[ORAL ARGUMENT REQUESTED]

No. 14-6026

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SOUTHERN NAZARENE UNIVERSITY; OKLAHOMA WESLEYAN UNIVERSITY; OKLAHOMA BAPTIST UNIVERSITY; MID-AMERICA CHRISTIAN UNIVERSITY,

Plaintiffs-Appellees,

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 HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF THE TREASURY

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Oklahoma No. 13-cv-1015 (Friot, J.)

BRIEF FOR THE APPELLANTS

STUART F. DELERY
Assistant Attorney General

SANFORD C. COATS
United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
ADAM C. JED
PATRICK G. NEMEROFF
(202) 305-8727
Attorneys, Appellate Staff
Civil Division, Room 7217
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Statutes:

Regulations:

Legislative Materials:

Other Authorities:

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. Substantially the same issues are presently pending before this Court in *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, No. 13-1540 (10th Cir.), and *Reaching Souls Int'l* v. *Sebelius*, No. 14-6028 (10th Cir.), and before other courts of appeals in:

Roman Catholic Archbishop of Washington v. *Sebelius*, Nos. 13-5371 & 14-5021 (D.C. Cir.), and *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, No. 13-5368 (D.C. Cir.) (consol.)

Roman Catholic Archdiocese of New York v. *Sebelius*, No. 14-427 (2d Cir.)

Geneva College v. *HHS*, No. 14-1374 (3d Cir.). *Persico* v. *Sebelius*, No. 14-1376 (3d Cir.), and *Zubik* v. *Sebelius*, No. 14-1377 (3d Cir.) (consol.)

East Texas Baptist Univ. v. *Sebelius*, No. 14-20112 (5th Cir.)

University of Dallas v. *Sebelius*, No. 14-10241 (5th Cir.)

Catholic Diocese of Beaumont v. *Sebelius*, No. 14-40212 (5th Cir.)

Michigan Catholic Conference v. *Sebelius*, No. 13-2723 (6th Cir.), and *Catholic Diocese of Nashville* v. *Sebelius*, No. 13-6640 (6th Cir.) (consol.)

Legatus v. *Sebelius*, No. 14-1183 (6th Cir.)

Ave Maria Foundation v. *Sebelius*, No. 14-1310 (6th Cir.)

Grace Schools v. *Sebelius*, No. 14-1430, and *Diocese of Fort Wayne-South Bend* v. *Sebelius*, No. 14-1431 (7th Cir.) (consol.)

Sharpe Holdings, Inc. v. *HHS*, No. 14-1507 (8th Cir.)

/s/ Patrick G. Nemeroff
Patrick G. Nemeroff

GLOSSARY

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 may opt out of the coverage requirement by informing their insurance issuer or 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 do not object to informing insurance issuers or third party administrators of their decision not to provide contraceptive coverage. They object, instead, to requirements imposed not on themselves, but on insurance issuers and third party administrators. In the case of an insured plan, when an eligible organization elects not to provide contraceptive coverage for religious reasons, the insurance company that issues the policy for that organization's employees is required to provide separate payments for contraceptive services for the employees. *See* 45 C.F.R. § 147.131(c)(2)(i)(B), (c)(2)(ii), and (f). In the case of a self-insured plan, these requirements must be met by the third party administrator that administers the plan. *See* 29 C.F.R. § 2590.715-2713A(b)(3). In all cases, the organization eligible for a religious accommodation does not administer this coverage and does not bear any

direct or indirect costs of the coverage, which is provided separately from its own health 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 "facilitating" the provision of contraceptive coverage by third parties. *E.g.,* A90 . 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. Third parties provide coverage as a result of legal obligations imposed 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. A16. The district court granted plaintiffs' motion for a preliminary injunction on December 23, 2013, A286, and

defendants filed a timely notice of appeal on February 11, 2014, A288. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

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

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 102-107.

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) 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.*, 45 C.F.R. § 147.131(c)(1); 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 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).[1] 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), (f). 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).

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. 29 C.F.R. § 2590.715- 2713A(b)(2). "The eligible organization will not act as the plan administrator or claims administrator with respect

[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).

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).

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. Plaintiffs are four universities—Southern Nazarene University, Oklahoma Wesleyan University, Oklahoma Baptist University, and Mid-America Christian University—each of which is concededly eligible for the accommodations described

above. A254-255.[2] Southern Nazarene University offers health care coverage through Blue Cross Blue Shield of Oklahoma to its approximately 500 employees and their dependents, and offers separate health care coverage to its students. A255-256.[3] Oklahoma Wesleyan University offers health care coverage through Community Care of Oklahoma to its approximately 550 employees and their dependents. A256. Oklahoma Baptist University offers health care coverage through Blue Cross Blue Shield of Oklahoma to its approximately 328 employees and their dependents, and offers separate health care coverage to its students. A257-258. And Mid-America Christian University offers health care coverage through GuideStone to its approximately 100 employees and their dependents. A258.

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

[2] The parties stipulated to facts for purposes of plaintiffs' motion for preliminary injunction. A254-264.

[3] It is not entirely clear from the Joint Stipulation of Facts how Southern Nazarene University's health plan operates. Southern Nazarene University explains that it offers its employees two choices of health insurance plans through Blue Cross Blue Shield of Oklahoma, but it also states that it is "partially self-insured." A256. Because Southern Nazarene University describes the accommodation available to it as the one available to self-insured eligible organizations, A46, we assume that to be the case for purposes of this brief.

requirement substantially burdens their religious exercise because doing so "facilitate[s] access to objectionable contraceptives" and thus the accommodation "compels the Universities, through their health insurance plans, to serve as the conduit through which objectionable products and services are provided to their employees and students." A91.[4]

2. The district court granted plaintiffs' motion for a preliminary injunction. A266-286. Relying on plaintiffs' statement that, "within the operation of the regulations, completing and delivering the self-certification to their issuers or third party administrators would violate the Universities' sincere religious beliefs," A274, the court deferred to plaintiffs' belief that the religious accommodation imposes a "substantial burden" on their exercise of religion under RFRA. A279-282. It reasoned that self-certification is "in effect, a permission slip" for the provision of contraceptive by others. A281. In holding the accommodation could not satisfy RFRA's compelling-interest test, the court relied on *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114 (10th Cir.) (en banc), *cert. granted,* 134 S. Ct. 678 (2013), while acknowledging that "decision does not address the accommodation" at issue in this case. A283. The district court further held that plaintiffs had satisfied the remaining requirements for preliminary relief. A285-286.

