See* 26 U.S.C. § 36B. It is not clear whether plaintiffs believe that this too would constitute "authorizing" contraceptive coverage; but it also would not constitute the kind of burden that is "substantial" under RFRA. This is yet another means by which the employer plaintiffs could avoid providing the coverage to which they object. *See Tony & Susan Alamo Found.* v. *Sec'y of Labor*, 471 U.S. 290, 303-05 (1985) (option to compensate employees by furnishing room and board obviates religious objection to paying cash wages). In that scenario, the employers would save the cost of providing health coverage and instead may be subject to a tax of $2,000 per full-time employee. *See* 26 U.S.C. § 4980H(a) and (c)(1). Even were the expense greater, a burden is not substantial when it merely "operates so as to make the practice of their religious

Continued on next page.

could object to opting out on the theory that with one more space available in the barracks, the Army would offer to pay an additional soldier to take his place.

Nothing in the cases on which plaintiffs rely, or in the pre-*Smith* case law that RFRA restored, supports the remarkable contention that opting out of an obligation may itself be deemed a substantial burden if someone else will take the objector's place. *See, e.g.*, *Notre Dame*, 743 F.3d at 557 (noting the "novelty of [the] claim—not for the exemption . . . but for the right to have it without having to ask for it"); *Korte* v. *Sebelius*, 735 F.3d 654, 687 (7th Cir. 2013) (emphasizing that the plaintiff corporations "are asking for relief from a regulatory mandate that coerces *them* to pay for something—insurance coverage for contraception") (court's emphasis); *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 710-712 (1981) (explaining that the plaintiff was substantially burdened because he was not able to opt out of the job in which he was "engaged directly in the production of weapons"); *see also Tilton* v. *Richardson*, 403 U.S. 672, 689 (1971) (plurality opinion) (rejecting the plaintiffs' claim that "the Free Exercise Clause is violated because they are compelled to pay taxes, the proceeds of which in part finance grants" to religiously-affiliated colleges to which they objected, on the ground that the plaintiffs were "unable to identify any coercion directed at the practice or exercise of their religious beliefs"); Senate Report 12 (expressly stating that RFRA was not intended to "change the law" as articulated in

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beliefs more expensive" or inconvenient. *See Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961).

Tilton)[5]; *Kaemmerling* v. *Lappin*, 553 F.3d 669, 673-674, 678-679 (D.C. Cir. 2008) (rejecting RFRA challenge to requirement that prisoner give tissue sample on which DNA analysis would later be carried out because the prisoner did not object in and of itself to bodily violation of giving sample but only to the government's later extracting DNA information).

Unlike the plaintiffs in cases like *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013), the plaintiffs here need not "contract, arrange, pay, or refer for contraceptive coverage" to which they have religious objections. 78 Fed. Reg. at 39,874. They "need not place contraceptive coverage into 'the basket of goods and services that constitute [their] healthcare plan[s].'" *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 & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), *cert. petn. pending*, No. 13-567). Indeed, the district court in *Notre Dame* observed that the Seventh Circuit emphasized this distinction in *Korte*, "when it stated that the lack of

[5] Likewise, in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), the plaintiffs challenging a state program providing textbooks to religious schools contended that the program violated the Free Exercise Clause because, "[t]o the extent books are furnished for use in a sectarian school operated by members of one faith, members of other faiths and non-believers are thereby forced to contribute to the propagation of opinions which they disbelieve" and that this was "no less an interference with religious liberty than forcing a man to attend a church." Br. of Appellants 35, *Allen*, *supra* (No. 660). The Court rejected that contention, holding that such a claim of indirect financial support did not constitute coercion of the plaintiffs "as individuals in the practice of their religion." *Allen*, 392 U.S. at 249.

an exemption or accommodation for the for-profit plaintiffs was 'notabl[e],' suggesting that the case might well have come out differently had the *Korte* plaintiffs had access to the accommodation now available to [eligible organizations]." *Notre Dame*, _ F. Supp. 2d _, 2013 WL 6804773, *9 (quoting *Korte*, 735 F.3d at 662). The Seventh Circuit directly addressed this issue in *Notre Dame*, where the court of appeals concluded that nothing in *Korte* supported the plaintiff's challenge to the accommodations. 743 F.3d at 558 ("Notre Dame can derive no support from our decision in *Korte* v. *Sebelius*, 735 F.3d 654 (7th Cir. 2013), heavily cited in the university's briefs.").

b. Plaintiffs note (Pl. Br. 38) that on the back of the form provided to a third party administrator is a box that describes the third party administrator's obligations under federal law. That box states that after an eligible organization opts out, the third party administrator "(1) 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 (2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A." Pl. Br. Add. 2. Further, it states that "[t]his certification is an instrument under which the plan is operated." *Ibid.* The box thus makes clear that any actions the third party administrator takes with respect to contraceptive coverage must be completely independent from the eligible organization.

