No. 13-03853

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNIVERSITY OF NOTRE DAME,
Plaintiff-Appellant,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the U.S. Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF THE TREASURY,
Defendants-Appellees

v.

JANE DOE 1, JANE DOE 2, and JANE DOE 3,
Intervenors-Appellees.

Appeal from the United States District Court
For the Northern District of Indiana
District Court Case No. 3:13-CV-1276
The Honorable Philip P. Simon

REPLY BRIEF OF PLAINTIFF-APPELLANT UNIVERSITY OF NOTRE DAME

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INTRODUCTION

This remains the only case in which a non-profit entity has not been granted injunctive relief against the Mandate under the Religious Freedom Restoration Act ("RFRA"). Because the Government has conceded that the Mandate cannot satisfy strict scrutiny under *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), for purposes of RFRA, the only question before this Court is whether the Mandate imposes a "substantial burden" on Notre Dame's religious beliefs. As explained in Notre Dame's opening brief, it clearly does.

The Government's principal response is that the "accommodation" allows Notre Dame to "opt out" of providing contraceptive coverage. Gov't Br. at 16. That assertion ignores Notre Dame's clear and consistent representations that it cannot take the actions required by the accommodation without violating its religious beliefs. For that reason, it is plainly incorrect to characterize the accommodation as an "opt out." In reality, the inaptly-named accommodation offers nothing more than a choice between the frying pan and the fire, allowing Notre Dame to pick one of two ways to violate its religious beliefs. Needless to say, imposing such a dilemma does not relieve the burden on Notre Dame's religious exercise.

The Government also claims that forcing Notre Dame to comply with the accommodation cannot be a "substantial" burden on religious exercise because Notre Dame "need only complete a form." *Id.* at 16. That argument is wrong as a matter of both law and fact. As a matter of law, this Court has made clear that a substantial burden arises whenever the Government imposes

substantial pressure on a claimant to take *any* action contrary to his sincere religious beliefs. Civil courts are in no position to second-guess whether the required action is religiously significant.

As a matter of fact, Notre Dame has identified numerous religiously objectionable actions it must take to comply with the "accommodation." Appellant's Br. at 25-29. The Government's only response is to falsely imply that Notre Dame does not *really* object to taking these actions, but instead objects only to actions taken by third parties. For example, the Government contends that Notre Dame does not actually object to maintaining a contractual relationship with a third party that will provide contraceptive coverage but, instead, "objects only to the fact that the insurance [provider] will separately make payments for contraceptives." Gov't Br. at 18-19. Once again, this claim boils down to *sub silento* second-guessing of Notre Dame's religious beliefs. That line of argument should be rejected.

For their part, Intervenors raise new arguments addressing not only the substantial-burden issue, but also seeking to resurrect the issue of whether the Mandate satisfies strict scrutiny. Because these arguments were neither raised nor addressed below, Intervenors are foreclosed from raising them now. But regardless, they lack merit.

Intervenors contend the Mandate does not impose substantial pressure on Notre Dame to violate its religious beliefs because Notre Dame could avoid the Mandate by dropping its health-insurance plans. That argument is wrong. Notre Dame exercises its religious beliefs by offering health coverage to its

students and employees through insurance arrangements that comply with Catholic values. Prohibiting Notre Dame from entering such arrangements substantially burdens its exercise of religion. Likewise, forcing Notre Dame to choose between violating its religious beliefs or dropping its insurance coverage obviously imposes substantial pressure on Notre Dame to violate its religious beliefs, because dropping coverage would require the University to pay millions of dollars in penalties and incur a host of spiritual, practical, and economic harms.

Finally, Intervenors contend that even if the Mandate substantially burdens Notre Dame's religious exercise, it should be upheld. As even the Government has conceded, however, this argument is foreclosed by circuit precedent. The Mandate is not the least restrictive means of advancing any compelling governmental interest, because even if the Government had an overriding need to provide free contraception, it could do so without forcing Notre Dame to violate its religious beliefs. And the Government's own regulatory scheme indicates that any interest it may assert is not "compelling." Therefore, RFRA requires an exemption for Notre Dame—and, contrary to Intervenors' claims, granting such an exemption is perfectly consistent with the Establishment Clause.

ARGUMENT

I. THE MANDATE IMPOSES A SUBSTANTIAL BURDEN ON NOTRE DAME'S EXERCISE OF RELIGION

As courts have held in every other case to consider application of the Mandate to nonprofit plaintiffs, Appellant's Br. at 2 n.2, Notre Dame is likely to

succeed in demonstrating that the Mandate substantially burdens its religious exercise. This Court explained in *Korte* that RFRA's substantial burden test involves a straightforward, two-part inquiry. First, the Court must identify the religious exercise at issue. In other words, it must determine whether Notre Dame "has an 'honest conviction' that what the government is requiring, prohibiting, or pressuring [it] to do conflicts with [its] religion." *Korte*, 735 F.3d at 683 (quoting *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981)). Second, the Court must assess whether the Government has placed "substantial pressure,"—*i.e.*, a substantial burden—on Notre Dame to take that action. Under *Korte*, this inquiry "focuses primarily on the '*intensity of the coercion* applied by the government to act contrary to [religious] beliefs.'" 735 F.3d at 683 (quotation omitted).

Here, there is no dispute that Notre Dame has an "'honest conviction' that what the government is requiring, prohibiting, or pressuring [it] to do conflicts with [its] religion." 735 F.3d at 683. Notre Dame's undisputed affidavits establish that it cannot, consistent with its religious beliefs, identify and contract with a third party willing to provide the mandated coverage, amend its plan documents to enable that party to supply the objectionable products and services, notify the third party of its obligations under the accommodation, or maintain a plan that serves as the conduit for the delivery of the very products and services to which Notre Dame objects. Appellant's Br. at Part I.A.1.a. This Court's only task, therefore, is to "evaluate[] the coercive effect of the governmental pressure on [that] religious practice." *Korte*, 735

F.3d at 683. That evaluation, however, has already been completed. As the panel in *Korte* concluded, "there can be little doubt" that fines of "$100 per employee [for failure] to include coverage for contraception and sterilization in [an] employee health-care plan[]"—the same fine facing Notre Dame here—"impose[] a substantial burden on . . . religious exercise." *Id.*

A. The Mandate Does Not Allow Notre Dame to "Opt Out" of Actions That Violate Its Religious Beliefs

The Government spends the majority of its brief insisting that the accommodation allows Notre Dame to "opt out" of providing contraceptive coverage. Gov't Br. at 2-3, 9, 15-24. This assertion either misunderstands or mischaracterizes Notre Dame's religious objection. Like the plaintiffs in *Korte*, Notre Dame objects to being required to directly provide contraceptive coverage in its employee and student health plans. (Affleck-Graves Aff., AA44–45.) But as its undisputed affidavits establish, Notre Dame also objects to taking the actions required by the accommodation. Among other things, Notre Dame cannot, consistent with its religious beliefs, submit the self-certification, maintain a contractual relationship with an entity authorized to provide the objectionable products and services, or offer a health plan that serves as a conduit for the delivery of the mandated coverage. Appellant's Br. at Part I.A.1.a. Thus, the Government's opt-out argument boils down to the assertion that Notre Dame can "opt out" of one action that violates its religious beliefs by taking different actions that violate its religious beliefs.