[4] While plaintiffs have alleged additional statutory and constitutional violations, their motion for a preliminary injunction invoked only their RFRA claim. A75-99; A266-267.

SUMMARY OF ARGUMENT

Plaintiffs are not required to provide contraceptive coverage to their employees or students. As eligible religious organizations, they can opt out of the coverage requirement by completing a form and providing a copy to their health insurance issuer or third party administrator. They object to opting out on the ground that, once they have done so, third parties will separately provide payments for contraceptive services without cost to or involvement by plaintiffs.

The requirements that federal law places on these third parties do not "substantially burden" plaintiffs' exercise of religion within the meaning of the Religious Freedom Restoration Act. The only entities required to provide contraceptive coverage are insurance companies and third party administrators. Plaintiffs cannot convert their opt-out right into a substantial burden by characterizing the opt-out as "facilitating" the provision of contraceptive 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 or offers of payment made to them.

The district court erred by ignoring the burden on plaintiffs' students and employees that would result from accepting plaintiffs' claim, despite pre-*Smith* jurisprudence that emphasized the importance of third-party interests to the free-

exercise analysis. The district court also erred by deferring to plaintiffs' characterization of the certification as a "substantial burden" on their exercise of religion. It is for courts, not plaintiffs, to decide whether opting out of providing contraceptive coverage affirmatively furthers the provision of contraceptive coverage and therefore burdens plaintiffs' exercise of religion.

Even if the accommodation were subject to RFRA's compelling-interest test, plaintiffs' claim would fail because the accommodation furthers the government's compelling interest in its ability to accommodate religious concerns in this and other schemes. Accepting plaintiffs' position—that even an opt-out provision substantially burdens the exercise of religion—would render the government unable to accommodate religious concerns and would impair the government's operations.

STANDARD OF REVIEW

The grant of a request for a preliminary injunction is reviewed for abuse of discretion. *Aid for Women* v. *Foulston*, 441 F.3d 1101, 1115 (10th Cir. 2006). A district court abuses its discretion by granting a preliminary injunction based on an error of law. *Ibid.*

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 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. Rather, they concede that they satisfy the criteria for the religious accommodations under which they do not have to provide contraceptive coverage. *See* 45 C.F.R. § 147.131(b), (c)(1); 29 C.F.R. § 2590.715-2713A(a), (b)(1). To opt out of this coverage requirement, 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.*, 45 C.F.R. § 147.131(c)(1); 29 C.F.R. § 2590.715-2713A(a)(4), (b)(1), (c)(1); *see also 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.) (eligible organizations need only "attest to [their] religious beliefs and step aside"). Indeed, plaintiffs 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. Plaintiffs object to requirements imposed on third parties, not on themselves.

The responsibilities that the regulations place on insurance issuers and third party administrators require no action by any plaintiff. Plaintiffs will not "contract, arrange, pay, or refer" for such coverage, 78 Fed. Reg. at 39,874, and 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 impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries."); 29 C.F.R. § 2590.715-2713A(b)(2)(i) 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.").

Insurance issuers and third party administrators—rather than the 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).

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 federal law requires insurers and third party administrators to provide coverage after plaintiffs declare that they will not provide coverage themselves. *See* A91 (objecting that, in light of the requirement that third parties independently pay for contraceptives, plaintiffs' opt out would "facilitate access to objectionable contraceptives"); A263 (objecting to "completing and delivering the self-certification to their issuers or third party administrators," "within the operation of the regulations").

The district court mistakenly characterized the act of opting out of providing coverage as "in effect" giving a third party "a permission slip . . . to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects." A281. Plaintiffs are not providing "permission" to third parties to perform duties established by federal law any more than they are providing "permission" to the United States to reimburse the third party administrator for its payments on behalf of individuals availing

themselves of contraceptive coverage. Ordinarily, health insurance issuers and third party administrators make payments for all covered health services. If, after an eligible employer opts out, an insurance issuer or third party administrator makes separate payments due to an obligation imposed by the government or the availability of reimbursement by the government, employees and students will receive coverage for contraceptive services *despite* plaintiffs' religious objections, not *because* of them.

In plaintiffs' view, it is 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." *University of Notre Dame* v. *Sebelius*, 743 F.3d 547, 556 (7th Cir. 2014). "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.*[5]

[5] Instead of opting out of contraceptive coverage, plaintiffs also could choose to discontinue offering health coverage. In that scenario, plaintiffs' employees and students 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 "facilitating" contraceptive coverage; but it also would not constitute the kind of burden that is "substantial" under RFRA. This is yet another means by which plaintiffs could avoid providing the coverage to which they object. *See Tony & Susan Alamo Found.* v. *Sec'y of Labor*, 471 U.S. 290, 303-305 (1985) (option to compensate

Continued on next page.

Nothing in the cases on which plaintiffs rely, or in the pre-*Smith* case law that RFRA restored, supports the 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

---

employees by furnishing room and board obviates religious objection to paying cash wages). In that scenario, with respect to their employees, plaintiffs 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 beliefs more expensive" or inconvenient. *See Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961). With respect to their students, plaintiffs would not be subject to any tax for not offering health coverage.

(expressly stating that RFRA was not intended to "change the law" as articulated in *Tilton*)[6]; *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

[6] 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.

Seventh Circuit emphasized this distinction in *Korte*, "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 [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.").

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

Plaintiffs (and the district court) erroneously assume 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 their view, it is immaterial whether an employer's assertion of a right under RFRA would deprive its employees or its students 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-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 235-236; *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 231-232. 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"

[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

Continued on next page.

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).

