IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN CATHOLIC CONFERENCE, in its own name and, obo Michigan Catholic Conference Second Amended And Restated Group Health Benefit Plan For Employees; CATHOLIC FAMILY SERVICES, dba Catholic Charities Diocese Of Kalamazoo

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS E. 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 Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; U.S. DEPARTMENT OF TREASURY

Defendants-Appellees.

No. 13-2723

OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

INTRODUCTION AND SUMMARY

Plaintiffs challenge the regulations establishing minimum health coverage requirements under the Affordable Care Act insofar as they include contraceptive coverage as part of required women's preventive health coverage. One of the plaintiffs, the Michigan Catholic Conference, is a "religious employer" that is entirely exempt from the contraceptive coverage requirement under 45 C.F.R. § 147.131(a). The other plaintiff, Catholic Family Services, d/b/a Catholic Charities Diocese of Kalamazoo (Catholic Charities), which provides group health coverage through a self-insured church plan, is concededly eligible for a religious accommodation set out in the regulations and is therefore not required "to contract, arrange, pay, or refer for contraceptive coverage," 78 Fed. Reg. 39,870-01, 39,874 (July 2, 2013). It need only self-certify that it is a non-profit organization that holds itself out as religious and that it has a religious objection to providing coverage for contraceptive services. *See id.* at 39,874-39,886; *see, e.g.,* 29 C.F.R. § 2590.715-2713A(b).

When eligible organizations opt out of providing contraceptive coverage, their employees generally receive contraceptive coverage through other mechanisms. In general, if an eligible organization opts out, the insurance company that issues the policy to the employer or the third-party administrator that administers its self-insured group health plan assumes responsibility for such coverage and provides or arranges separate payments for contraceptive services. *See* 45 C.F.R. § 147.131(c)(2)(i)(B) and (ii); 29 C.F.R. § 2590.715-2713A(b)(2). Insurance issuers and third-party

administrators are prohibited from imposing any premium, fee, or other charge, directly or indirectly, on the eligible organization or its group health plan with respect to contraceptive coverage. 45 C.F.R. § 147.131(c)(2)(ii); 29 C.F.R. § 2590.715-2713A(b)(3). In the case of self-insured group health plans, the costs are borne by the federal government, at the third-party administrator's option. *See* 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50.

Plaintiffs urge that it is immaterial that employers, such as Catholic Charities, can opt out of providing contraceptive coverage, because third parties might provide coverage once employers decline to do so. But an employer's exercising its ability to opt out of the contraceptive coverage requirement does not, as plaintiffs suggest, "authorize" (Mot. 10, 11, 14, 18) or "facilitate" (Mot. 3, 4, 8, 10, 28) possible coverage by third parties. Nor is it a "permission slip" (Mot. 6) for third-parties to do so. As the district court explained, "the accommodation in this case requires Catholic Charities to attest to its religious beliefs and step aside." Op. 11. "It is true that, once it steps aside, another person may step in and provide coverage of contraceptive services for Catholic Charities' employees." *Ibid.* But the possible acts of third-parties cannot constitute a substantial burden to plaintiffs' exercise of religion. Catholic Charities must only "do what is has always done," *i.e.,* "notify the [third-party administrator] that it objects to providing contraceptive coverage." Op. 12.

The district court thus properly concluded that the challenged regulations do not impose a substantial burden on plaintiffs' practice of religion and denied preliminary

relief. We respectfully urge that this Court should deny plaintiffs' request for an injunction pending appeal and note that on December 30, 2013, the Seventh Circuit in *Univ. of Notre Dame* v. *Sebelius*, No. 13-3853 (7th Cir.), denied a similar emergency motion, Dkt. No. 11 (Dec. 30, 2013).