As the preamble to the rules explain, the self-certification is "a document notifying the third party administrator(s) that the eligible organization will not provide, fund, or administer payments for contraceptive services," and therefore is "one of the instruments under which the employer's plan is operated under ERISA section 3(16)(A)(i)." 78 Fed. Reg. at 39,879. The form directs third party administrators to their own "obligations set forth in the[] final regulations" and makes clear that the eligible organization has no such obligations. *Ibid.*; *see also* 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(A) and (B) (form "shall include notice" that "[t]he 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" and that "[o]bligations of the third party administrator are set forth in [Department of Labor regulations]"). The preamble explains that the third party administrator's legal obligations derive from ERISA section 3(16). Insofar as the result of an eligible organization's opting out is that the third party administrator has its own legal obligations under applicable regulations to act in the employer's stead, the form "*will be treated* as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits[.]" 78 Fed. Reg. at 39,879 (emphasis added). The preamble further notes that "[t]he Departments have determined that the ERISA section 3(16) approach most effectively enables eligible organizations to avoid contracting, arranging, paying, or referring for contraceptive coverage after meeting the self-certification standard, while also creating the fewest

barriers to or delays in plan participants and beneficiaries obtaining contraceptive services without cost sharing." *Ibid.*[6]

4. Plaintiffs' analysis disregards the burdens placed on plan participants and beneficiaries if plaintiffs' position were accepted.

Plaintiffs' analysis also erroneously assumes that the RFRA inquiry should evaluate the nature of the asserted burden placed on their exercise of religion without regard to the burden on third parties that would result from accepting their position. In plaintiffs' view, it is immaterial whether an employer's assertion of a right under RFRA would deprive its employees of health care coverage.

That approach is at odds with the pre-*Smith* jurisprudence incorporated by RFRA and with both of the free-exercise decisions cited in RFRA itself, *see* 42 U.S.C. § 2000bb(b)(1), which emphasized the importance of third-party interests to the free-

[6] We note, moreover, that if an employer objects to particular aspects of the accommodation for *self-insured* plans, in which the intricacies of ERISA are at play, the employer is free to offer its employees an *insured* plan, as many plaintiffs do. This option obviates any objection that is based on the particulars of the accommodation for self-insured organizations. *See Tony & Susan Alamo Found*,. 471 U.S.at 303-305 (option to compensate employees by furnishing room and board obviates religious objection to paying cash wages). An eligible organization may have business reasons to prefer self-insurance over an insured plan, but the Supreme Court has held that such considerations do not establish a substantial burden on the exercise of religion. *See Braunfeld*, 366 U.S. at 605 (rejecting Orthodox Jewish merchants' free exercise challenge to Sunday closing law that "operates so as to make the practice of their religious beliefs more expensive"). The plaintiffs here may prefer the self-insured route because were the employers to use an insurance issuer, the issuer would have a separate legal obligation to provide contraceptive coverage which would continue after the employers opted out. In other words, their employees would receive contraceptive coverage (albeit separately and independently from the employers' health plans).

exercise analysis. In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the Court accepted the free exercise claim only after stressing that "recognition of the [employee's] right to unemployment benefits under the state statute" did not "serve to abridge any other person's religious liberties." *Id.* at 409. In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), the Court held that the Free Exercise Clause required an exemption from compulsory education laws for Amish parents only after determining that the parents had "carried" the "difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education," thus establishing that there was only a "minimal difference between what the State would require and what the Amish already accept." *Id.* at 235-36; *see id.* at 222. Moreover, the Court in *Yoder* emphasized that its holding would not extend to a case in which an Amish child affirmatively wanted to attend school over his parents' objection. *See id.* at 231-32. And, in *United States* v. *Lee,* 455 U.S. 252 (1982), the Court's rejection of the employer's free-exercise claim relied on the fact that exempting the employer from the obligation to pay Social Security taxes would "operate[] to impose the employer's religious faith on the employees," who would be denied the benefits to which they were entitled by federal law. *Id.* at 261.