4. 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.

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

---

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, 708-711 (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).

governmental conduct," but the law "recognize[s] such a distinction"); *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448 (1988) (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").

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 person 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.

The district court erred by accepting (A280) not only that plaintiffs' religious beliefs are sincere but *also* that the challenged right to opt out creates a "substantial" burden on their "exercise of religion" as contemplated by RFRA. This approach does not accord with settled law. *See, e.g., Bowen*, 476 U.S. at 701 n.6; *Lyng*, 485 U.S. at 448; *Kaemmerling*, 553 F.3d at 679; *Mahoney*, 642 F.3d at 1121; *see* 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (explaining addition of the "substantial burden" requirement); *see also Tilton*, 403 U.S. at 689; *Allen*, 392 U.S. at 248-249. This Court's decision in *Hobby Lobby* does not support plaintiffs' contention that courts are bound by their assertion of a substantial burden. Because the for-profit corporation

plaintiffs in that case were not eligible for the accommodations (and thus were required to contract, arrange, and pay for contraceptive coverage), the Court did not address whether an accommodation that requires a plaintiff to do nothing beyond opting out, after which legal obligations require *others* to provide coverage, imposes a "substantial" burden as contemplated by RFRA. *See Hobby Lobby Stores, Inc.*, 723 F.3d at 1140-1141.

Similarly, plaintiffs find no support in *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981). 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 711-713.

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 717-718. 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 711-712 (""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 1143-1145. 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 third parties will make or arrange separate payments. Plaintiffs' extraordinarily broad argument is that a religious objectors 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 may not shift plaintiffs' obligations to a third party but must, in their view, 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. Plaintiffs' reasoning would fundamentally undermine the means by which the government accommodates religious concerns and would impair the government's operations.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

JOHN F. WALSH
United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK. B. STERN
ALISA B. KLEIN
ADAM C. JED
/s/ Patrick G. Nemeroff
PATRICK G. NEMEROFF
(202) 515-8727
Attorneys, Appellate Staff
Civil Division, Room 7217
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

APRIL 2014

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 page limitation of Fed. R. App. P. 32(a)(7)(A), because it does not exceed 30 pages.

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/ Patrick G. Nemeroff
Patrick G. Nemeroff

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 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/ Patrick G. Nemeroff
Patrick G. Nemeroff

ADDENDUM

TABLE OF CONTENTS

Page

45 C.F.R. § 147.131

(a) Religious employers. In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(b) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

> (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. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

(c) Contraceptive coverage--insured group health plans--

> (1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the

self-certification described in paragraph (b)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) Payments for contraceptive services--

(i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (b)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 147.130(a)(1)(iv) must--

> (A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and
>
> (B) Provide separate payments for any contraceptive services required to be covered under § 147.130(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 147.130(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--insured group health plans and student health insurance coverage. For each plan year to which the accommodation in paragraph (c) of this section is to apply, an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your [employer/institution of higher education] has certified that your [group health plan/student health insurance coverage] qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your [employer/institution of higher education] will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of health insurance issuer] will provide separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your [group health plan/student health insurance coverage]. Your [employer/institution of higher education] will not administer or fund these payments. If you have any questions about this notice, contact [contact information for health insurance issuer]."

(e) Reliance--

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the plan

> complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(f) Application to student health insurance coverage. The provisions of this section apply to student health insurance coverage arranged by an eligible organization that is an institution of higher education in a manner comparable to that in which they apply to group health insurance coverage provided in connection with a group health plan established or maintained by an eligible organization that is an employer. In applying this section in the case of student health insurance coverage, a reference to "plan participants and beneficiaries" is a reference to student enrollees and their covered dependents.

29 C.F.R. § 2590.715-2713A

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 2590.715–2713(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 (a)(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 (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) Contraceptive coverage--self-insured group health plans--

(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides each third party administrator that will process claims for any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section, which shall include notice that--

(A) 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; and

(B) Obligations of the third party administrator are set forth in § 2510.3–16 of this chapter and § 2590.715–2713A.

(iii) The eligible organization 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 must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

(2) If a third party administrator receives a copy of the self-certification described in paragraph (a)(4) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a 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; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a 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.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) 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.

(c) Contraceptive coverage--insured group health plans--

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (a)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) Payments for contraceptive services--

(i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (a)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 2590.715–2713(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

> The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 715 of ERISA. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) Reliance--insured group health plans--

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

26 C.F.R. § 54.9815-2713A

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 54.9815–2713(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 Secretaries of Health and Human Services and Labor, that it satisfies the criteria in paragraphs (a)(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 (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) Contraceptive coverage--self-insured group health plans. (1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) of this section are satisfied:

> (i) The eligible organization or its plan contracts with one or more third party administrators.
>
> (ii) The eligible organization provides each third party administrator that will process claims for any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section, which shall include notice that--
>
> > (A) 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; and

(B) Obligations of the third party administrator are set forth in 29 CFR 2510.3–16 and 26 CFR 54.9815–2713A.

(iii) The eligible organization 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 must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

(2) If a third party administrator receives a copy of the self-certification described in paragraph (a)(4) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a 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; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a 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.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) 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.

(c) Contraceptive coverage--insured group health plans--(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (a)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) Payments for contraceptive services. (i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (a)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 54.9815–2713(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of

> the PHS Act, as incorporated into section 9815. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) Reliance--insured group health plans.

> (1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in

paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

42 U.S.C. § 2000bb-1

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SOUTHERN NAZARENE UNIVERSITY; OKLAHOMA WESLEYAN UNIVERSITY; OKLAHOMA BAPTIST UNIVERSITY; and MID-AMERICA UNIVERSITY,	)	
Plaintiffs,	)	
-vs-	)	Case No. CIV-13-1015-F
KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The plaintiffs, Southern Nazarene University, Oklahoma Wesleyan University, Oklahoma Baptist University, and Mid-America University, have brought this action against Kathleen Sebelius, Secretary of the United States Department of Health and Human Services ("HHS"), and other government officials and agencies, challenging regulations issued under the Patient Protection and Affordable Care Act, Pub.L. No. 111-148, 124 Stat. 119 (2010), as amended by the Heath Care and Education Reconciliation Act, Publ. L. No. 111-152, 124 Stat. 1029 (2010) ("ACA"). The matter is now before the court on plaintiffs' motion for a preliminary injunction. Doc. no. 19, filed on November 27, 2013 (Motion). Defendants have responded to the motion. Doc. no. 25. Although the complaint asserts both constitutional and statutory

violations, the Motion invokes only the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq*.