Plaintiffs' contentions are particularly anomalous because Catholic Charities (unlike the plaintiff in *Notre Dame*), had made clear that it provides group health coverage through a self-insured "church plan," Compl. ¶¶ 16, 50-51, a statutory category of employee benefit plan, *see* 26 U.S.C. § 414(e), that is ordinarily exempt from the Employee Retirement Income Security Act (ERISA). 29 U.S.C. § 1003(b)(2). There is no statutory authority to regulate a church plan's third-party administrator. Accordingly, the third-party administrator that administers plaintiffs' church plan may choose—but is not required—to assume responsibility for contraceptive coverage and provide separate payments for contraceptive services. *See* 29 C.F.R. § 2590.715-2713A(b)(2). If the third-party administrator of a self-insured church plan chooses not to provide such coverage, it is not subject to penalties. And, in that scenario, the employer also is not subject to penalties because it has satisfied its regulatory requirement by certifying that it is eligible for the accommodation and providing a copy of the certification to its third-party administrator. *See* 29 C.F.R. § 2590.715-2713A(b)(1). Thus, not only may Catholic Charities opt out of providing contraceptive coverage but it is speculative whether the third-party administrator will provide such coverage in its stead.

Even if plaintiffs' third-party administrator were to decide to provide contraceptive coverage, employees and their covered dependents would receive such coverage *despite* plaintiffs' religious objections, not *because* of those objections. The district court thus correctly held that plaintiffs have failed to show that these regulations substantially burden their exercise of their religion.

STATEMENT

A. Regulatory Background

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

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

HHS requested the assistance of the Institute of Medicine in developing such comprehensive guidelines for preventive services for women. 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012). Experts, "including specialists in disease prevention, women's health issues, adolescent health issues, and evidence-based guidelines," developed a list of services "shown to improve well-being, and/or decrease the likelihood or delay the onset of a targeted disease or condition." Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 2-3 (2011). These included the "full range" of "contraceptive methods" approved by the Food and Drug Administration, *id.* at 10; *see id.* at 102-110, which the Institute found can greatly decrease the risk of unwanted pregnancies, adverse pregnancy outcomes, and other adverse health consequences, and can vastly reduce medical expenses for women. *See id.* at 102-07.

Consistent with those recommendations, the HRSA guidelines include "'[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,' as prescribed" by a provider. 77 Fed. Reg. at 8725 (quoting the guidelines). The relevant regulations adopted by the three Departments implementing this portion of the Act (HHS, Labor, and Treasury) require coverage of, among other preventive services, the contraceptive services recommended in the HRSA guidelines. 45 C.F.R.

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

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

When the Departments first issued final regulations, in response to religious objections by additional employers, the Departments announced that they would develop changes "'that would meet two goals' — providing contraceptive coverage without cost-sharing to covered individuals and accommodating the religious objections of [additional] non-profit organizations." *Wheaton College* v. *Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012) (per curiam) (quoting 77 Fed. Reg. at 8727).

After notice and comment rulemaking, the Departments published the current regulations which provide religion-related accommodations for group health plans of eligible organizations. The accommodations are available for group health plans established or maintained by "eligible organizations" (and group health insurance coverage provided in connection with such plans). *See* 78 Fed. Reg. 39,874-39,886; 45 C.F.R. § 147.131(b) (HHS); 29 C.F.R. § 2590.715-2713A(a) (Labor); 26 C.F.R. §

54.9815-2713A(a) (Treasury). An "eligible organization" is an organization that satisfies the following criteria:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.
>
> (2) The organization is organized and operates as a nonprofit entity.
>
> (3) The organization holds itself out as a religious organization.
>
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies.

45 C.F.R. § 147.131(b); *see also* 29 C.F.R. § 2590.715-2713A(a); 26 C.F.R. § 54.9815-2713A(a); 78 Fed. Reg. at 39,874-75.

Under these regulations, an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874. To be relieved of any such obligations, an eligible organization need only complete a self-certification form stating that it is an eligible organization, and it then must provide a copy of that self-certification to its insurance issuer or third-party administrator. *Id.* at 39,874-75; *see, e.g.,* 29 C.F.R. § 2590.715-2713A(a)(4), (b)(1), (c)(1).

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

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

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

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

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

B. Factual Background and Prior Proceedings

Plaintiffs are the Michigan Catholic Conference and Catholic Family Services, d/b/a Catholic Charities Diocese of Kalamazoo (Catholic Charities). The Michigan Catholic Conference is a "religious employers" that is entirely exempt from the contraceptive coverage requirement under 45 C.F.R. § 147.131(a). Catholic Charities provides group health coverage through a self-insured church plan and can concededly opt out of providing contraceptive coverage by certifying that it is eligible for the religious accommodation.