The error of the Government's position is readily apparent. According to the Government, the religious exercise of a pacifist would be protected by a law

allowing him to "opt out" of military service by working in a munitions factory. *Cf. Thomas*, 450 U.S. 707. Needless to say, the Government cannot relieve a substantial burden on religious exercise by offering an alternative that also requires claimants to act contrary to their beliefs. In essence, the Mandate forces Notre Dame to pick its poison: provide contraceptive coverage directly, or take the actions necessary to comply with the "accommodation." Either option is fatal in the view of Notre Dame's religious conscience.

At bottom, the Government's assertion that the accommodation relieves the burden on Notre Dame's religious exercise rests on an impermissible assessment of the University's religious beliefs. Appellant's Br. at 31-34. The only way to view the accommodation as a true "opt out" is to make the *religious judgment* that Notre Dame does not really object to taking the actions required under the "accommodation." But "question[s] of religious conscience" are for Notre Dame, not the Government, "to decide." *Korte*, 735 F.3d at 685. Here, Notre Dame has determined that taking the actions required by the accommodation make it "complicit in a grave moral wrong" and "undermine[its] ability to give witness to the moral teachings" of the Catholic Church, thereby creating scandal. *Id.* at 683.[1] Thus, for the Government to

[1] Indeed, in a recent address to the University's Board of Trustees, Pope Francis himself stated that it is essential for Catholic universities to bear "uncompromising witness" "to the Church's moral teaching, and the defense of her freedom" and expressed his "hope that the University of Notre Dame will continue to offer unambiguous testimony to this aspect of its foundational Catholic identity, especially in the face of efforts, from whatever quarter, to dilute that indispensable witness." Press Release, Univ. of Notre Dame, Notre Dame Leaders Meet with Pope Francis (Jan. 30, 2014), *available at*

assert that "the accommodation sufficiently insulates [Notre Dame] from the objectionable services," *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12-cv-2452, 2013 WL 6579764, at *14 (E.D.N.Y. Dec. 16, 2013) ("*RCNY*"), is to "simply disagree[]" with Notre Dame's religious judgment to the contrary, *McCarthy v. Fuller*, 714 F.3d 971, 978 (7th Cir. 2013). "[T]he federal judiciary has no authority to entertain [that] argument." *Id.*

In any event, it is inaccurate to assert that the accommodation allows Notre Dame to "opt out" of the process of providing contraceptive coverage. Notre Dame is not merely "step[ping] aside" and "informing third parties that the University is *not* providing coverage." Gov't Br. at 23. To the contrary, it must take "affirmative steps" "to qualify [its] employees [and students] for certain contraceptive services." *Reaching Souls Int'l, Inc. v. Sebelius*, No. 13-cv-1092, 2013 WL 6804259, at *7 (W.D. Okla. Dec. 20, 2013). At the most basic level, it must contract with or maintain a relationship with a third party willing to procure the mandated coverage. It must then amend its plan documents to "designat[e its] third party administrator as the plan administrator" for contraceptive services through the self-certification form, which is an "instrument under which [Notre Dame's] plan is operated" and without which a third party may not provide the mandated coverage under the accommodation. 29 C.F.R. § 2510.3-16; *e.g.*, *id.* § 2590.715-3713A(b)(2) (permitting a third party administrator to provide coverage only "[i]f [it] receives a copy of the self-

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http://news.nd.edu/news/45917-notre-dame-leaders-meet-with-pope-francis/.

certification" and "agrees to enter into or remain in a contractual relationship" with the objector). Notre Dame must also, through the self-certification, "notif[y] the TPA or issuer of their obligations [1] to provide contraceptive-coverage to employees otherwise covered by the plan and [2] to notify the employees of their ability to obtain those benefits." *E. Tex. Baptist Univ. v. Sebelius*, No. H-12-3009, 2013 WL 6838893, at *11 (S.D. Tex. Dec. 27, 2013). By taking such actions, Notre Dame authorizes the third party to provide the mandated coverage, which the Government admits is then "technically . . . *part of [Notre Dame's self-insured] plan*," AA122 (emphasis added), and which will only be available to beneficiaries "so long as [they] are enrolled in [Notre Dame's] health plans," 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B). But Notre Dame's obligations do not end there. It must continue to maintain its health plans, providing fees, services, and documentation to sustain the infrastructure necessary to deliver the mandated coverage. Appellant's Br. at 23-29.

If Notre Dame fails to take any one of these actions, its employees and students will not receive the mandated coverage and Notre Dame will be in violation of the law. Thus, contrary to the Government's claims, Notre Dame's students and employees receive access to the mandated coverage "because of," not "despite," Notre Dame's actions. Gov't Br. at 3. Notre Dame's "self-certification and the group health plans [it] put[s] into place *are necessary* to their employees' [and students'] obtaining the free access to the contraceptives that [Notre Dame] find[s] religiously abhorrent." *E. Tex.*, 2013 WL 6838893, at

*22 (emphasis added). "It is the insurance plan that [Notre Dame] put into place, the issuer or TPA [Notre Dame] contracted with, and the self-certification form [Notre Dame] completes and provides the issuer or TPA, that enable the employees [and students] to obtain the free access to the" objectionable coverage. *Id.*; *S. Nazarene Univ. v. Sebelius*, 13-cv-1015, 2013 WL 6804265, at *8–9 (W.D. Okla. Dec. 23, 2013) (describing the "self certification" as "a permission slip which must be signed by the institution to enable the plan beneficiary to get access" to the mandated coverage). Far from "opting out," under the accommodation, Notre Dame is required to violate its beliefs by playing an integral role in the delivery of products and services it finds objectionable.

B. The Nature of Notre Dame's Religious Exercise Is Irrelevant to the Substantial Burden Analysis.

The fact that the plaintiffs in *Korte* exercised their religion by refusing to "purchase the required contraception coverage," 735 F.3d at 668, while Notre Dame exercises its religion by refusing to take the actions required under the "accommodation," is immaterial to the substantial burden analysis. In Notre Dame's religious judgment, complying with the "accommodation" will impermissibly entangle it in the provision of objectionable products and services to its employees and students. If a claimant faces substantial pressure to act in violation of his beliefs, the nature of the act is irrelevant to the substantial burden analysis. Appellant's Br. at 28; *S. Nazarene*, 2013 WL 6804265, at *8 ("RFRA undeniably focuses on violations of conscience, not on physical acts.")

