No. 14-12696-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ETERNAL WORD TELEVISION NETWORK, INC., an Alabama non-profit corporation,

,

Plaintiff-Appellant,

v.

SYLVIA BURWELL, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the U.S. Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; U.S. DEPARTMENT OF THE TREASURY,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Alabama

OPPOSITION TO APPELLANT'S MOTION FOR INJUNCTION PENDING APPEAL BEFORE JULY 1, 2014

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, the undersigned counsel certifies that, to the best of our knowledge, in addition to those listed in appellant's motion, the following persons and entities may have an interest in the outcome of this case:

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INTRODUCTION AND SUMMARY

Plaintiff challenges regulations that establish minimum health coverage requirements under the Affordable Care Act ("ACA") insofar as they include contraceptive coverage as part of women's preventive-health coverage under section 1001 of the Act. Plaintiff, however, may opt out of this requirement by informing its third party administrator that it is eligible for a religious accommodation set out in the regulations and therefore is not required "to contract, arrange, pay, or refer for contraceptive coverage." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013).

Plaintiff does not object to informing its third party administrator of its decision not to provide contraceptive coverage. Plaintiff objects, instead, to requirements imposed not on itself but on its third party administrator. When an eligible organization with a self-insured plan elects not to provide contraceptive coverage for religious reasons, the third party administrator that administers the plan generally must make or arrange separate payments for contraception. *See* 29 C.F.R. § 2590.715-2713A(b)(2). The eligible organization does not administer this coverage and does not bear any direct or indirect costs of this coverage.

Although plaintiff is thus free to opt out of providing contraceptive coverage, it nevertheless claims that the challenged regulations impermissibly burden its exercise of religion in violation of the Religious Freedom Restoration Act of 1993 ("RFRA"). In *University of Notre Dame* v. *Sebelius*, 743 F.3d 547 (7th Cir. 2014), *rehearing en banc denied*, No. 13-3853, ECF No. 64 (May 7, 2014), the Seventh Circuit considered the

same claim and held that the claim is not a basis for a preliminary injunction. In *Michigan Catholic Conference* v. *Burwell*, _ F.3d _, Nos. 13-2723, 13-6640, 2014 WL 2596753 (6th Cir. June 11, 2014), the Sixth Circuit reached the same conclusion.

As the *Notre Dame* and *Michigan Catholic Conference* decisions illustrate, plaintiff cannot transform its right, as an eligible organization, *not* to provide contraceptive coverage into a substantial burden by characterizing its decision to opt out as "trigger[ing]" or "facilitat[ing]" the provision of such coverage by others. Eligible organizations that opt out do not "facilitate" the provision of contraceptive coverage by third parties, just as they do not "facilitate" the federal government's reimbursement of 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 payment by the government. Plaintiff is "free to opt out of providing the coverage [itself], but [it] can't stop anyone else from providing it." *Univ. 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

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 for health insurance issuers that offer coverage in the group and the individual health insurance markets. The Act

requires non-grandfathered group health plans and health insurance issuers offering non-grandfathered health insurance coverage to cover four categories of 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 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) (IOM Report). 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 102-107. 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), (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 Coll.* v. *Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012) (per curiam) (quoting 77 Fed. Reg. at 8727). After notice and comment rulemaking, the Departments

published the current final regulations, challenged here, in July 2013. *See* 78 Fed. Reg. 39,870, 39,874-86 (July 2, 2013); 45 C.F.R. § 147.131(b) (HHS); 29 C.F.R. § 2590.715-2713A(a) (Labor); 26 C.F.R. § 54.9815-2713A(a) (Treasury). 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 (like plaintiff here),[1] the regulations generally require the third party administrator to make or arrange separate payments for contraceptive services for plan participants and beneficiaries. 29 C.F.R. § 2590.715-2713A(b)(2).[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 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

[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 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] These requirements do not apply when the third party administrator is administering a "church plan" that the Employee Retirement Income Security Act ("ERISA") does not cover. *See* 29 U.S.C. § 1003(b)(2); *see also* 29 U.S.C. § 1002(33).