Although the challenged regulations issued in July 2013, plaintiffs waited until late November to file suit and until early December to ask that the district court expedite consideration of a request for preliminary injunctive relief.

Plaintiffs acknowledge that Catholic Charities can opt out of providing contraceptive coverage by certifying that it is eligible for the religious accommodation.

They nonetheless claim that the regulations violate the Religious Freedom Restoration Act (RFRA), 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. They urge that certifying that they are eligible for the accommodation would "authorize" (Mot. 10, 11, 14, 18) or "facilitate" (Mot. 3, 4, 8, 10, 28) their third-party administrator's possibly providing contraceptive coverage after they decline to do so.

The district court held that plaintiffs had not demonstrated a substantial burden on their exercise of religion. The court explained that "the accommodation in this case requires Catholic Charities to attest to its religious beliefs and step aside." Op. 11. "It is true," the court noted, "that, once it steps aside, another person may step in and provide coverage of contraceptive services for Catholic Charities' employees." *Ibid.* But the regulations "require[] Catholic Charities to do what it has always done," *i.e.*, "notify the [third-party administrator] that it objects to providing contraceptive coverage." Op. 12. Thus, the court found, "Plaintiffs are not required to 'modify [their] behavior.'" *Ibid.* (quoting *Thomas* v. *Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 70, 7187 (1981)). "Rather, it is the TPA that [may] modify its behavior and take action by providing contraceptive services — without the assistance of Catholic Charities." *Ibid.* (citing 78 Fed. Reg. at 39,874 (eligible organizations may not be required to contract, arrange, pay, or refer for contraceptive coverage)).

The court explained that it is not a "substantial burden" on the exercise of plaintiffs' religion that, as a result of some action by plaintiffs, third-parties may take action to which the plaintiffs object. Op. 12-13 (citing *Bowen* v. *Roy*, 476 U.S. 693 (1986) and *Kaemmerling* v. *Lappin*, 553 F.3d 669 (D.C. Cir. 2008)). "An objection to the activities of third parties—no matter how sincere or deeply felt—does not constitute a substantial burden." Op. 13. The court noted that "although Plaintiffs assert that the accommodation requires them to participate in a scheme to provide contraceptives, in fact, it just does the opposite. It provides a mechanism for employers with religious objections to contraceptives, like Catholic Charities, to opt out of that scheme." *Ibid.* "This mechanism simply requires [Catholic Charities] to state that [it] choose[s] to opt out based on their religious beliefs." *Ibid.* "The fact that the scheme will continue to operate without them may offend Plaintiffs' religious beliefs, but it does not substantially burden the exercise of those beliefs." *Ibid.*[1]

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

[1] The district court additionally rejected claims brought under the First Amendment's Free Speech, Free Exercise, and Establishment Clauses, and the Administrative Procedure Act. Plaintiffs, however, have not raised those claims in their motion for an injunction pending appeal.

preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. In a case presenting similar issues, *Univ. of Notre Dame* v. *Sebelius*, the Seventh Circuit found that the plaintiffs had not met the requirements for an injunction pending appeal. No. 13-3853 (7th Cir.), Dkt. No. 11 (Dec. 30, 2013). We respectfully urge this Court to do the same.

Plaintiffs' asserted harm—an alleged substantial burden on their religious exercise—turns on a likelihood of success on the merits, *see Autocam, Inc. v. Sebelius,* 730 F.3d 618, 624 (6th Cir. 2013), which they cannot demonstrate for reasons discussed below. Plaintiffs' request for extraordinary relief is particularly anomalous because they have a self-insured church plan that is categorically exempt from regulation under ERISA; their third-party administrator is thus outside the scope of the challenged regulations' authority and it is therefore speculative whether the third-party administrator will provide contraceptive coverage after employers opt out of doing so.

Moreover, although plaintiffs insist that they must obtain an injunction by January 1, they have in many ways created their own emergency by waiting nearly five months to file suit and then nearly another three weeks after that to seek expedition of its motion for a preliminary injunction.