I. Facts

The parties, at the invitation of the court, have entered into a stipulation as to the facts to be considered by the court for purposes of ruling on the motion for preliminary injunction. Doc. no. 43, filed on December 21, 2013 (herein: Stipulation).

The stipulated facts, which form the factual basis for the court's analysis and conclusions, are as follows:

1. Plaintiffs Southern Nazarene University (SNU), Oklahoma Wesleyan University (OKWU), Oklahoma Baptist University (OBU), and Mid-America Christian University (MACU) (collectively, "the Universities") are Christ-centered institutions of higher learning.

2. The Universities hold, as a matter of sincere religious conviction, that it would be sinful and immoral for them to participate in, pay for, facilitate, enable, or otherwise support access to Plan B, ella, and IUDs, and related counseling.

3. The Universities believe that Plan B, ella, and IUDs can and sometimes do act abortifaciently by preventing implantation after fertilization.

4. They hold that one of the prohibitions of the Ten Commandments ("thou shalt not murder") precludes them from facilitating, assisting in, or enabling the use of drugs or devices that they believe destroy very young human beings in the womb.

5. The Universities believe that their religious duties include promoting the physical well-being and health of their employees by providing them health insurance coverage.

6. OBU and SNU believe that their religious duties include promoting the physical well-being and health of their employees by offering them health insurance

coverage.

7. SNU has approximately 505 employees, of which approximately 315 are full-time.

8. Approximately 253 SNU employees are enrolled in health insurance plans sponsored by the University. Approximately 249 dependents of employees are covered. The plans thus cover approximately 502 individuals.

9. SNU offers coverage through BlueCross BlueShield of Oklahoma. SNU offers beneficiaries two choices: "Blue Choice PPO – SNU Choice" and "Blue Choice PPO – SNU Premier."

10. SNU's health plan is partially self-insured. The university has contracted with an outside insurance company to pay all claims over $100,000.

11. The plan year for SNU's employee health insurance coverage begins on July 1 of each year.

12. SNU's employee health plans cover a variety of contraceptive methods. However, consistent with its religious commitments, SNU's contract for employee health coverage states that all drugs and devices that act after fertilization has occurred are excluded.

13. All SNU students enrolled in nine hours or more of classroom instruction are required to have health insurance.

14. SNU offers a health plan to those students who do not have health insurance coverage of their own.

15. The student plan excludes ella, Plan B, and IUDs.

16. The next student plan year begins on August 21, 2014.

17. Oklahoma Wesleyan University has approximately 557 employees, and about 112 of them are full-time.

18. OKWU provides two plans insured by Community Care of Oklahoma. One is an HMO benefit plan and the other is a PPO benefit plan.

19. Ninety-three employees are enrolled in the group health plans sponsored by OKWU. An additional 128 of these employees' dependents are covered, meaning that 221 individuals are covered by OKWU's group health plans.

20. Consistent with its religious commitments, the University's current contracts for employee health coverage exclude IUDs and emergency contraception.

21. The OKWU employee health plans do cover a variety of contraceptive methods.

22. The plan year for Oklahoma Wesleyan University's employee health insurance coverage begins on July 1 of each year.

23. OBU has approximately 328 employees, of whom about 269 are full time.

24. OBU provides eligible employees a PPO health plan with the choice of two networks provided by Blue Cross Blue Shield of Oklahoma.

25. Approximately 279 employees are covered by the plans. Approximately 696 dependents of employees are covered by the plans, bringing total coverage to 975 individuals.

26. Plan years for OBU's employee health plans begin on January 1 of each year.

27. The current OBU employee health plan excludes coverage of Plan B, ella, and IUDs.

28. All undergraduate and graduate students taking nine or more credit hours' worth of classes are eligible to enroll in a health plan facilitated by OBU.

29. The current OBU student health plan does not cover Plan B, ella, or

IUDs. Case

30. A new OBU student plan is scheduled to go into effect on January 1, 2014.

31. MACU has approximately 298 employees, of whom about 139 are full time.

32. MACU's employee health plans cover approximately 100 employees.

33. The plan covers approximately 116 dependents of these employees.

34. MACU offers two traditional PPO plans: Health Choice 1000 and Health Choice 2000, both provided by GuideStone.

35. The plan year for MACU's employee health plan begins on January 1.

36. MACU's employee health plan does not cover Plan B, ella, or IUDs.

37. Prior to the promulgation of the challenged regulations, the Universities contracted with their health insurance issuers and third party administrators not to provide or pay for the coverage to which the Universities object.

38. In March 2010, Congress passed, and President Obama signed, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (March 23, 2010), and the Health Care and Education Reconciliation Act, Pub. L. No. 11-152 (March 30, 2010), together known as the "Affordable Care Act" (ACA).

39. One ACA provision requires that any "group health plan" or "health insurance issuer offering group or individual health insurance coverage" provide coverage for certain preventive care services, including "[for] women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)]." 42 U.S.C. § 300gg-13(a).

40. These services must be covered without "any cost sharing." 42 U.S.C.

§ 300gg-13(a).

41. Because there were no such existing HRSA guidelines relating to preventive care and screening for women, the Department of Health and Human Services (HHS) requested that the Institute of Medicine (IOM) develop recommendations to implement the requirement to provide coverage, without cost-sharing, of preventive services for women.

42. After conducting a review, IOM recommended that women's preventive services include, among other things, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity."

43. On August 1, 2011, HRSA adopted guidelines consistent with IOM's recommendations, subject to an exemption relating to certain religious employers authorized by regulations issued that same day.