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). And the 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 a third party. Instead, the 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. 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. Plaintiff Eternal Word Television Network, Inc. is a non-profit organization that offers health care to its approximately 350 employees through a self-insured health plan administered by Blue Cross Blue Shield of Alabama and that is admittedly eligible for the religious accommodation set out above.[3] *See* Warsaw Decl. ¶¶ 5, 24, 28. Plaintiff contends that the accommodation violates its 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

[3] The State of Alabama is also a plaintiff in this case, but has not filed a notice of appeal.

application of that burden is the least restrictive means to advance a compelling governmental interest. Plaintiff argues that opting out of the coverage requirement substantially burdens its religious exercise because doing so "trigger[s]" or "facilitate[s]" the provision of contraceptive coverage by third parties. Compl. 19-20, 22, 26. Plaintiff also asserts that the accommodation compels speech in violation of the First Amendment. Compl. 39-40.[4]

2. The district court granted the government's motion for summary judgment with respect to plaintiff's RFRA and free speech claims. Rejecting plaintiff's claim that the accommodation substantially burdens its exercise of religion under RFRA, the court explained that "the duties the mandate imposes on other parties are irrelevant to [plaintiff's] RFRA claim." Op. 8 (citing *Bowen* v. *Roy*, 476 U.S. 693, 700-701 (1986); *Kaemmerling* v. *Lappin*, 553 F.3d 669, 678-679 (D.C. Cir. 2008)). Plaintiff "cannot explain how [opting out] violates its religion without reference to the obligation that the mandate will impose upon others after [plaintiff] delivers the form." Op. 9. "To the extent that [plaintiff's] third-party administrator is under compulsion to act, that compulsion comes from the law, not from Form 700." Op. 9-10 (citing *Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547, 554 (7th Cir. 2014); *Mich. Catholic Conference* v. *Burwell*, _ F.3d _. Nos. 13-2723, 13-6640, 2014 WL 2596753, at *9, *11 (6th Cir. June 11, 2014)). "Because [plaintiff's] only religious objection to the

[4] Plaintiff has asserted additional causes of action before the district court, which are not at issue in this motion for an injunction pending appeal.

mandate hinges upon the effect it will have on other parties," the court held "the mandate does not impose a substantial burden on [plaintiff's] religious practice within the meaning of RFRA." Op. 10.

The court also rejected plaintiff's claim that the accommodation compels speech in violation of the First Amendment. The court noted that "[w]hen compelled speech is purely incidental to the government's regulation of conduct, there is no First Amendment problem." Op. 16. In this case, the "notice requirement is a regulation of conduct, not speech, and the fact that Form 700 uses written words to facilitate that notice is purely incidental." *Ibid.* In any event, "the accommodation's certification requirement does not compel [plaintiff] to express any opinions or beliefs that it does not hold." *Ibid.*

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. Plaintiff's asserted harm—an alleged substantial burden on its religious exercise and alleged compelled speech—turns on a likelihood of success on the merits, which it cannot demonstrate for reasons discussed below. Moreover, the balance of equities and public interest preclude a preliminary

injunction. If an injunction issues, plaintiff's employees will be unable to obtain contraceptive coverage from third parties as provided by the regulations. And, by virtue of plaintiff's non-conforming coverage, the employees will also be ineligible for subsidies to purchase their own health coverage that covers all essential health benefits, including contraceptive benefits. *See* 26 U.S.C. § 36B.

A. The Challenged Regulations Do Not Impermissibly Burden Plaintiff's Exercise of Religion Under RFRA.

1. 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), (b)(1); *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, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); *ibid.* (statement of Sen. Hatch); *see also* 146 Cong. Rec. S7774, S7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy) (explaining that, for purposes of the RLUIPA, which was modeled on RFRA, "[t]he term 'substantial burden' . . . is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise"). Whether a burden is "substantial" under RFRA is a

question of law, not a "question[] of fact, proven by the credibility of the claimant." *Mich. Catholic Conference* v. *Burwell*, _ F.3d _, Nos. 13-2723, 13-6640, 2014 WL 2596753, at *7 (6th Cir. June 11, 2014) (quoting *Mahoney* v. *Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011)) (brackets in original); *accord Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547, 558 (7th Cir. 2014) ("substantiality—like compelling governmental interest—is for the court to decide"), *reh'g en banc denied*, No. 13-3853, ECF No. 64 (May 7, 2014); *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.").

Plaintiff here is eligible for a religious accommodation under which it does not have to provide contraceptive coverage. *See* 29 C.F.R. § 2590.715-2713A(a), (b)(1). To opt out, it must only complete a form stating that it is eligible and provide a copy to its third party administrator, Blue Cross Blue Shield. *See id.* § 2590.715-2713A(a)(4), (b)(1), (c)(1); *see also Mich. Catholic Conference* v. *Sebelius*, _ F. Supp. 2d _, 2013 WL 6838707, at *7 (W.D. Mich. Dec. 27, 2013) (eligible organizations need only "attest to [their] religious beliefs and step aside"), *aff'd* _ F.3d _, Nos. 13-2723, 13-6640, 2014 WL 2596753 (6th Cir. June 11, 2014). Indeed, plaintiff presumably would need to inform its third party administrator of its objection even if it were automatically exempt from the coverage requirement, to ensure that it would not be

contracting, arranging, paying, or referring for such coverage. *Univ. of Notre Dame* v. *Sebelius*, _ F. Supp. 2d _, 2013 WL 6804773, at *8, *aff'd*, 743 F.3d 547 (7th Cir. 2014).[5]