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

RFRA requires a plaintiff to show, as a threshold matter, that a challenged regulation "substantially burden[s] [the plaintiff's] exercise of religion." 42 U.S.C.

§ 2000bb-1(a). "[O]nly *substantial* burdens on the exercise of religion trigger the compelling interest requirement." *Henderson* v. *Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001) (emphasis added). "An inconsequential or *de minimis* burden on religious practice does not rise to this level." *Kaemmerling* v. *Lappin*, 553 F.3d 669, 673 (D.C. Cir. 2008); *see also Braunfeld* v. *Brown*, 366 U.S. 599, 606 (1961).

Whether a burden is "substantial" is a question of law, not a "question[] of fact, proven by the credibility of the claimant." *Mahoney* v. *Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011); *see, e.g., Bowen* v. *Roy*, 476 U.S. 693, 701 n.6 (1986) ("Roy's religious views may not accept this distinction between individual and governmental conduct," but the law "recognize[s] such a distinction"); *Kaemmerling*, 553 F.3d at 679 ("[a]ccepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened").

A. To opt out of providing contraceptive coverage, Catholic Charities need only certify that it is a non-profit organization that holds itself out as religious and that, because of religious objections, it is opposed to providing coverage for some or all contraceptive services. Plaintiffs acknowledge that they can avail themselves of a religious accommodation. Thus, plaintiffs "need not place contraceptive coverage into 'the basket of goods and services that constitute [their] healthcare plan,' nor must [they] even permit, much less 'approve and endorse' such coverage in [their] plan," *Priests for Life*, v. *U.S. Dep't of Health & Human Servs.*, __ F. Supp. 2d __, No. 13-cv-1261, 2013 WL

6672400, at *10 (D.D.C. Dec. 19, 2013) (quoting *Gilardi* v. *U.S. Dep't of Health and Human Servs.*, 733 F.3d 1208, 1217 (D.C. Cir. 2013)).

After plaintiffs decline to offer contraceptive coverage, the third-party administrator that administers their self-insured church plan may choose—but is not required—to provide such coverage. Even if the third-party administrator did so, the regulations bar it from charging the eligible organizations any premium, fee, or other charge, directly or indirectly, with respect to payments for contraceptive services. *See* 78 Fed. Reg. at 39,874, 39,879-80; 29 C.F.R. § 2590.715-2713A(b)(2). Plaintiffs would "not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services." 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(A). The third-party administrator would make clear to beneficiaries that plaintiffs are neither administering nor funding the contraceptive benefits. *See* 78 Fed. Reg. at 39,880, 39,881; 29 C.F.R. § 2590.715-2713A(d). And any information that the third-party administrator sends about contraceptive coverage would be sent "separate from" any materials "distributed in connection with" plaintiff's group health coverage.

The regulations thus do not require plaintiffs to "modify [their] behavior" in any way, *Thomas*, 450 U.S. at 717. As noted, the Michigan Catholic Conference, is a "religious employer" that is entirely exempt from the contraceptive coverage requirement under 45 C.F.R. § 147.131(a). Catholic Charities does not object, as a general matter, to informing a third-party administrator that it is not legally required to

provide contraceptive coverage and does not wish to pay for such services. It has presumably done so prior to the issuance of the regulations, to ensure that it is not responsible for contracting, arranging, paying, or referring for such coverage, and would need to do so if it obtained the extraordinary injunction sought here. Nor does Catholic Charities object to declaring that it meets the criteria for the accommodation. It has done so in this litigation. The only change effected by the regulations is that if Catholic Charities determines not to cover contraception, "t*he government and the TPA [may] pay for contraception,*" *Univ. of Notre Dame* v. *Sebelius*, No. 13-cv-01276, slip op. at 14-15 (N.D. Ind. Dec. 20, 2013) (emphasis in original). A law cannot be a substantial burden on religious exercise when "it involves no action or forbearance on [plaintiffs'] part, nor . . . otherwise interfere[s] with any religious act in which [plaintiffs] engage[]." *Kaemmerling*, 553 F.3d at 679.