Contrary to the Government's claim that "[n]othing in *Korte* supports this assertion," Gov't Br. at 27, *Korte* emphasized that RFRA protects "'*any* exercise of religion, *whether or not compelled by, or central to*, a system of religious belief,'" 735 F.3d at 682 (citation omitted). Were that not enough, the court went further, explaining that "[t]his definition is undeniably very broad, so the term 'exercise of religion' should be understood in a generous sense." *Id.* at 674. Indeed, to establish that a religious exercise is protected under RFRA, "[i]t is enough that the claimant has an 'honest conviction' that what the government is requiring, prohibiting, or pressuring him to do"—whatever that may be—"conflicts with his religion." *Id.* at 683 (quoting *Thomas*, 450 U.S. at 716). To be sure, that does not end the inquiry—a court must still determine whether the law in question places substantial pressure on the plaintiff to forgo his religious exercise (and if so, whether it passes strict scrutiny). Appellant's Br. at 23-30; *infra* Part I.C. But *Korte* could not have been clearer in holding that the nature of that exercise has no bearing on the analysis. If the requirements of the law conflict with his religious beliefs, "what the government" is forcing the plaintiff to do simply does not matter to the substantial burden analysis. *Korte*, 735 F.3d at 683. What matters is the "'*intensity of the coercion* applied by the government to act contrary to [religious] beliefs.'" *Id.* (citation omitted).

Any other approach would put courts in the untenable position of judging the relative importance of religiously motivated actions. For example, to say that it is impermissible to force an Orthodox Jew to sell pork at his

kosher deli, but permissible to force the same individual to flip a light switch on the Sabbath, is to make the *religious* judgment that adherence to kosher laws is more significant to the Jewish religion than the command of Sabbath rest. By the same token, to say—as this Court has—that it is impermissible to force a plaintiff to "purchase . . . contraception coverage," *Korte*, 735 F.3d at 668, but permissible to compel Notre Dame to comply with the accommodation, would be to conclude that the latter exercise of religion is not as important to the Catholic faith as the former. No "principle of law or logic," *Emp't Div. v. Smith*, 494 U.S. 872, 887 (1989), equips a court to make these determinations, and RFRA and Supreme Court precedent expressly prohibit them from doing so. 42 U.S.C. § 2000cc-5(7); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular . . . practices to a faith.").

For that reason, the Government's repeated attempts to minimize the significance of the self-certification are inappropriate. *E.g.*, Gov't Br. at 18 (describing the accommodation as "simply completing a form"). "The government's argument rests on the premise that the simple act of signing a piece of paper . . . cannot be morally . . . repugnant—an argument belied by too many tragic historical episodes to be canvassed here." *S. Nazarene*, 2013 WL 6804265, at *8. Moreover, the Government's representations are inaccurate. Notre Dame must do far more than "simply complet[e] a form" to comply with the accommodation, and the form itself is much more than a

statement of Notre Dame's religious objection to contraceptives. Appellant's Br. at 25-29, 33-34; *supra* Part I.A.[2]

It is of course true that for religious exercise to be protected, it must involve some action on the part of the plaintiff. But unlike *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008), "this is not a case in which the religiously offensive consequence . . . occurs only after, and independently of, any act or forbearance on the plaintiffs' part," *E. Tex.*, 2013 WL 6838893, at *22. In *Kaemmerling*, the D.C. Circuit went to great lengths to emphasize that, unlike here, the prisoner did not have a religious objection to any action he was required to take. The prisoner "[did] not allege that his religion require[d] him not to cooperate with collection of a fluid or tissue sample." 553 F.3d at 679. Instead, he objected to "the government extracting DNA information" from biological specimens that could be obtained without any action on his part—such as by "sweeping up his hair after a haircut or wiping up dust that contains particles of his skin." *Id.* at 678-79. Based on these facts, the Court found that the prisoner's religious objection was only to activity of the government—*i.e.*, extracting DNA from a sample through a procedure in which he "play[ed] no role and which occur[red] after the [government] ha[d] taken his fluid or tissue sample (to which he does not object)." *Id.* at 679.

[2] To the extent the Government contends Notre Dame need not "modify" its behavior or that the University only objects to the "consequences" of its actions, Gov't Br. at 16–21, those arguments are without merit for the reasons stated in prior briefing. Appellant's Br. at 36-39.

The Government unearths the pleadings in *Kaemmerling* to contend that, contrary to the clearly stated premise of the D.C. Circuit's holding, the prisoner did assert a religious objection to the requirement that he participate in the collection of a blood or tissue sample. Gov't Br. at 27-29. But this confuses the remedy the prisoner requested with the religious objection he stated. Although the prisoner sought to enjoin the government from collecting a tissue sample, "he [did] not allege that his religion require[d] him not to cooperate with collection of a fluid or tissue sample." 553 F.3d at 679; *see also Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (denying claim where plaintiffs objected only to government action).[3] Thus, at most, *Kaemmerling* stands for the unremarkable principle that a plaintiff cannot enjoin government action that does not require him to act in violation of his faith—a principle plainly inapposite here, where Notre Dame is forced to take actions it finds religiously objectionable.

Indeed, *Bowen v. Roy*, 476 U.S. 693 (1986), which *Kaemmerling* followed, 553 F.3d at 680, demonstrates that the Government's interpretation of *Kaemmerling* is flawed. *Bowen*, like *Kaemmerling*, draws a distinction between religious objections to actions taken by third parties and religious objections to

[3] The Government's argument appears to be based on a misreading of the language used in *Kaemmerling*. As the D.C. Circuit clarified, Kaemmerling's objection to "DNA sampling, collection and storage," Gov't Br. at 28, was not an objection to the collection of tissue samples from his person. Instead, it referred to the extraction of DNA from material in the Government's possession, and which could be obtained without any action from Kaemmerling. 553 F.3d at 678 (stating that Kaemmerling's "objection to 'DNA sampling and collection'" was a "specific objection to the collection of the DNA information contained within any sample").

actions plaintiffs themselves must take. Thus, when the Supreme Court considered Roy's objection to the actions of a third party—the government—it concluded he was not entitled to relief. *Bowen*, 476 U.S. at 700. But when considering Roy's religious objection to an action *he* was required to take—submitting a form that contained his daughter's social security number—a majority of the Court would have held (but for a dispute over mootness) that Roy's exercise of religion was substantially burdened. *See id.* at 715-16 (Blackmun, J., concurring in part); *id.* at 724–33 (O'Connor, J., concurring in part, dissenting in part); *id.* at 733 (White, J., dissenting).

C. The Mandate Places Substantial Pressure on Notre Dame to Violate Its Religious Beliefs

Notre Dame does not and never has maintained that "a court is bound to accept its position that the opt-out provision imposes a substantial burden on its exercise of religion." Gov't Br. at 26. To the contrary, Notre Dame has been clear that courts are only required to accept plaintiffs' representations regarding the religious exercise at issue—*e.g.*, that taking the actions required of them by the Mandate violates their Catholic beliefs. Appellant's Br. at 21-29. A court must still proceed to resolve the legal question of whether the law at issue substantially pressures the plaintiff to take the required actions. *Id.* at 29-30. In short, once a court has identified the relevant religious exercise, it must assess whether the law at issue "'put[s] substantial pressure on an

adherent to modify his behavior and to violate his beliefs.'" *Korte*, 735 F.3d at 682 (quoting *Thomas*, 450 U.S. at 718).[4]

Here, the answer to that question is straightforward. The Mandate requires Notre Dame to choose between (1) taking actions contrary to its Catholic beliefs, or (2) incurring enormous fines and other draconian consequences. Thus, as in *Korte*, "the federal government has placed enormous pressure on [Notre Dame] to violate [its] religious beliefs and conform to its regulatory mandate." 735 F.3d at 683.