2. After an employer declines to offer contraceptive coverage, the third party administrator that administers its health plans generally is required to make or arrange separate payments for contraception. 29 C.F.R. § 2590.715-2713A(b)(2). This requires no action by any employer. Employers that opt out will not "contract, arrange, pay, or refer" for such coverage, 78 Fed. Reg. at 39,874, and the regulations bar third party administrators from passing along any costs, directly or indirectly, with respect to payments for contraceptive services, 29 C.F.R. § 2590.715-2713A(b)(2)(i), (ii); *see also id.* § 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,

[5] Instead of opting out of contraceptive coverage, plaintiff also could choose to discontinue offering health coverage. In that scenario, its 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 plaintiff believes that this too would "facilitate" or "trigger" contraceptive coverage; but it also would not constitute the kind of burden that is "substantial" under RFRA. This is yet another means by which plaintiff could avoid providing the coverage to which it objects. *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, plaintiff would save the cost of providing health coverage. It could then be subject to a tax of $2,000 per full-time employee. *See* 26 U.S.C. § 4980H(a), (c). Even were the expense greater, a burden is not substantial when it merely "operates so as to make the practice of [one's] religious beliefs more expensive" or inconvenient. *See Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961).

or contribute to the funding of contraceptive services."). Further, the third party administrators—rather than the eligible employers—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 third party administrator . . . provides separate payments for contraceptive services[.]" *Id.* § 2590.715-2713A(d).

Plaintiff does not contend that its religious exercise is burdened by completing a form that states that it is a religious non-profit organization with religious objections to providing contraceptive coverage. Its objection is instead that, after it opts out, federal law requires its third party administrator, Blue Cross Blue Shield, to make or arrange separate payments for contraceptive services. Plaintiff's attempt to collapse the provision of contraceptive coverage by a third party with its own decision not to provide such coverage fails. Plaintiff mistakenly characterizes its decision to opt out as "trigger[ing]" or "facilitat[ing]" contraceptive coverage by *others*. *E.g.,* Compl. 22, 26. But if, after an eligible employer opts out, a third party administrator makes separate payments because of an obligation imposed by the government, employees and covered dependents will receive coverage for contraceptive services *despite* plaintiff's religious objections, not *because* of them.

In plaintiff's view, it is immaterial whether it is required to offer and pay for contraceptive coverage or whether it may decline to do so. This view of what can constitute a "substantial burden" under RFRA is at odds with our Nation's long

history of allowing religious objectors to opt out and the government then requiring others to fill the objectors' shoes. On plaintiff's reasoning, a conscientious objector could object not only to his own military service, but also to opting out, on the theory that his opt-out would "'trigger' the drafting of a replacement who was not a conscientious objector." *Notre Dame*, 743 F.3d at 556. Similarly, on plaintiff's reasoning, the plaintiff in *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), could have demanded not only that he not make weapons but also that he not *opt out* of doing so, because someone else would take his place on the assembly line.

3. Nothing in the cases on which plaintiff relies, 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*, 450 U.S. at 710-712 (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"); S. Rep. No. 103-111, at 12 (1993) (expressly stating that RFRA was not intended to "change the law" as articulated in *Tilton*); *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 to bodily violation of giving sample in and of itself, 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 plaintiff here need not "contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874. It "need not place contraceptive coverage into 'the basket of goods and services'" that it furnishes to its employees. *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, 1217 (D.C. Cir. 2013), *cert. petn. pending*, No. 13-567); *see also Notre Dame*, 743 F.3d at 558 (explaining that the plaintiffs that could opt out "can derive no support from [the] decision in *Korte* v. *Sebelius*, 735 F.3d 654 (7th Cir. 2013)," in which the for-profit plaintiffs could *not* opt out).

Plaintiff is similarly mistaken in urging that the Supreme Court's order in *Little Sisters of the Poor, Home for the Aged* v. *Sebelius*, 134 S. Ct. 1022 (Jan. 24, 2014) (mem.), should govern here. The Supreme Court explicitly stated that the "order should not be construed as an expression of the Court's views on the merits." *Ibid.* The Court also made clear that the order was issued "based on all of the circumstances of the case," *ibid.,* which are quite different from the circumstances of this case. In *Little Sisters*, because the group health plan was a self-insured church plan exempt from ERISA, the third party administrator could not be required to assume responsibility for contraceptive coverage; and that third party administrator (which was also a plaintiff) made clear that it "does not intend" to provide payments for contraceptive services voluntarily. *See Little Sisters of the Poor*, __ F. Supp. 2d __, No. 13-cv-2611, 2013 WL 6839900, at *10-11, *13 (D. Colo. Dec. 27, 2013); *see also id.* at *15 (explaining 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"); Order, *Little Sisters of the Poor* v. *Sebelius*, No. 13-1540 (10th Cir. Dec. 31, 2013). Thus, the Supreme Court's order did not alter whether the employees would receive coverage. In sharp contrast, the plaintiff in this case provides coverage through an ERISA-covered plan. Blue Cross Blue Shield is therefore required to make or arrange separate payments for contraception after plaintiff opts out of providing coverage itself. Unlike in *Little Sisters*, an injunction pending appeal would deprive hundreds of employees and their families of medical coverage.