In this case, moreover, not only does Catholic Charities *not* have to provide contraceptive coverage, but it is speculative whether the third-party administrator will step in and provide such coverage in its stead. Plaintiffs' group health plan is a self-insured church plan and is therefore not subject to regulation under ERISA. *See* 29 U.S.C. § 1003(b)(2). Accordingly, although the third-party administrator could elect to provide contraceptive coverage if Catholic Charities opts out, the third-party administrator is not required to do so.

B. Plaintiffs cannot collapse the possible provision of contraceptive coverage by third-parties with their own decision *not* to provide such coverage by stating that they

object to "participat[ing] in a regulatory scheme to provide their employees" with contraceptive coverage. Mot. 1. Plaintiffs mistakenly characterize their own decision *not* to provide such coverage as "authoriz[ation]" (Mot. 10, 11, 14, 18), "facilitat[ion]" (Mot. 3, 4, 8, 10, 28), or a "permission slip" (Mot. 6) for contraceptive coverage by third parties.

Plaintiffs mistakenly describe their interactions with the self-insured church plan's third-party administrator as if plaintiffs were directing the third-party administrator to provide contraceptive coverage and aiding it in doing so. On page 11 of their motion for an injunction pending appeal, they identify five (highly duplicative) required actions and one purported restraint that they regard as substantial burdens on their practice of religion.

(1) Plaintiffs argue that they must "[e]xecute a 'self-certification' that would authorize a third party to provide coverage for the objectionable products and services." But these "self-certifications" merely inform insurance issuers that employers and universities are eligible for a religious accommodation and do not wish to provide contraceptive coverage. As the district court explained in rejecting an identical challenge in *Notre Dame*, "[i]f Notre Dame opts out of providing contraceptive coverage, as it always has and likely would going forward, it is *the government* who will authorize the third party to pay for contraception." Slip op. at 2 (emphasis in original).

Plaintiff does not advance its argument by declaring that "the 'self-certification' actually 'designat[es] . . . the third party administrator[] as plan administrator and claims

administrator for contraceptive benefits.'" Mot. 16 (partially quoting 78 Fed. Reg. at 39,879)). The section of the preamble cited by plaintiff makes clear, however, that the certification is not an act of designation. The preamble explains the somewhat complex interaction of ERISA provisions, noting that "a document notifying the third party administrator(s) that the eligible organization will not provide, fund, or administer payments for contraceptive services," for purposes of Section 3(16) of ERISA, "*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).

(2) Plaintiffs argue that they must "[p]ay premiums to a third party that is authorized to provide their employees with the objectionable products and services." Plaintiffs do not and cannot argue, however, that money they pay to the self-insured plan or third-party administrator could be used to pay for contraceptive coverage or to administer such coverage. As they do not dispute, the third-party administrator is prohibited from imposing any premium, fee, or other charge, directly or indirectly, on the eligible organization or the group health plan with respect to the issuer's payments for contraceptive services. *See* 78 Fed. Reg. at 39,875-79; *see, e.g.,* 45 C.F.R. § 147.131(c)(2). Plaintiffs thus object only to the fact that third parties will separately make contraceptive coverage available to their employees at no expense to plaintiffs.

(3) Plaintiffs state that they will have to "[o]ffer enrollment paperwork for employees to enroll in the MCC plan overseen by a third party authorized to provide the

objectionable products and services." This assertion combines the mistaken contention that plaintiffs' opt-out is, in fact, an authorization, and their equally-mistaken suggestion that their premiums are in some way related to contraceptive coverage. The plaintiffs presumably already offer employees paperwork to enroll in health plans, and the regulations do not require it to offer any additional (or different) paperwork. And neither the paperwork nor plaintiffs themselves "authorizes" the third-party administrator to offer additional coverage. Such additional coverage is a function of government requirements placed on third parties, not on plaintiffs.

(4) Plaintiffs argue that they will be required to "[s]end health-plan-enrollment paperwork (or tell employees where to send it) if the MCC plan is overseen by a third party that is authorized to provide the objectionable products and services." This assertion is merely a variation of the previous contention that plaintiffs are required to provide employees with paperwork in connection with their own health plans (which, once plaintiffs opt out, will "[e]xpressly exclude" contraceptive coverage, 45 C.F.R. § 147.131(c)(2)(i)(A)).