44. Plan B, ella, and IUDs fall within the category of "FDA-approved contraceptive methods."

45. Defendants exempted certain religious employers from the regulations.

46. The Universities are not eligible for this exemption.

47. Defendants created a "Temporary Enforcement Safe Harbor" for religious organizations ineligible for the religious exemption.

48. The Universities were eligible for, and took advantage of, the Temporary Enforcement Safe Harbor.

49. The Temporary Enforcement Safe Harbor expires beginning January 1, 2014. More specifically, the Safe Harbor is no longer available at the beginning of the first plan year on or after January 1, 2014.

50. The Safe Harbor is thus not available to OBU and MACU with respect

to the employee and student plan years that begin on January 1, 2014.

51. The Safe Harbor will no longer be available to SNU and OKWU with respect to its employee and student plan years that begin on July 1, 2014.

52. Defendants promulgated regulations that provide for accommodations for certain organizations not eligible for the exemption that have a religious objection to including some or all "FDA-approved contraceptive methods" and related counseling in their employee and/or student health insurance plans.

53. A non-exempt religious organization is eligible for an accommodation if it satisfies the following requirements: (a) it opposes providing coverage of some or all of any contraceptive services required to be covered under the applicable regulations on account of religious objections; (b) it is organized and operates as a nonprofit entity; (c) it holds itself out as a religious organization; and (d) it self-certifies, in a form and manner specified by the Secretaries of Health and Human Services and Labor, that it satisfies the three preceding criteria and makes such self-certification available for examination upon request.

54. Under the regulations, a group health plan established or maintained by an organization eligible for an accommodation ("eligible organization") that provides benefits on a self-insured basis complies with the requirement to provide contraceptive coverage if (a) the organization or its plan contracts with one or more third party administrators; and (b) the organization provides each third party administrator that will process claims for any contraceptive services that must be covered with a copy of a "self-certification."

55. Under the regulations, a group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis must not, directly or indirectly, seek to interfere with a third party administrator's arrangements

to provide or arrange separate payments for some or all contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make such arrangements.

56. Under the regulations, if a third party administrator receives a copy of the self-certification, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services.

57. Under the regulations, a group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies with the requirement to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification to each issuer that would otherwise provide such coverage in connection with the group health plan.

58. A group health insurance issuer that receives a copy of the self-certification must (a) expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; (b) provide separate payments for any required contraceptive services for plan participants and beneficiaries for so long as they remain enrolled in the plan.

59. For each plan year with respect to which the accommodation is in effect, a third party administrator or issuer required to provide or arrange payments for contraceptive services must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year.

60. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints.

61. The regulations prohibit an issuer or third party administrator from passing the costs of the separate payments for contraceptive services on to the eligible organization, its group health plan, or plan participants or beneficiaries.

62. The Universities must choose among four options: (a) provide the coverage to which they object; (b) violate the regulations and incur penalties of $100 per day for each affected individual; (c) discontinue all health plan coverage for employees and/or students; or (d) self-certify that they qualify for the accommodation and provide that self-certification to their third party administrators or issuers.

63. If the Universities discontinue health plan coverage for employees, they would be subject to an annual penalty of $2,000 per full-time employee, after the first 30 employees.

64. The Universities believe that, within the operation of the regulations, completing and delivering the self-certification to their issuers or third party administrators would violate the Universities' sincere religious beliefs.

65. The Universities believe that providing employee or student health insurance that includes coverage for Plan B, ella, and/or IUDs would violate the Universities' sincere religious beliefs.

66. The Universities' missions include promoting the spiritual maturity of members of their respective communities by fostering obedience to and love for what they understand to be God's laws, including His restrictions on the unjustified taking of innocent human life.

67. The Universities believe that sinful behavior adversely affects their relationships with God.

68. Christian conviction, including respect for and dignity and worth of human life from the moment of conception, is a qualification for entry into and participation in the Universities' communities.

II. Jurisdiction and Standing

Defendants responded to the Motion with a motion to dismiss, combined with a memorandum in opposition to the Motion. Doc. nos. 25 and 26, filed on December 17, 2013. The motion to dismiss is filed under Rules 12(b)(1) and (6), Fed.R.Civ.P. The motion to dismiss under Rule 12(b)(1) is apparently directed only to plaintiffs' claim that certain regulations were not promulgated in compliance with the Administrative Procedure Act. *See*, doc. no. 25, at 19, referring the court to pp. 43 - 44. The plaintiffs' motion for preliminary injunction does not seek relief on the basis of the APA claim. Consequently, the defendants' Rule 12(b)(1) motion need not be addressed at this juncture. The defendants' arguments under Rule 12(b)(6) – attacking the plaintiffs' RFRA claim on the merits – encompass the entire range of arguments advanced by defendants in opposition to plaintiffs request for a preliminary injunction. Accordingly, the court's consideration of the Rule 12(b)(6) issues will be subsumed in the court's resolution of the issues presented by the Motion.

Defendants' contentions with respect to standing are, likewise, addressed only to the APA claim. *See*, doc. no. 25, at 25, 43 - 44. Accordingly, since this action clearly falls, in the first instance, within the grant of subject matter jurisdiction set forth in 28 U.S.C. § 1331, issues with respect to standing under the APA present no impediment to consideration of the Motion. *Cf.* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, at 1126 (10th Cir. 2013), *cert. granted,* 134 S.Ct. 678 (Nov. 26, 2103).

See also, Reaching Souls International, Inc. v. Sebelius, Case No. CIV-13-1092-D, U.S.D.C. W.D. Okla., Memorandum Decision and Order, Dec. 20, 2013 (doc. no. 67), at 7 - 9 (DeGiusti, J.) (herein: Reaching Souls); Roman Catholic Archdiocese of New York v. Sebelius, 2013 WL 6579764 at *6 - 7 (E.D.N.Y. Dec. 16, 2013).