Intervenors attempt to raise new substantial-burden arguments for the first time on appeal. These arguments are not properly before the Court and, in any event, are meritless.

First, by raising arguments not addressed below, Intervenors seek to circumvent the "long-standing rule against considering new arguments on appeal." *Domka v. Portage Cnty.*, 523 F.3d 776, 784 (7th Cir. 2008). This Court requires issues to be raised first in the district court so "that parties may have the opportunity to offer all the evidence they believe relevant to the issues." *Boyers v. Texaco Ref. & Mktg., Inc.*, 848 F.2d 809, 812 (7th Cir. 1988) (quotation omitted). Indeed, "propounding new arguments on appeal" that

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[4] Contrary to the Government's and Intervenors' fears, this does not give religious organizations carte blanche to exempt themselves from federal law on a whim. Courts must additionally "[c]heck[] for sincerity and religiosity" "to weed out sham claims," *Korte*, 735 F.3d at 683, and assess whether the burden is the least restrictive means of furthering a compelling interest. 42 U.S.C. § 2000bb-1(b). For decades, these safeguards have sufficed to prevent religious actors from becoming a law unto themselves. *See Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 436 (2006).

were "never considered by the trial court[] is not only somewhat devious, it undermines important judicial values." *St. Marys Foundry, Inc. v. Employers Ins. of Wausau*, 332 F.3d 989, 996 (6th Cir. 2003); *cf. Charles v. Daley*, 846 F.2d 1057, 1059 (7th Cir. 1988) ("Just as a party is barred procedurally from raising for the first time on appeal an argument it failed to include in its Opening Brief, so too an amicus ordinarily may not press arguments on appeal that the parties have waived by raising them belatedly.").

Second, Intervenors have no standing to raise arguments regarding Notre Dame's employee health plan. Intervenors are students, and thus have no "concrete and particularized" interest in Notre Dame's employee plan. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Howard v. McLucas*, 782 F.2d 956, 958–59 (11th Cir. 1986) (preventing intervenors from challenging a backpay award in which they had "no particularized financial interest"). Intervenors have not and cannot allege any cognizable injury that will befall them should the mandated coverage be excluded from Notre Dame's employee health plan.

Third, even if Intervenors' arguments were properly before the Court, they are meritless. Intervenors make the remarkable claim that the Mandate does not impose any substantial burden on Notre Dame because Notre Dame could drop its health plans. The premise of this argument, however, is fundamentally flawed because RFRA protects religious adherents in whatever activity they choose to pursue. 42 U.S.C. § 2000cc-5(7)(A) (safeguarding "any exercise of religion, whether or not compelled by, or central to, a system of

religious belief"). If the Government prohibited Jews from wearing yarmulkes on airplanes, it would substantially burden their religious exercise even though they could choose not to fly. So too here, it does not matter that Notre Dame could drop its health plans—or, for that matter, shut down its operations altogether. What matters is that Notre Dame *does* operate a University and *does* offer insurance to its students and employees, and RFRA protects its ability to engage in these activities in a manner consistent with its religious beliefs. Indeed, Intervenors cannot cite a single case for the proposition that forcing someone to abandon an activity to avoid a burden on their religion does not impose a substantial burden on his religious exercise. This omission reflects the fact that Intervenors' theory is flatly contrary to the manner in which courts have applied the substantial burden test. *E.g.*, *Korte*, 735 F.3d at 683 (identifying a substantial burden without considering whether it would be cheaper for the employers to drop their plan and pay the fines).

In any event, Intervenors are wrong to suggest that Notre Dame could drop its insurance plan without incurring substantial harms. With respect to Notre Dame's employer plan, Intervenors argue that dropping coverage would cost Notre Dame less in penalties than it currently pays to maintain the coverage. Interv. Br. at 23-25. This argument is inconsistent with Supreme Court precedent[5] and squarely foreclosed by *Korte,* where the plaintiffs were

[5] For example, in *Wisconsin v. Yoder*, the Supreme Court did not ask whether the Amish plaintiffs would derive more than $5 (the amount they were fined for violating a compulsory education law) in benefits from having their

subject to the *exact same penalty scheme* that applies to Notre Dame.[6] *Korte* held that the Government imposed a substantial burden on plaintiffs' religious exercise when it threatened to fine them for offering a health plan consistent with their religious beliefs. 735 F.3d at 683. It was immaterial that the Appellants in *Korte*—like Notre Dame here—could, in theory, drop their employee health plans. The substantial burden arose when the Government threatened to impose fines of "$100 per day" per affected beneficiary if Appellants did "not include coverage for contraception and sterilization in their employee health-care plans." *Id.* So too here. If Notre Dame offers a group health plan that does not include contraceptive coverage—either directly, or via the accommodation—it is fined $100 per day per affected beneficiary. 26 U.S.C. § 4980D(b). "[T]here can be little doubt that [this] imposes a substantial burden on [Notre Dame's] religious exercise." *Korte*, 735 F.3d at 683; *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1210 & n.2, 1218 (D.C. Cir. 2013) (same).[7]

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children home to assist with household chores or the family business. 406 U.S. 205, 218 (1972).

[6] In *Korte,* as here, there were two potential fines at issue. Offering a health plan that does not include contraceptive coverage—either directly or through the accommodation—subjects entities to penalties of $100 a day per affected beneficiary. 26 U.S.C. § 4980D(b). Dropping coverage altogether subjects entities to fines of $2,000 per year, per full-time employee after the first thirty employees. *Id.* § 4980H(a), (c)(1).

[7] In any event, Intervenors wildly underestimate the "cost" of dropping health coverage. If dropping health coverage and paying the $2000 per employee per year fines were "cheaper" than offering health coverage, no rational profit-seeking enterprise would continue to offer health care under the Affordable Care Act. Intervenors fail to account for a host of "costs" Notre Dame would suffer were it compelled by the Mandate to drop coverage, such as

In addition, forcing Notre Dame to drop its employer health coverage would deny Notre Dame a government benefit because it would prevent Notre Dame from taking advantage of the tax exemptions for employee health coverage, which allow Notre Dame to offer more attractive compensation packages at lower costs. *E.g.*, 26 U.S.C. § 106(a) ("income of an employee does not include employer-provided coverage under an accident or health plan"); Ind. Code § 6-3-1-3.5 (adopting the federal definition). Denying this benefit places a substantial burden on Notre Dame's religious exercise because, as the Supreme Court held in *Sherbert*, "to condition the availability of [a] benefit[] upon [Notre Dame's] willingness to violate a cardinal principle" of its religion—*i.e.*, to offer a health plan that includes the mandated coverage—"effectively penalizes" Notre Dame's religious exercise. 374 U.S. at 406. Forcing a religious adherent to forfeit "even a gratuitous benefit inevitably deter[s] or discourage[s] the [free] exercise of [religion]." *Id.* at 405. "While the compulsion

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spiritual harm suffered from an inability to act consistent with the University's mission, tax benefits, additional compensation required to make former beneficiaries whole, and the consequences of forcing its employees and students to seek coverage through the Affordable Care Act's exchanges. (Affleck-Graves Aff., AA43–45, AA55–56.)