4. Plaintiff does not advance its argument by noting that the opt-out form provided to a third party administrator "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, and will serve as "an instrument under which the plan is operated," 29 C.F.R. § 2510.3-16(b). Plaintiff suggests that this aspect of the accommodation for self-insured organizations raises concerns that are not presented by the accommodation for insured organizations. Mot. 6-7, 10-11.

Plaintiff misunderstands the regulation and its relationship to ERISA. The section of the preamble from which plaintiff quotes explains that 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), (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).

In any event, if an employer objects to particular aspects of the accommodation for *self-insured* plans, it is free to offer its employees an *insured* plan. This option obviates any objection that is based on the particulars of the accommodation for self-insured organizations. *See Tony & Susan Alamo Found.* v. *Sec'y of Labor*, 471 U.S. 290, 303-305 (1985) (option to compensate employees by furnishing room and board obviates religious objection to paying cash wages); *Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961) (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").

5. Plaintiff's claim would fail even if the accommodation were subject to RFRA's compelling-interest test. The Affordable Care Act and its preventive-services coverage provision advance the compelling interest of ensuring a "comprehensive insurance system with a variety of benefits available to all participants." *United States* v. *Lee*, 455 U.S. 252, 258 (1982). The impact on third parties that would result from plaintiff's position would undermine comprehensive efforts to protect the public health, which is unquestionably a compelling governmental interest. This is not a

"broadly formulated interest[] justifying the general applicability of government mandates," *O Centro*, 546 U.S. at 431, but rather a concrete and specific one, supported by a wealth of empirical evidence. Contraceptive use reduces health risks posed by unintended pregnancies, avoids risks of adverse pregnancy outcomes by improving birth spacing, and can prevent certain cancers, menstrual disorders, and pelvic pain. *See, e.g.*, IOM Report 102-107; 78 Fed. Reg. at 39,872. The contraceptive-coverage regulations, including the religious accommodations, also advance the government's related compelling interest in assuring that women have equal access to recommended healthcare services. 78 Fed. Reg. at 39,872, 39,887.

Moreover, the government's ability to accommodate religious concerns in this and other programs depends on its ability to ask that 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. Plaintiff's analysis, on the other hand, asserts that it is insufficient to permit an objector to opt out of an objectionable requirement; the government may not shift plaintiff's obligations to a third party but must, in plaintiff's view, try to somehow fundamentally restructure its operations. 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. Plaintiff's reasoning would fundamentally undermine the means by which the government accommodates religious concerns and would impair the government's operations.

B. The Regulations Do Not Violate Plaintiff's Freedom of Speech.

Plaintiff also argues that the accommodation compels speech in violation of the First Amendment because the act of opting out of providing contraceptive coverage is itself speech with which it disagrees. Mot. 17-19. This assertion is inexplicable. The requirement to complete an opt-out form does not constrain plaintiff's speech on any topic, and "does not deprive [plaintiff] of the freedom to speak out about abortion and contraception on [its] own terms." *Mich. Catholic Conference*, _F.3d_, 2014 WL 2596753, at *13. "Nothing 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, by opting out, plaintiff would explicitly proclaim its objection to contraception. "The form requires [plaintiff] to assert [its] opposition to contraception," and therefore does not compel "speech that [plaintiff] disagree[s] with and so cannot be the basis of a First Amendment claim." *Mich. Catholic Conference*, _F.3d_, 2014 WL 2596753, at *13.

CONCLUSION

Plaintiff's motion for an injunction pending appeal should be denied.

Respectfully submitted,

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CERTIFICATIONS OF COMPLIANCE

I hereby certify this brief complies with the requirements of Fed. R. App. P. 27 (d)(1)(E) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that this brief complies with the page limitation of Fed. R. App. P. 27(d)(2) because it is 20 pages long.

/s/ Patrick G. Nemeroff
Patrick G. Nemeroff

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2014, I electronically filed the foregoing document with the Clerk of this 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/ Patrick G. Nemeroff
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