RFRA is not properly interpreted to create tension with the approach of these pre-*Smith* cases.[7] Indeed, the Supreme Court has stressed that in "[p]roperly applying" the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which was modeled on RFRA, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries[.]" *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005).[8] *Cf. Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 80 (1977) (Title VII's reasonable-accommodation requirement does not entitle employee to a religious accommodation that would come at the expense of other employees).

[7] The types of accommodations cited in the debates prior to enactment of RFRA did not impose substantial costs or burdens on third parties. *See, e.g.*, 139 Cong. Rec. E1234-01 (daily ed. May 11, 1993) (statement of Rep. Cardin) (citing as examples of contemplated accommodations ensuring burial of veterans in "veterans' cemeteries on Saturday and Sunday . . . if their religious beliefs required it" and precluding autopsies "on individuals whose religious beliefs prohibit autopsies"); 139 Cong. Rec. S14350-01 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (contemplated accommodations include allowing parents to home school their children, allowing individuals to volunteer at nursing homes, and allowing families to decline autopsies). Such accommodations do not require third parties to forfeit federal protections or benefits to which they are entitled.

[8] For this reason, *Cutter* rejected an Establishment Clause challenge to RLUIPA. Indeed, the Supreme Court has held that, under certain circumstances, an accommodation that imposes burdens on employees can violate the Establishment Clause. *See Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 708-11 (1985) (holding that a statute requiring an employer to accommodate an employee's Sabbath observance without regard to the burden such an accommodation would impose on the employer or other employees violated the Establishment Clause).

5. It is the province of this Court to consider whether regulations that allow plaintiffs to decline to provide contraceptive coverage "substantially" burden their exercise of religion under RFRA.

Although a court accepts a litigant's sincerely held religious beliefs, it must assess the nature of a claimed burden on religious exercise to determine whether, as a legal matter, that burden is "substantial" under RFRA. Plaintiffs cannot preclude that inquiry by collapsing the question of substantial burden into the sincerity of their beliefs. Were that the case, any individual or religious non-profit institution would be able not only to declare a sincerely held religious belief but also to demand absolute deference to its assessment of what constitutes a substantial burden on that belief.

Nevertheless, plaintiffs are clear that they believe that a court is bound to accept their position that the opt-out provision "substantially burden[s] [their] exercise of religion." 42 U.S.C. § 2000bb-1. *See* Pl. Br. 44-46. Plaintiffs' proposition does not accord with settled law. Whether a burden is "substantial" under RFRA 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"); *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448 (1998) (similar); *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").

Plaintiffs' reliance on cases like *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981), is wide of the mark. In *Thomas*, the plaintiff's "religious beliefs prevented him from participating in the production of war materials." *Id.* at 709. When his employer placed him in "a department that fabricated turrets for military tanks," the plaintiff looked for openings in departments not "engaged directly in the production of weapons," and, when he could not find one, quit his job. *Id.* at 710. He was denied unemployment compensation on the ground that "a termination motivated by religion is not for 'good cause' objectively related to the work." *Id.* at 711-13.

The Supreme Court disagreed and held that the state could not deny unemployment compensation "because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs[.]" *Id.* at 717-18. Notably, Thomas objected to *his* "fabricat[ing] turrets for military tanks." *Id.* at 710; *see id.* at 711 (finding that he objected to "producing or directly aiding in the manufacture of items used in warfare"). He did not object to *opting out* of doing so. Indeed, Thomas looked in the same company for jobs not "engaged directly in the production of weapons." *Id.* at 710; *see also id.* at 711-12 (""Claimant continually searched for a transfer to another department which would not be so armament related""). The burden in *Thomas* thus resulted from the absence of the type of opt-out mechanism available in this case. *Thomas* did not

suggest that his religious rights would be burdened if, as a consequence of his actions, *another employee* was assigned to work on armaments manufacture.