Intervenors cite *Braunfeld v. Brown* for the sweeping proposition that a burden is not substantial when it "operates so as to make the practice of [one's religion] more expensive." 366 U.S. 599, 605 (1961). That language cannot bear the weight Intervenors place on it, because *every* burden on religious exercise makes such exercise more expensive, yet that has been no impediment to courts identifying a substantial burden. *E.g.*, *Sherbert v. Verner*, 374 U.S. 398, 404-06 (1963) (loss of unemployment compensation). Regardless, that language is not controlling, because the law in *Braunfeld* was only "saved" by a "strong state interest in providing one uniform day of rest for all workers." *Id.* at 408; *Braunfeld*, 366 U.S. at 607-09. No comparable interest is present here. *Infra* Part II.

may be indirect, the infringement upon free exercise is nonetheless substantial." *Thomas*, 450 U.S. at 718.

This reasoning applies with equal force to Notre Dame's student health plan. *Geneva Coll. v. Sebelius*, No. 2:12-CV-00207, 2013 WL 3071481, at *8 (W.D. Pa. June 18, 2013) (considering *Sherbert* and concluding that dropping a student health plan would prevent the plaintiff from "enjoy[ing] the benefits of providing its students with health insurance that is free of the [objectionable] coverage"). While Intervenors assert that Notre Dame could simply drop student coverage without paying any penalty, Interv. Br. at 16–20, this argument is blind to the reality that dropping student health coverage would itself be a penalty on the University for adhering to its religious beliefs. *S. Nazarene*, 2013 WL 6804265, at *8-9 (holding that the choice between offering a student plan including the mandated coverage or discontinuing the plan imposed a substantial burden). Indeed, the only evidence in the record establishes that Notre Dame would incur significant spiritual, competitive, and other economic harms should it discontinue its student health plans. (Affleck-Graves Aff., AA43–44.)

In sum, there can be no question that the Mandate imposes substantial pressure on Notre Dame by forcing it to choose between (1) complying with the Mandate and providing coverage under the "accommodation," (2) paying massive fines, or (3) dropping their student plan altogether. The choice between option 1 on the one hand, and options 2 and 3, on the other, plainly

imposes "substantial pressure" on Notre Dame to choose option 1—as the Government no doubt intended when it adopted the Mandate in the first place.[8]

II. INTERVENORS' ARGUMENT THAT THE MANDATE SATISFIES STRICT SCRUTINY IS NOT BEFORE THE COURT AND, IN ANY EVENT, IS MERITLESS

The Government has conceded that enforcing the Mandate against Notre Dame is not the least restrictive means of advancing a compelling governmental interest.[9] Based on that understanding, Notre Dame and the Government litigated this case by focusing on the question of substantial burden. Now, Intervenors seek to dramatically expand the scope of litigation by raising a raft of new arguments for the first time on appeal, relying on a compendium of factual assertions not in the record, which Notre Dame has never had any chance to challenge or rebut.

The present case illustrates the wisdom of barring parties from raising such issues for the first time on appeal. *Supra* pp. 15-16. Intervenors spend multiple pages setting forth untested factual assertions, empirical studies, and theoretical assumptions about the behavioral effects of contraceptive coverage. Interv. Br. at 31-35, 36-44. Notre Dame should not be forced to address these

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[8] Intervenors' arguments must also fail because they ultimately rely on facts outside the record (*i.e.*, the alleged "costs" of Notre Dame's benefit plans). Interv. Br. at 16-25. Because this Court's "review is limited to the record before the district court," "[a]ny supplemental facts," submitted by the Intervenors, "true or not, . . . cannot be considered." *Cass Cnty. Music Co. v. Muedini*, 55 F.3d 263, 264 n.2 (7th Cir. 1995); *Rodi Yachts, Inc. v. Nat'l Marine, Inc.*, 984 F.2d 880, 887 (7th Cir. 1993) ("Appellate courts . . . do not make their own findings [of fact]."). At the least, should this Court decline to reject Intervenors' arguments outright, it should remand for further factual development.

[9] Defs.' Resp. in Opp. to Pl.'s Mot. for Prelim. Inj. (Doc. 13), at 16.

issues without the benefit of a record, on an extremely short time frame, under the space constraints of a reply brief. Because the Government itself has conceded that the Mandate cannot satisfy strict scrutiny, Intervenors' arguments cannot provide a basis for denying relief to Notre Dame.[10]

In any event, even if they were properly raised, Intervenors' arguments are without merit.

A. The Mandate Cannot Satisfy Strict Scrutiny

Because Appellants have demonstrated that the Mandate substantially burdens their exercise of religion, the "burden is placed squarely on the Government" to demonstrate that the regulation is the least restrictive means of advancing a compelling governmental interest. *O Centro*, 546 U.S. at 429–31. *Korte* held that the Government could not carry that burden for two reasons. First, "[s]ince the government grants so many exceptions [to the Mandate] already, it can hardly argue against exempting [religious objectors]." 735 F.3d at 686. And second, even assuming a compelling interest in providing access to free contraception, "there are many ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors." *Id.* As the Government has conceded, the

[10] The Government did not put forth *any* affirmative evidence in the district court. Accordingly, if this Court were to discern any merit in Intervenors' new arguments, it should at most remand the case for the district court to address them in the first instance. *Kunz v. DeFelice*, 538 F.3d 667, 681 (7th Cir. 2008).

same reasoning is dispositive here. Indeed, not a single court has found that the Mandate can survive strict scrutiny.[11]

Intervenors do not argue that the Mandate can satisfy strict scrutiny as applied to Notre Dame's employee health plans. Instead, Intervenors attempt to distinguish *Korte* on the ground that it "did not involve students, who have an especially dire need for seamless access to contraceptives." Interv. Br. at 31. That distinction, however, cannot bear the weight Intervenors place on it. Even if the Government had asserted a distinct compelling interest in providing free contraception to college students—and it did not—it could advance that interest through the same less-restrictive alternatives recognized in *Korte*. Moreover, the Government's own regulatory scheme belies the notion that the Government has a "compelling" interest in providing college-age women with free contraceptive coverage, because the Mandate leaves millions of them without it.