III. Other Recent Decisions

The issues now before the court are of recent vintage, but the court is not without significant guidance, some of it binding and some not. Some, but certainly not all, of the issues in this action have been resolved (definitively for now, but subject to Supreme Court review) by the Tenth Circuit's *en banc* decision in Hobby Lobby. There is only a partial overlap between this case and Hobby Lobby. That case addressed several issues arising at the intersection of the ACA and RFRA, but issues as to the validity of the self-certification regulations for non-exempt religious organizations under 45 C.F.R. § 147.131 (herein: Self-certification Regulations; see Stipulation no. 53, above) were not before the court in Hobby Lobby.[1] *See also,* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dept. of Health and Human Svces, 724 F.3d 377 (3d Cir. July 26, 2013), *cert. granted*, 134 S.Ct. 678 (Nov. 26, 2013) (overlapping substantially with Hobby Lobby); Autocam Corp. v. Sebelius, 730 F.3d 618 (6th Cir. Sept. 17, 2013) (same); Korte v. Sebelius, 735 F.3d 654 (7th Cir. Nov. 8, 2013) (same) and Gilardi v. U.S. Dep't of Human Svces, 733 F.3d 1208 (D.C. Cir. Nov. 1, 2013) (same). More on point are five recent district court decisions

[1] One of the predominant issues in Hobby Lobby, not present in this case, is the question of whether a private, for-profit business corporation may avail itself of RCRA's protections. Hobby Lobby, 723 F.3d at 1128 *et seq.* No such issue is before the court in this action. To the extent (which is substantial, as will be seen) that the court relies on Hobby Lobby in this order, that reliance is based on conclusions articulated by the court in Hobby Lobby that will likely remain good law regardless of the fate, in the Supreme Court, of the Tenth Circuit's holding with respect to the status of business corporations under RFRA.

directly addressing the validity of the Self-certification Regulations: Reaching Souls, *supra;* Priests for Life v. U.S. Dep't of Health & Human Svces, 2013 WL 6672400 (D.D.C. Dec. 19, 2013); Roman Catholic Archdiocese of New York v. Sebelius, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); Zubik v. Sebelius, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013) and Geneva College v. Sebelius, 2013 WL 3071481 (W.D. Pa. June 18, 2013).

IV. Standard for Granting a Preliminary Injunction

Although, in some situations, more stringent or more relaxed standards apply, the showing normally required to support a request for a preliminary injunction is that the plaintiffs must show that (i) they are likely to succeed on the merits; (ii) they are likely to suffer irreparable harm in the absence of preliminary relief; (iii) the balance of equities tips in their favor; and (iv) an injunction is in the public interest. *See*, Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008); *see also*, Hobby Lobby, 723 F.3d at 1128. Plaintiffs assert that a more relaxed standard should be applied, doc. no. 20, at 4, but, for the reasons stated by Judge DeGiusti in Reaching Souls, *supra*, at 10, the court disagrees. Accordingly, the court will apply the traditional test.

V. Analysis Under the Preliminary Injunction Standard

A. Likelihood of Success on the Merits

1. Basic Principles Under RFRA

As wardens and dieticians throughout the federal prison system have discovered, the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq*., is a truly extraordinary piece of legislation. By its express terms, RFRA trumps any other federal law ("and the implementation of that law") encroaching upon the broad reach of RFRA, regardless of whether any such law was enacted before or after RFRA was enacted, "unless such law explicitly excludes" application of RFRA. 42

U.S.C. § 2000bb-3. As the Tenth Circuit explained in Hobby Lobby:

> Congress [in enacting RFRA] obligated itself to *explicitly exempt* later-enacted statutes from RFRA, which is conclusive evidence that RFRA trumps later federal statutes when RFRA has been violated. That is why our case law analogizes RFRA to a constitutional right [citing Kikumura v. Hurley, 242 F.3d 950, 963 (10th Cir. 2001)].
>
> . . .
>
> Congress did not exempt the [Affordable Care Act] from RFRA, nor did it create any sort of wide-ranging exemption for HHS and other agencies charged with implementing the ACA through the regulations challenged here.

Hobby Lobby, 723 F.3d at 1146.

> RFRA's reach is expressed in § 2000bb-1:
>
> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

2. Application of RFRA Principles to the Stipulated Facts

Substantial burden

Under RFRA, government action imposes a "substantial[] burden" if it (i) requires participation in an activity prohibited by a sincerely held religious belief, (ii) prevents participation in conduct motivated by a sincerely held religious belief, or (iii) places substantial pressure on an adherent to engage in conduct contrary to a sincerely held religious belief. Hobby Lobby, at 1138 (citing and quoting from Abdulhaseeb

v. Calbone, 600 F.3d 1301, 1315 (10th Cir. 2010)).

The first step in applying the substantial burden test is to "identify the religious belief in this case." Hobby Lobby, at 1140. The parties' stipulation describes the plaintiffs' relevant beliefs in general terms as well as in terms specific to the court's consideration of the Self-certification Regulations:

- [W]ithin the operation of the [Self-certification Regulations], *completing and delivering the self-certification* to their issuers or third party administrators would violate the Universities' sincere religious beliefs.
- [P]roviding employee or student health insurance that includes coverage for Plan B, ella, and/or IUDs would violate the Universities' sincere religious beliefs.
- [Their] missions include promoting the spiritual maturity of members of their respective communities by fostering obedience to and love for what they understand to be God's laws, including His restrictions on the unjustified taking of innocent human life.
- [S]inful behavior adversely affects their relationships with God.
- Christian conviction, including respect for and dignity and worth of human life from the moment of conception, is a qualification for entry into and participation in the Universities' communities.

Stipulation, ¶¶ 64 - 68 (emphasis added).[2]

It is noteworthy that, in the case at bar, unlike the decision four days ago in Priests for Life v. U.S. Dep't of Health & Human Svces, 2013 WL 6672400 (D.D.C. Dec. 19, 2013), it is stipulated that the *act of signing the certification* is contrary to the religious beliefs to which these institutions subscribe. Thus, in Priests for Life, the court pointedly noted that:

[2] The defendants contest the plaintiffs' claims on many fronts, but their papers do not intimate, much less assert, that these beliefs are insincere. *Cf.* Hobby Lobby, at 1140 ("The government does not dispute the [plaintiffs'] sincerity, and we see no reason to question it either.").