(5) Plaintiffs argue that they must "[i]dentify for a third party which of their employees will participate in the plan, if the third party is authorized to provide the objectionable products and services to those participating employees." This assertion is another variation of the paperwork argument. It simply observes that plaintiffs inform a third-party administrator of the persons covered by their own health plan.

"[A] third party's objectionable use of a plaintiff's information doesn't make a viable RFRA claim." *Notre Dame*, slip op. at 16.

(6) Finally, plaintiffs argue that they must "[r]efrain from canceling their insurance arrangement if they become aware that their third party is authorized to provide the objectionable products and services to their employees." This assertion highlights the theme of plaintiffs' granular attack on the regulations: their objection is not to any requirements placed on *them*, but to their inability to veto the acts of *others*.

In short, plaintiffs' analysis boils down to the assertion that their exercise of religion will be substantially burdened because a third party may provide contraceptive coverage after they decline to do so—*i.e.,* that the regulations substantially burden *their* exercise of religion because *someone else* may arrange for and fund contraceptive coverage. As the district court explained, "the accommodation in this case requires Catholic Charities to attest to its religious beliefs and step aside," much as they have previously done and, indeed, would do so if they obtained the injunction that they seek. Op. 11. "It is true," the court noted, "that, once it steps aside, another person may step in and provide coverage of contraceptive services for Catholic Charities' employees." *Ibid.* But, as the district court explained in *Notre Dame,* "[t]he government isn't violating [an employer's] [rights] by letting it opt out, or by arranging for third party contraception coverage." Slip op. at 2.

C. Plaintiffs' failure to come to grips with the nature of the regulation is underscored by their assertion that "any attempt to distinguish" *Korte* v. *Sebelius*, 735

F.3d 654 (7th Cir. 2013); *Gilardi*, v. *U.S. Dep't of Health & Human Servs.* 733 F.3d 1208 (D.C. Cir. 2013), *cert. petn. pending*, No. 13-567, or *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), *cert. granted*, 134 S. Ct. 678 (2013), "is wholly unavailing." Mot. 13.

The for-profit corporations that were plaintiffs in those cases could *not* opt-out of providing contraceptive coverage. Thus, it appears that the Seventh Circuit had no difficulty distinguishing *Korte*. *See Notre Dame*, No. 13-3853, Dkt. No. 11 (7th Cir. Dec. 30, 2013) (denying emergency motion that contained nearly the exact same arguments made here). As the district court in *Roman Catholic Archbishop of Wash.* v. *Sebelius*, No. 13-cv-01441 (D.D.C. Dec. 20, 2013) explained, in contrast to the for-profit plaintiffs, institutions that are eligible for an accommodation are not "required to provide and pay for the contraceptive coverage themselves," place contraceptive coverage in "'the basket of goods and services that constitute [its] healthcare plan,'" or "'meaningfully approve and endorse the inclusion of contraceptive coverage in their companies' employer-provided plans.'" Slip op. 34-36 & n.14 (quoting *Gilardi*, 733 F.3d at 1217-18). Similarly, the district court in *Notre Dame* explained that "this case differs greatly from *Korte* because the accommodation removes the coercion facing private for-profit companies by offering a different choice[.]" The district court observed that "*Korte* itself recognized this important distinction when it stated that the lack of 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 Notre Dame." Slip op. at 15 (quoting *Korte,* 735 F.3d at 662). (This Court rejected challenges brought by for-profit corporations in *Autocam, Inc.* v. *Sebelius*, 730 F.3d 618 (6th Cir. 2013) and *Eden Foods, Inc.* v. *Sebelius,* 733 F.3d 626 (6th Cir. 2013)).

Plaintiffs' discussion of other case law is similarly wide of the mark. In *Thomas,* for example, the plaintiff's "religious beliefs prevented him from participating in the production of war materials." 450 U.S. at 709. When his employer transferred him "to a department that fabricated turrets for military tanks," he 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 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 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.