1. Least Restrictive Means

As this Court held in *Korte*, "there are many ways to increase access to free contraception without doing damage to the religious-liberty rights of [Notre Dame]." 735 F.3d at 686. For example: "The government [could] provide a

[11] *E.g.*, *Korte*, 735 F.3d at 685-87; *Gilardi*, 733 F.3d at 1219-24; *Hobby Lobby*, 723 F.3d at 1143-45; *S. Nazarene*, 2013 WL 6804265 at *7–11; *Geneva Coll.*, 2013 WL 3071481, at *27; *RCNY*, 2013 WL 6579764, at *16–19; *Zubik v. Sebelius*, No. 13-cv-1459, 2013 WL 6118696, at *28–32 (W.D. Pa. Nov. 21, 2013); *Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648, 2013 WL 3297498, at *16-18 (M.D. Fla. June 25, 2013); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 806-07 (E.D. Mich. 2013); *Tyndale House v. Sebelius*, 904 F. Supp. 2d 106, 125-29 (D.D.C. 2012).

'public option' for contraception insurance; it [could] give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers; it [could] give tax incentives to consumers of contraception and sterilization services. No doubt there are other options." *Id.* Through any of the alternatives outlined in *Korte*, the Government could provide free contraception to Notre Dame's students without requiring Notre Dame to act in violation of its religious beliefs.

Trying to evade the plain import of *Korte*, Intervenors seek refuge in the thicket of behavioral economics, arguing that "[t]he results [of providing free contraception] are greatest when both cost and *convenience-related* barriers are removed." Interv. Br. at 38 (emphasis added). According to Intervenors, Notre Dame's students are not only short on money and transportation, but they also "lack well-developed planning skills" because, "[n]eurologically," they "are simply less adept at planning ahead." *Id.* For that reason, Intervenors contend that even if the Government were to offer students free contraceptive coverage, they would be incapable of taking advantage of it.

In other words, Intervenors ask this Court to override Notre Dame's rights of religious conscience for the sake of making it slightly more convenient for students to obtain free contraception. Whatever the policy virtue of "nudges," they do not rise to the highest level of constitutional importance. Interv. Br. 36-37. That is especially true here, where there is *no evidence in the record* to support Intervenors' facially implausible empirical claims about the "neurological" deficiencies of college students. Without solid evidence, "[a]

court should not assume a plausible, less restrictive alternative would be ineffective." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 824, 826 (2000) (reversing because "[t]he record is silent as to the comparative effectiveness of the two alternatives"); *see also Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 670 (2004) ("Absent a showing that the proposed less restrictive alternative would not be as effective, [the more restrictive option cannot] survive strict scrutiny.").

Intervenors are also incorrect that the "accommodation" can pass the least-restrictive-means test on the ground that it does not require Notre Dame to pay for or provide contraceptive coverage. Interv. Br. at 39. As *Korte* made clear, the relevant question is whether the "accommodation" trammels needlessly on the "religious-liberty rights of" Notre Dame. 735 F.3d at 659. As detailed above, *supra* Part I, Notre Dame has a religious objection not only to directly providing or paying for contraceptive coverage, but also to facilitating or becoming entangled with it as required under the "accommodation." Because the Government could provide free contraception to Notre Dame's students without forcing Notre Dame violate its religious beliefs, the "accommodation" is not the least restrictive means available.

Finally, because the issue of strict scrutiny is championed solely by Intervenors in their capacity as students, it bears mentioning that they themselves have a readily available "less restrictive" option. These students have voluntarily chosen to enroll at Notre Dame, knowing full well its Catholic religious principles, including the fact that its student health plan did not cover

contraceptives. If these students are dissatisfied with Notre Dame's insistence on adhering to its beliefs regarding insurance coverage, they are free to enroll in any of the numerous other universities throughout the country with different beliefs. Indeed, the very idea of religious liberty presupposes that individuals can choose to join together in voluntary arrangements structured according to private religious beliefs. Just as Intervenors could not show up at a Halal butcher and demand a side of pork, neither can they enroll at Notre Dame and insist that the University compromise its faith. Their recourse is to seek service elsewhere.

2. Compelling Interest

Intervenors argue that, "[w]hatever the government's interest in ensuring access to contraceptives generally, it applies with special force to a college-age population, which represents the demographic most vulnerable to the harms the regulations seek to prevent." Interv. Br. at 32. But as the Supreme Court has explained, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993); *see also O Centro*, 546 U.S. at 433.

Here, the Government cannot claim a "vital interest" of the "highest order" in providing free contraceptive coverage for college-age women who attend Notre Dame, because the regulatory scheme leaves millions of other college-age women without such coverage. Most obviously, the Mandate does not make contraceptive coverage available for college-age women who do not

have insurance coverage—a large population entirely ignored in Intervenors' brief.[12] Moreover, even among those who do have coverage, many are not eligible for free contraceptive coverage due to the Mandate's "grandfathering" provisions and the exemption for "religious employers." *Korte*, 735 F.3d at 686; *Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1143 (10th Cir. 2013) ("[T]he interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people.") (en banc); *Gilardi*, 733 F.3d at 1222–23 (same).

If the Government's interest in providing free contraception to the "college-age population" were truly "compelling," then the Government could not have left so many college-age women without coverage. By doing so, the Government has illustrated that a religious exemption for Notre Dame would not undermine any truly vital state interest.

For similar reasons, the Government's interest in enforcing the Mandate against Notre Dame cannot be considered compelling because, at best, the Mandate would "[f]ill" only a "modest gap" in the availability of contraception for Notre Dame's students. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). Contrary to the bleak picture painted by Intervenors, contraceptives are widely available for free or reduced cost through various

[12] The Centers for Disease Control estimate that over 20 percent of women between the ages of 18 and 24 do not have health insurance. *See* Ctrs. for Disease Control & Prevention, Lack of Health Insurance Coverage and Type of Coverage 11 (Dec. 2013), http://www.cdc.gov/nchs/data/nhis/earlyrelease/earlyrelease201312_01.pdf.

government programs and community clinics.[13] Even without government support, popular brands of contraceptive drugs can be purchased at stores such as Kroger, Target, Wal-Mart, and Sam's Club for $9 per month,[14] making it highly implausible for Intervenors to contend that college students have a "dire need" for free contraception. Interv. Br. at 31. On the contrary, enforcing the Mandate against Notre Dame would at best provide a modest subsidy for students, making it marginally easier for them to obtain contraceptives that are already quite readily accessible. Accordingly, Intervenors cannot claim to have "identif[ied] an actual problem in need of solving," *Brown*, 131 S. Ct. at 2738—at least, not a problem sufficiently acute to override Notre Dame's rights of religious conscience. The Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9.