> Plaintiffs here do not allege that the self-certification itself violates their religious beliefs. To the contrary, the certification states that Priests for Life is opposed to providing contraceptive coverage, which is consistent with those beliefs. Indeed, during oral argument, plaintiffs stated that they have no religious objection to filling out the self-certification; it is the issuer's subsequent provision of coverage to which they object.

Id. at * 2.[3]

Thus, the combined effect of the ACA and the Self-certification Regulations is that the universities are forced by law to choose one of four options:

> (a) provide the coverage to which they object; (b) violate the regulations and incur penalties of $100 per day for each affected individual; (c) discontinue all health plan coverage for employees and/or students; or (d) self-certify that they qualify for the accommodation and provide that self-certification to their third party administrators or issuers.

Stipulation, ¶ 62.

This, plainly, is a "Hobson's choice," Hobby Lobby, at 1141; Abdulhaseeb, 600 F.3d at 1315. Defendants belittle the burden of signing the self-certification. Doc. no. 25 at 24 - 25. But, unless they choose to contest the sincerity of the beliefs in question, their belittling is impermissible under RFRA: "Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." Hobby Lobby at 1137. The focus is on the pressure exerted, not on the onerousness of the physical act that might result from yielding to that pressure. If the belief is sincere and the pressure to violate that belief is substantial, the substantial burden test is satisfied. *Id.* at 1137 -

[3] *Compare*, Zubik, 2013 WL 6118696, at * 19: "The act of signing the self-certification form will violate these Plaintiffs' sincerely-held religious beliefs."

38.[4]

The self certification is, in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects. If the institution does not sign the permission slip, it is subject to very substantial penalties or other serious consequences. If the institution does sign the permission slip, and only if the institution signs the permission slip, institution's insurer or third party administrator is obligated to provide the free products and services to the plan beneficiary. It is no answer to assert, as the government does here, that, in self-certifying, the institution is not required to do anything more onerous than signing a piece of paper. Doc. no. 25, at 25 - 27. The government's argument rests on the premise that the simple act of signing a piece of paper, even with knowledge of the consequences that will flow from that signing, cannot be morally (and, in this

[4] The defendants' argument that the burden on plaintiffs is only indirect, doc. no. 25 at 31 - 32, fares no better. Although Hobby Lobby does not address the Self-certification Regulations because the "accommodation" was not in issue in that case, the court's opinion suggests that the universities' position on this issue (*i.e.* whether the fact that the accommodation arguably moves the provision of objected to contraceptive services to a third party and therefore makes it unnecessary for the university to provide the services or violate its religious beliefs) would prevail in that court. For example, Hobby Lobby, at 1139, quotes Thomas v. Review Bd. of the Indiana Employment Security Division, 450 U.S. 707 (1981), for the proposition that "While the compulsion may be *indirect*, the infringement upon free exercise is *nonetheless substantial*."). Hobby Lobby characterizes United States v. Lee, 455 U.S. 252 (1982), as a case which did not turn on whether the Amish faced direct or indirect coercion or whether the supposed violations of their faith turned on actions of independent third parties. Hobby Lobby, at 1139-40. *Compare:* Priests for Life v. U.S. Dep't of Health & Human Svces, 2013 WL 6672400, at * 8 (D.D.C. Dec. 19, 2013) ("The accommodation specifically ensures that provision of contraceptive services is entirely the activity of a third party - namely, the issuer - and Priests for Life plays no role in that activity.") That analysis, if it were applied to the act of signing the self-certification (not at issue in Priests for Life, as discussed above on p. 15) could not be squared with the Supreme Court's decisions in Thomas and Lee or with the Tenth Circuit's decision in Hobby Lobby.

case, religiously) repugnant – an argument belied by too many tragic historical episodes to be canvassed here. The burden, under RFRA, is not to be measured by the onerousness of a single physical act. RFRA undeniably focuses on violations of conscience, not on physical acts. Thus, the question is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity. Hobby Lobby, at 1142.

The government has put these institutions to a choice of either acquiescing in a government-enforced betrayal of sincerely held religious beliefs, or incurring potentially ruinous financial penalties, or electing other equally ruinous courses of action. That is the burden, and it is substantial.

Compelling governmental interest

RFRA's second prong requires the court to determine whether the government has presented a compelling interest implemented through the least restrictive means available. Hobby Lobby at 1142-43.

Even at the preliminary injunction stage, the government is required to demonstrate that mandating compliance with the contraceptive-coverage requirement by way of the Self-certification Regulations is the least restrictive means of advancing a compelling interest. Hobby Lobby at 1143. The court must scrutinize the asserted harm of granting the specific exemption sought to *the particular religious claimants before the court.* Hobby Lobby at 1143. The government's justification must focus on the claimant asserting the RFRA violation, not on its interest in promoting some general policy. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006); Hobby Lobby at 1143 (citing O Centro). It must show with particularity how even an admittedly strong interest would be adversely affected by granting the exemption requested. *Id*. (citing Wisconsin v. Yoder, 406 U.S. 205, 236

(1972).

Aside from mentioning generalized governmental interests in public health and gender equality (interests which are neither challenged by the plaintiffs nor questioned by this court), the government offers no developed argument on this prong, noting, as it must, that the Tenth Circuit has rejected the government's public health and gender equity arguments. Doc. no. 25, at 27-28.

Moreover:

> Even if the government had stated a compelling interest in public health or gender equality, it has not explained how those larger interests would be undermined by granting [the universities] their requested exemption. [They] ask only to be excused from covering four contraceptive methods out of twenty, not to be excused from covering contraception altogether. The government does not articulate why accommodating such a limited request fundamentally frustrates its goals.

Hobby Lobby, at 1144.