In short, while this Court does not scrutinize the sincerity of plaintiffs' religious beliefs, it properly determines whether the challenged regulations impose a substantial burden on those beliefs as provided for by RFRA and pre-*Smith* free-exercise law. Plaintiffs may decline to provide contraceptive coverage without facing any penalties. RFRA does not allow plaintiffs to block the government and third parties from making payments for contraceptive services.

B. Plaintiffs' Claims Would Fail Even If the Accommodations Were Subject to RFRA's Compelling-Interest Test.

Plaintiffs' claims would fail even if the accommodations were subject to RFRA's compelling-interest test. In *Hobby Lobby*, this Court held that the interests in public health and gender equality did not justify the requirement that employer-sponsored plans cover contraception. 723 F.3d at 1143-45. As the Court is aware, *Hobby Lobby* is pending before the Supreme Court. We respectfully submit that its analysis of these two compelling interests is incorrect for the reasons set out in the government's Supreme Court briefs, but we recognize that *Hobby Lobby* controls at this juncture with respect to the plans offered by for-profit corporations.

At issue in this case, however, are a far narrower set of regulations, which allow plaintiffs to opt out of providing contraceptive coverage and then provide that the government will pay third parties who voluntarily choose to make or arrange separate

payments. Plaintiffs' extraordinarily broad argument, as crystalized in their Supreme Court filing and their opening brief here, is that a religious objector may object not only to *their* complying with legal obligations but also to the fact that only if they decline to comply will the government pursue its policy objectives in another way.

The government's ability to accommodate religious concerns in this and other schemes depends on its ability to ask that religious objectors who do not belong to a pre-defined class (such as exempt organizations under the Internal Revenue Code) certify that they are entitled to the religious exception. *See Notre Dame*, 743 F.3d at 557 ("The novelty of [plaintiff's] claim—not for the exemption, which it has, but for the right to have it without having to ask for it—deserves emphasis."). It also depends on the government's ability to fill the gaps created by the accommodations. Plaintiffs' analysis, on the other hand, asserts that it is insufficient to permit an objector to opt out of an objectionable requirement; the government must, in their view, fundamentally restructure its operations and may not shift plaintiffs' obligations to a third party. As the Supreme Court admonished in its pre-*Smith* decisions, "[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. Plaintiffs' reasoning would fundamentally undermine the means by which the government accommodates religious concerns and would impair the government's operations.

II. Plaintiffs Have Not Identified Any Violation of Their Constitutional Rights.

A. The Regulations Do Not Violate the Free Exercise Clause or the Establishment Clause.

Plaintiffs take issue with the fact that churches (and other houses of worship) are automatically exempt from the contraceptive-coverage provision, whereas other religiously affiliated organizations (such as religiously affiliated colleges and universities) may opt out of providing contraceptive coverage by availing themselves of the accommodations. Contrary to plaintiffs' assertions (Pl. Br. 48-51), these regulations do not favor some denominations over others in violation of the Establishment Clause or Free Exercise Clause.

Under the regulations, an organization is a "religious employer" if it "is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.131(a). The cited provisions of the Internal Revenue Code refer to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order.

Although plaintiffs apparently believe that these Internal Revenue Code provisions are unconstitutional, they offer no plausible basis for this contention. Rejecting the same argument, the Seventh Circuit explained that "religious employers, defined as in the cited regulation, have long enjoyed advantages (notably tax advantages) over other entities, 26 U.S.C. §§ 6033(a)(3)(A)(i), (iii), without these

advantages being thought to violate the establishment clause." *Notre Dame*, 743 F.3d at 560 (citing *Walz* v. *Tax Comm'n of the City of New York*, 397 U.S. 664, 666 (1970) (upholding property tax exemptions for real property owned by religious organizations and used exclusively for religious worship)).

Plaintiffs' reliance on cases such as *Larson* v. *Valente*, 456 U.S. 228, 244 (1982), is entirely misplaced. The statute held unconstitutional in that case was "drafted with the explicit intention" of requiring "particular religious denominations" to comply with registration and reporting requirements while excluding other religious denominations. *Id.* at 254; *see also id.* at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). The Supreme Court in *Larson* contrasted the case with its earlier decision that upheld an exemption from the draft, where "conscientious objector status was available on an equal basis to both the Quaker and the Roman Catholic." *Id.* at 246 n.23 (discussing *Gillette* v. *United States*, 401 U.S. 437 (1971)). Here, too, the religious employer exemption does not grant any denominational preference or otherwise discriminate among religions.