B. Exempting Notre Dame From the Mandate Would Not Impermissibly "Harm" Third Parties

Intervenors argue that exempting Notre Dame from the Mandate would impermissibly "harm" its students and employees by requiring them to "forfeit federal protections or benefits to which they [are] otherwise entitled." Interv. Br. at 47. Once again, Intervenors' argument is foreclosed by *Korte*, where this Court granted a RFRA exemption blocking free contraceptive benefits that the

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[13] Press Release, U.S. Dep't of Health & Human Servs., A Statement by Secretary Kathleen Sebelius (Jan. 20, 2012), http://www.hhs.gov/news/press/2012pres/01/20120120a.html.

[14] Reproductive Health Access Project, "Pharmacies with Low-Cost Birth Control Pills," *available at* http://www.reproductiveaccess.org/contraception/lowcost_pills.htm (last visited January 29, 2014).

plaintiffs' employees would have been "otherwise entitled" to receive. But even aside from *Korte,* Intervenors' arguments are wrong. Exempting Notre Dame from the Mandate would not impose any cognizable "harm" on third parties because it would not deprive them of any lawful entitlement. On the contrary, an exemption would alleviate a needless regulatory burden on Notre Dame, while leaving ample alternative means for the Government to provide contraceptive coverage to Notre Dame's students and employees.

1. Under RFRA, the Government Cannot Create a Third-Party Benefit that Forces Notre Dame to Violate Its Religious Beliefs Without Satisfying Strict Scrutiny

Intervenors contend that exempting Notre Dame under RFRA would deprive students and employees of a legal entitlement to free contraceptive coverage. That is wrong for two reasons. *First*, as detailed above, exempting Notre Dame would not preclude the Government from using any of the "le[ss] restrictive means" approved in *Korte* to deliver the same "benefit" without doing any "damage to [Notre Dame's] religious-liberty rights." *Korte*, 735 F.3d at 686. Under those circumstances, an exemption for Notre Dame would not prevent anyone from receiving free contraceptive coverage.

Second, even if exempting Notre Dame means that some individuals would not receive free contraceptive coverage, such a result would not be a cognizable harm, because nobody is lawfully entitled to benefit from a regulatory scheme that violates RFRA. Before judging whether the failure to receive a benefit can be considered a "harm," it is necessary to set the baseline of legal entitlements by determining whether the benefit in question is lawful.

If not, would-be recipients have no grounds to complain, because they are not being deprived of anything rightfully theirs.

By its express terms, RFRA is incorporated into every act of Congress that does not expressly reject it. 42 U.S.C. § 2000bb-3(b). Because the Affordable Care Act did not reject RFRA, the Government may not create entitlements under the Act that violate RFRA. For example, a federal regulation requiring all religious groups to hand out free birth control during worship services would provide a tangible "benefit" for some people. But the benefit would be void *ab initio* under RFRA, and thus declining to confer the benefit would not "deprive" anyone of anything, regardless of whether the benefit were "deemed, after extensive study, to be 'necessary for women's health and well-being.'" Interv. Br. at 48 (citation omitted).

Under RFRA, the Government may not create a third-party entitlement that would require Notre Dame to violate its religious beliefs, unless the creation of the entitlement is the least restrictive means of advancing a compelling interest. As discussed above, *supra* Part II.A, the Mandate's entitlement scheme cannot meet that test. Thus, even if the Government could create a legal entitlement to free contraceptive coverage in general, it could not do so where enforcement of that entitlement would unduly infringe on Notre Dame's free exercise rights.

In arguing that they are "entitled" to receive free contraceptive benefits, Intervenors rely on a rather curious notion of "personal autonomy." Interv. Br. at 48. On their view, they not only have the right to act in accordance with

their own values, but they also have license to coerce Notre Dame to act contrary to *its* values. Whatever the philosophical merits of such a view, it is flatly inconsistent with RFRA.

2. Granting Notre Dame a RFRA Exemption Would Not Violate the Establishment Clause

Intervenors contend that religious exemptions violate the Establishment Clause when they have the effect of denying benefits to third parties. Under this argument, the "religious employer" exemption itself would be unconstitutional, since (in Intervenors' view) it violates employees' rights. The Supreme Court, however, "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144–45 (1987).

For example, in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Supreme Court rejected an argument similar to the one Intervenors make here. In that case, the State of Ohio argued that it would violate the Establishment Clause to grant a religious exemption for a prisoner under the Religious Land Use and Institutionalized Persons Act (RLUIPA), in part because "providing benefits for some inmates necessarily imposes costs on others." Br. for Respondent at 2, *Cutter v. Wilkinson*, 544 U.S. 709 (No. 03-9877). The Supreme Court disagreed, holding that RLUIPA is a "permissible government accommodation of religious practices." *Cutter*, 544 U.S. at 714.

In upholding RLUIPA, *Cutter* focused on the statute's "compelling governmental interest" test, which was "carried over from RFRA." *Id.* at 717.

Under this test, *the statute itself* ensures compliance with the Establishment Clause by directing courts to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Id.* at 720 (citing *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985)). Properly applied, the statute ensures that religious exemptions do not "override other significant interests." *Id.* at 722.[15]

Intervenors place great weight on *Thornton*, where the Supreme Court struck down a state statute that gave all private employees "an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath," 472 U. S. at 709, regardless of the burden on their employer. In *Cutter*, however, the Supreme Court expressly distinguished *Thornton*, explaining that the law at issue there violated the Establishment Clause because, unlike RFRA, it "unyielding[ly] weigh[ted]" the interests of Sabbatarians "over all other interests," without any balancing test. *Cutter*, 544 U.S. at 722 (quoting *Thornton*, 472 U. S. at 710)). RFRA, of course, is free of that defect because it expressly incorporates the strict scrutiny standard, which itself adequately safeguards third-party rights.[16]

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[15] This Court has also upheld RFRA against Establishment Clause challenge. *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996), *vacated on other grounds*, 521 U.S. 1114 (1997).

[16] Nor does *United States v. Lee*, 455 U.S. 252 (1982), support Intervenors' argument. The Court's rationale in that case for denying a religious exemption had nothing to do with the Establishment Clause. *Id.* at 260 n.11.

Numerous cases illustrate that religious exemptions are permissible even when they require third parties to forgo far greater benefits than free contraception. For example, in *Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330 (1987), the Supreme Court upheld a Title VII provision exempting the "secular nonprofit activities of religious organizations" from federal anti-discrimination laws. 42 U.S.C. § 2001e-1(a). Despite the important interest of protecting third parties from discrimination, the Court held that the exemption did not violate the Establishment Clause but merely "lift[ed] a regulation that burdens the exercise of religion." *Amos*, 483 U.S. at 338; *id.* at 337 n.15 (distinguishing *Thornton*); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (rejecting Establishment Clause challenge to property-tax exemption for churches, which resulted in higher tax burden on non-religious taxpayers). Likewise, the Court has upheld the well-known exemption from the military draft for conscientious objectors who believe in a "Supreme Being," despite the cost to others who would have to go to war in their place. *Gillette v. United States*, 401 U.S. 437 (1971); *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965). As these cases illustrate, religious exemptions are consistent with the Establishment Clause even where third parties would benefit if the exemption were denied. Indeed, a contrary rule would call into question numerous religious-conscience protections at both the state and federal level. *E.g.*, 42 U.S.C. § 300a-7 *et seq.* (protecting the religious conscience rights of individuals and entities that object to performing

abortions); Ind. Code Ann. § 16-34-1-4 (same). There is no support for that radical proposition.