In short, although the Hobby Lobby decision does not address the accommodation, its rationales provide guidance, as do other decisions which have granted preliminary relief in cases in which the government relied on the accommodation. Reaching Souls International, Inc. v. Sebelius, Case No. CIV-13-1092-D, U.S.D.C. W.D. Okla., Memorandum Decision and Order, Dec. 20, 2013 (doc. no. 67); Roman Catholic Archdiocese of New York v. Sebelius, 2013 WL 6579764 (E.D. N.Y. Dec. 16, 2013); Zubik v. Sebelius, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013) (Trustee of Roman Catholic Diocese, beneficial owner of Catholic benefits trust, and Catholic Charities of Diocese granted preliminary injunction, having shown, among other things, that the government did not have a compelling interest); Geneva College v. Sebelius, 2013 WL 3071481 (W.D. Pa. June 18, 2013) (non-profit religious college; preliminary injunction granted). The government's policy argument, not

particularized to demonstrate a compelling governmental interest in enforcing all parts of the defendants' contraceptive policy prescription *against these claimants*, fails, for that reason, as a matter of law.

But, if it were a close question (it is not), any contention that the government's asserted interest is compelling would be thoroughly undermined by the fact that application of the government's policy prescription is riddled with exceptions. Hobby Lobby, at 1123 - 24 (cataloging exceptions and exemptions). The number of individuals who are covered by exempt health plans has been estimated at more than 50 million, and perhaps as many as 100 million. *Id.* at 1124. Including individuals covered by "grandfathered" plans, the number of excepted and exempted individuals may total more than 190 million. Geneva College, 2013 WL 3071481, at *10. Taken one by one, each exemption and exception likely has an appealing, or at least defensible, rationale. But this assemblage of special cases "severely undermines the legitimacy of defendants' claim of a compelling interest." *Id.* Thus, the number of exemptions and exceptions, let alone the number of individuals affected thereby, is not just a convenient straw man: granting that there may well be a plausible basis for every exception that has been carved out of the mandate, the government's arguments for a compelling interest in applying the mandate in every particular to these universities ring hollow in light of the collective effect of those exceptions and exemptions.

Least restrictive means

The government offers no developed argument on the issue of whether it has employed the "least restrictive means of furthering" its governmental interest. Accordingly, as was the case in Hobby Lobby, 723 F.3d at 1144, the government loses by default on this issue. Alpine Bank v. Hubbell, 555 F.3d 1097, 1109 (10th Cir.

2009) (citing Murrell v. Shalala, 43 F.3d 1388, 1389 n. 2 (10th Cir. 1994)). Aside from that waiver, the court agrees with the conclusion in Roman Catholic Archdiocese of New York v. Sebelius, 2013 WL 6579764 at *18 - 19 (E.D.N.Y. Dec. 16, 2013) that the defendants have not employed the least restrictive means of furthering the governmental interest that they assert.

B. Irreparable Harm

Viewing the matter in light of the extraordinary preemptive effect of RFRA, the Tenth Circuit has equated RFRA violations with First Amendment violations. Hobby Lobby, 723 F.3d at 1146 (citing Kikumura v. Hurley, 242 F.3d 950, 963 (10th Cir.2001). On that basis, the Tenth Circuit made short work of the irreparable harm issue: "a likely RFRA violation satisfies the irreparable harm factor." Hobby Lobby at 1146. That prerequisite has, accordingly, been satisfied here.[5]

C. The Balance of the Equities

Plaintiffs have no objection to coverage for any of the mandated products other than Plan B, ella and IUDs. Stipulation, ¶¶ 2, 3, 65. That leaves sixteen of the twenty mandated methods available, Hobby Lobby, at 1146, for which reason:

[5] Even though, as discussed, the irreparable harm requirement has been satisfied essentially as a matter of law, one factual contention advanced by defendants deserves mention at least in passing. Defendants argue that two of the plaintiffs, Southern Nazarene University and Oklahoma Wesleyan University cannot show irreparable harm because "the challenged regulations will not be enforced by defendants against [those plaintiffs] until July 1, 2014." Doc. no. 25, at 48. On this point, the court will observe, simply, that the fact that the other plaintiffs may be able, one way or another, to come within a few days of their year-end renewal date does not mean it would be reasonable to require Southern Nazarene and Oklahoma Wesleyan to incur the serious financial and administrative risk that would be inherent in substantial additional delay, nor does that mean that the court would be able to adjudicate the issues as to Southern Nazarene and Oklahoma Wesleyan by way of a Rule 54 final judgment before July 1, 2014. Moreover, the irreparable harm requirement, even where not satisfied as a matter of law, need not be supported by a showing of imminent disaster. Kansas Health Care Ass'n v. Kansas Dep't of Social and Rehabilitation Svces, 31 F.3d 1536, 1544 (10th Cir. 1994).

> "the government's interest is largely realized while coexisting with [the universities'] religious objections. And in any event, the government has already exempted health plans covering millions of others. *These plans need not provide any of the twenty contraceptive methods*.
>
> By contrast, [the universities] remain subject to the Hobson's choice between catastrophic fines or violating [their] religious beliefs. Accordingly, the balance of equities tips in [the universities'] favor.

Hobby Lobby, 723 F.3d at 1146 - 47 (emphasis added).

D. The Public Interest

A grant of preliminary injunctive relief in these circumstances would be in the public interest. *Id.* There is no need to elaborate upon the Tenth Circuit's conclusion on this issue.

VI. Conclusion

Plaintiffs' motion for preliminary injunction, doc. no. 19, is **GRANTED**. Defendants' motion to dismiss, doc. no. 26, to the extent that it seeks dismissal under Rule 12(b)(6), is **DENIED**.

PRELIMINARY INJUNCTION

The defendants, their agents, officers, and employees, and all others in active concert or participation with them, Rule 65, Fed.R.Civ.P., are **ENJOINED** and **RESTRAINED** from any effort to apply or enforce, as to plaintiffs, the substantive requirements imposed by 42 U.S.C. § 300gg-13(a)(4) and at issue in this case, or the self-certification regulations related thereto, or any penalties, fines or assessments related thereto, until the further order of the court.

Dated this 23rd day of December, 2013.

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

13-1015p004.wpd