The breadth of plaintiffs' argument is remarkable, and their position lacks any discernible limiting principle. Their contentions would transform RFRA from a shield into a sword. A plaintiff could essentially veto any conduct by others on the ground that it would transform the plaintiff's opt out or other prior action into "authoriz[ation]" (Mot. 10, 11, 14, 18), "facilitat[ion]" (Mot. 3, 4, 8, 10, 28), or a "permission slip" (Mot. 6) for the conduct to which the plaintiff objects. No precedent supports that remarkable contention. Under plaintiffs' view of the law, it is not sufficient that they can decline to provide contraceptive coverage. It must also be impossible, as a matter of law, for a third-party to separately provide contraceptive coverage to the people who are plan participants and beneficiaries if the plaintiffs decline to do so. Whatever the scope of an employer's own protections under RFRA, it does not give the employer a right to control the actions of third parties, such as a third-party administrator or private individuals who happen to be participants or beneficiaries in a plan sponsored by the employer.

II. Even If the Regulations Were Found to Impose More Than a *De Minimis* Burden on The Exercise of Religion, They Survive Strict Scrutiny.

Because the regulations do not place a substantial burden on the practice of religion, there is no need to determine whether the regulations are tailored to advance a

compelling governmental interest. If the Court were to reach that question, however, it should conclude that the contraceptive coverage regulations and the religious accommodation would survive strict scrutiny.

The promotion of public health is unquestionably a compelling governmental interest, and there are few "'matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" *Korte* v. *Sebelius*, No. 12-3841, 2013 WL 5960692, at *63 (Rovner, J., dissenting) (quoting *Eisenstadt* v. *Baird,* 405 U.S. 438, 453 (1972)). "A woman's ability to control whether and when she will become pregnant has highly significant impacts on her health, her child's health, and the economic well-being of herself and her family." *Id.* at *62. Unintended pregnancies "pose risks to both mother and fetus in that a woman, neither planning to be pregnant nor realizing that she is, may both delay prenatal care and continue practices (including smoking and drinking) that endanger the health of the developing fetus." *Ibid.* (citation omitted). "Pregnancy is contraindicated altogether for women with certain health conditions." *Ibid.* (citation omitted). "Intervals between pregnancies also matter, as pregnancies commencing less than eighteen months after a prior delivery pose higher risks of pre-term births and low birth weight." *Ibid.* (citation omitted). And unintended pregnancies "account for the lion's share of induced abortions." *Ibid.* Nearly half (49%) of all pregnancies in the United States are unintended, and "roughly 40 percent of those pregnancies (22 percent of all pregnancies) end in abortion, resulting in more than 1.2 million abortions annually as of 2008." *Ibid.* (citation omitted).

The contraceptive-coverage requirement also advances the government's distinct compelling interest in assuring that women have equal access to health-care services. 78 Fed. Reg. at 39,872, 39,887. Congress enacted the women's preventive-services coverage requirement because the legislative record showed that "women have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. 29,070 (2009) (statement of Sen. Feinstein); *see IOM Report* 18. "Among women insured by employer-based plans, oral contraceptives alone account for one-third of their total out-of-pocket health care spending." *Korte*, 2013 WL 5960692, at *61 (Rovner, J., dissenting) (citation omitted). Women often find that copayments and other cost sharing for important preventive services "are so high that they avoid getting [the services] in the first place." 155 Cong. Rec. at 29,302 (statement of Sen. Mikulski); *see IOM Report 19-20*. The Supreme Court recognized in *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), that there is a fundamental "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." *Id.* at 626. "Assuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests." *Ibid.*

In asserting that the regulations are not the least restrictive means available to achieve these interests (Mot. 24-26), plaintiffs again rely on the decisions involving for-profit corporations that could not opt-out of the requirement. The question here is whether the regulations, *including the opt-out provisions*, are overly restrictive. The

regulations do no more than require plaintiffs to state that they are eligible to opt-out of providing contraceptive coverage. Such a statement is necessary if the government or a third party is to provide independent contraceptive coverage to employees. Indeed, plaintiffs' stated religious objection would render impossible any alternative in which the government or other third-parties stepped in to provide contraceptive coverage because plaintiffs opted out of doing so. *See, e.g.*, Compl. ¶ 93 ("A religious organization's self-certification [that it meets the criteria for the accommodation] therefore, is a trigger and but-for cause of the objectionable coverage.").

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2013, I electronically filed the foregoing document with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Adam Jed
Adam C. Jed