Finally, there is no merit to Intervenors' argument that exempting Notre Dame from the Mandate would give the University a "veto over the regulatory obligations of third parties." Interv. Br. at 51. As Notre Dame has made clear, Appellant's Br. at 39-40, it seeks nothing more than the freedom to conduct its affairs in accord with its religious conscience. Notre Dame does not request any relief other than to be left alone, to offer health plans in accordance with Catholic religious beliefs, without interference from the federal government.

III. THE MANDATE VIOLATES THE FREE EXERCISE, FREE SPEECH, AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT.

A. The Mandate Violates the Free Exercise Clause

The Government does not seriously attempt to deny that the Mandate "exempt[s] vast numbers of entities while refusing to extend the religious employer exemption to include entities like" Notre Dame. *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 437 (W.D. Pa. 2013). Instead, the Government relies on the district court's argument that "[t]he categories that the ACA creates" "are objectively delineated, without reference to religion." Gov't Br. at 32 (quoting SA30). But there is nothing "objective" about the Mandate's exemption scheme, which treats many *secular* concerns as more worthy of solicitude than Notre Dame's *religious* concerns. By creating exemptions for many entities "with a secular objection" while refusing to exempt Notre Dame based on its "religious objection," the Mandate directly implicates the concerns that animated *Smith* and *Lukumi*; namely the prospect of the government

"deciding that secular motivations are more important than religious motivations." *Fraternal Order of Police v. Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.); *Ward v. Polite*, 667 F.3d 727, 739 (6th Cir. 2012). The "fact that the [G]overnment saw fit to exempt so many entities and individuals from the mandate's requirements renders their claim of general applicability dubious, at best." *Geneva Coll.*, 929 F. Supp. 2d at 437.

B. The Mandate Violates Notre Dame's Freedom of Speech

1. The Mandate Imposes a Gag Order that Violates The First Amendment

The Mandate also violates the First Amendment by prohibiting religious organizations from "directly or indirectly, seek[ing] to influence the[ir TPA's] decision" to procure the mandated coverage. 26 C.F.R. § 54.9815-2713A(b)(iii). The Government relies on the District Court's conclusion that "the regulations don't prohibit speech, but instead prevent[] 'an employer's improper attempt to interfere with its employees' ability to obtain contraceptive coverage from a third party," Gov't Br. at 35-36 (quoting SA 36), and suggests that such improper attempts to interfere are threats, *id.* at 36. But that is not what the regulations say. Instead, the regulations prohibit any attempt to "directly or indirectly . . . *influence*" the decision to provide contraceptive coverage. 26 C.F.R. § 54.9815-2713A(b)(iii) (emphasis added). That broad prohibition is a naked, content-based speech restriction. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011); *Roman Catholic Archbishop of Wash. v. Sebelius*, 13-cv-1441, 2013 WL 6729515, at *37 (D.D.C. Dec. 20, 2013) (striking down the Mandate's gag order).

2. The Mandate Compels Speech in Violation of the First Amendment.

The Mandate impermissibly compels speech by requiring Notre Dame to facilitate access to contraceptive "counseling." Appellant's Br. at 45-47. The Government claims, incredibly, that the Mandate "do[es] not require that [Notre Dame's] counseling encourage any particular service." Gov't Br. at 34. This disavowal is incompatible not only with the description of such services in the IOM Report, but also with the Government's claims elsewhere that the Mandate serves an allegedly compelling interest in promoting the use of contraceptives. In any event, the First Amendment "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995). Having thus violated the First Amendment by compelling Notre Dame to engage in objectionable speech, the Government cannot cure the violation by allowing Notre Dame subsequently to "express[] its opposition to the use of contraceptives." Gov't Br. at 35.

C. The Mandate Violates the Establishment Clause

1. Discrimination Among Religious Groups

The Government maintains that the Mandate does not "impermissibly favor some religion over others" because "the challenged exemption does not grant any denominational preference or otherwise discriminate among religions." Gov't Br. at 37. For the same reasons these arguments failed in *Larson v. Valente*, 456 U.S. 228 (1982), and *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), they cannot prevail here. Like the

appellants in *Larson*, the Government maintains that "a statute's disparate impact among religious organizations is constitutionally permissible when such distinctions result from application of secular criteria." 456 U.S. at 246 n.23. But regardless of whether the Mandate refers to any particular denomination, the exemption plainly favors "houses of worship" or "religious orders" and the denominations that primarily rely on them to carry out their ministry, while disadvantaging groups that exercise their faith through alternative means.

By asserting that the Mandate is constitutional because it "distinguishes not between types of religions, but between types of institutions," the Government's argument rests on a "puzzling and wholly artificial distinction." *Colo. Christian*, 534 F.3d at 1259. In the same way that a law may not privilege a denomination with "well-established churches," while disadvantaging "churches which are new and lacking in a constituency," *Larson*, 456 U.S. at 246 n.23, or provide special treatment "solely for 'pervasively sectarian' schools," *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002), neither may a law prefer denominations that exercise religion principally through "churches, synagogues, mosques, and other houses of worship, and religious orders," 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013), while disfavoring a denomination whose faith "move[s] [its adherents] to engage in" broader religious ministries. *Colo. Christian*, 534 F. 3d at 1259. Such preferences have been "consistently and firmly deprecated" by the Supreme Court. *Larson*, 456 U.S. at 246.

2. Excessive Entanglement

As previously noted, Appellant's Br. at 49-52, determining a group's eligibility for the "religious employer" exemption requires unduly intrusive religious judgments such as whether a group has "a recognized creed and form of worship." *Found. of Human Understanding v. United States*, 88 Fed. Cl. 203, 220 (2009). The Government's claim that no government body would be called upon to make these sorts of determinations defies belief. Gov't Br. at 38. While no application may be required for religious employer status, there can be little doubt that the Government and private citizens will seek to enforce these regulations, which must be applied by someone. 29 U.S.C. § 1132(a)(1)(B) (authorizing private suits). It is irrelevant that these determinations have yet to be made. Gov't Br. at 38. Notre Dame need not wait for the Government or a court to "troll[] through [its] religious beliefs," before filing suit. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.).

CONCLUSION

For the forgoing reasons, the judgment of the district court should be reversed.

Respectfully submitted, this the 3rd day of February, 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Reply Brief of Plaintiff-Appellant University of Notre Dame complies with the type volume limitations set out for reply briefs in Federal Rule of Appellate Procedure 32(a)(7)(B) as amended by this court's order granting a word limit extension to 10,000 words. The brief, including headings, footnotes, and quotations, contains 9,996 words, as calculated by the Microsoft Word word count function.

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CERTIFICATE OF SERVICE

I hereby certify that, on February 3, 2014, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

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