B. The Regulations Do Not Violate the Free Speech Clause.

Plaintiffs have alleged two free speech violations, neither of which has merit.

1. Plaintiffs' "compelled speech" argument (Pl. Br. 52-55) reasons that after an employer declines to provide coverage, an insurer or third party administrator is required to separately provide coverage (except in the case of church plans). The

covered services might include medical "education and counseling." In plaintiffs' view, by declining to provide coverage for these services, they are unwillingly supporting the coverage.

Plaintiffs cannot convert a refusal to provide coverage into support of the coverage. Plaintiffs are free to "express[] [their] opposition to the use of contraceptives." 78 Fed. Reg. at 39,880 n.41. Completion of the simple self-certification form is "plainly incidental to the . . . regulation of conduct," and is not itself protected speech. *See Rumsfeld* v. *Forum for Academic & Inst. Rights, Inc.,* 547 U.S. 47, 61-63 (2006). Nor, in any event, does requiring the provision of insurance coverage for "'education and counseling for all women with reproductive capacity' as prescribed by a provider," 77 Fed. Reg. at 8725, compel speech by an insurer. Receiving medical care often involves a conversation between a patient and a doctor or a patient and a pharmacist. That does not transform any required health coverage into compelled speech. *See FAIR*, 547 U.S. at 61-63.

2. Plaintiffs are also mistaken in claiming that, if they opt out, they must "be silent on specific topics to specific audiences." Pl. Br. 55. The relevant regulations state that an eligible organization that is self-insured "must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries," and, quoted by the plaintiffs, "*must not, directly or indirectly, seek to influence the third party*

administrator's decision to make any such arrangements." 29 C.F.R. § 2590.715-2713A(b)(1)(iii) (emphasis added).

The quoted regulation makes no reference to speech, and it is not properly interpreted to prohibit protected speech. Indeed, the preamble states that "[n]othing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." 78 Fed. Reg. at 39,880 n.41. Moreover, it is not properly interpreted to apply at all to the plaintiffs here. The reference to "the third party administrator's decision" contemplates the same legal obligation to provide contraceptive coverage that is contemplated by the rest of the regulations. But no such obligation exists for third party administrators that are administering an exempt church plan.

The two parts of the regulation address two different types of improper conduct. The first part, addressing efforts "to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries," prohibits an employer from obstructing the provision of benefits that the third party administrator is attempting to provide. The second part, addressing efforts to "influence the third party administrator's decision to make any such arrangements," is meant only to prevent a self-certifying organization from using its economic power to coerce a third-party administrator into not fulfilling its legal obligation to provide contraceptive coverage. That second part does not prohibit protected speech. *See* 78 Fed. Reg. at 39,880 n.41.

And it assumes (like the rest of the regulations) that a third party administrator would be legally obligated to provide contraceptive coverage, which is not the case where, as here, there is an exempt church plan. It thus in no way infringes on protected speech. *See NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (rejecting First Amendment challenge to prohibition on "threat of reprisal or force or promise of benefit" intended to "coer[ce] . . . employees in the exercise of their right to self-organization"); *see also United States* v. *Williams*, 553 U.S. 285, 298 (2008) (no First Amendment protection for direct inducement of illegal conduct).

"[W]hen an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation." *Oklahoma* v. *EPA*, 723 F.3d 1201, 1211 (10th Cir. 2013) (quoting *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013)). That principle has particular force where, as here, the government's interpretation avoids a constitutional issue that a different interpretation would present. *See, e.g., Weaver* v. *U.S. Information Agency*, 87 F.3d 1429, 1438 (D.C. Cir. 1996) (courts should be particularly "reluctant to find burdens on speech that the government eschews any intention to impose").

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

This appeal presents the question whether the Religious Freedom Restoration Act ("RFRA") allows employers not only to opt out of providing federally required health coverage benefits but also to prevent third parties from providing such coverage. The same issue is pending before other circuits. Given the importance of the issue, the government respectfully requests oral argument.

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 9,472 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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

/s/ Adam C. Jed
Adam C. Jed

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system and caused seven hard copies to be delivered within two business days. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Adam C. Jed
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