[ORAL ARGUMENT REQUESTED]

No. 14-6028

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REACHING SOULS INTERNATIONAL, INC., an Oklahoma non-profit corporation; TRUETT-McCONNELL COLLEGE, INC., a Georgia non-profit corporation, by themselves and on behalf of all others similarly situated; GUIDESTONE FINANCIAL RESOURCES OF THE SOUTHERN BAPTIST CONVENTION, a Texas non-profit corporation,

Plaintiffs-Appellees,

v.

SYLVIA MATHEWS BURWELL, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; THOMAS E. PEREZ, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Oklahoma No. 13-cv-1092 (DeGiusti, J.)

REPLY BRIEF

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: **Page**

Statutes:

Regulations:

INTRODUCTION AND SUMMARY

Plaintiffs urge that this case is not meaningfully distinguishable from *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013). *See* Br. 29. It is thus irrelevant, in plaintiffs' view, that the *Hobby Lobby* plaintiffs were required to provide contraceptive coverage whereas plaintiffs in this case need not do so. The regulations impose a substantial burden on their exercise of religion under the Religious Freedom Restoration Act of 1993 ("RFRA"), plaintiffs urge, whether or not an entity is free to opt out of providing contraceptive coverage.

The Sixth and Seventh Circuits properly rejected the same argument that plaintiffs make here. *See Mich. Catholic Conference* v. *Burwell*, _ F.3d _, Nos. 13-2723, 13-6640, 2014 WL 2596753 (6th Cir. June 11, 2014); *Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547, 557 (7th Cir. 2014), *reh'g en banc denied*, No. 13-3853, ECF No. 64 (May 7, 2014). As plaintiffs do not dispute, they need only inform their third party administrators that they are eligible for religious accommodations 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' quarrel is not with a burden imposed upon their own conduct. They complain, instead, that after they exercise their right to opt out, their third party administrators may choose to provide coverage. Plaintiffs cannot transform the protections of the Free Exercise Clause that were recognized in the jurisprudence

incorporated by RFRA into a means of prohibiting the government itself from reimbursing health coverage of which plaintiffs disapprove.

ARGUMENT

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

A. Opting Out of Providing Contraceptive Coverage Does Not "Substantially" Burden Plaintiffs' Religious Exercise Under RFRA.

Plaintiffs challenge minimum health coverage requirements under the Affordable Care Act insofar as the requirements include contraceptive coverage as part of required women's preventive-health services coverage. However, one of the plaintiffs (GuideStone) is not subject to any contraceptive coverage requirement, and the remaining plaintiffs (Reaching Souls and Truett-McConnell College) may opt out of this requirement by informing their third party administrators that they are eligible for an accommodation set out in the regulations and wish to opt out. They therefore are not required "to contract, arrange, pay, or refer for contraceptive coverage." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). They need only "attest to [their] religious beliefs and step aside." *Mich. Catholic Conference* v. *Sebelius*, _ F. Supp. 2d _, 2013 WL 6838707, at *7 (W.D. Mich. Dec. 27, 2013), *aff'd*, _ F.3d _, Nos. 13-2723, 13-6640, 2014 WL 2596753 (6th Cir. June 11, 2014).

Plaintiffs are mistaken in characterizing their decision to opt out as "*the* trigger to obligate, authorize, direct, and incentivize others to provide contraceptives."

Br. 32-37 (emphasis in original). As the Sixth Circuit and Seventh Circuit have recognized, "'[f]ederal law, not the religious organization's signing and mailing the form, requires . . . third party administrators of self-insured plans[] to cover contraceptive services.'" *Mich. Catholic Conf.*, _F.3d_, 2014 WL 2596753, at *9 (quoting *Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547, 554 (7th Cir. 2014), *reh'g en banc denied*, No. 13-3853, ECF No. 64 (May 7, 2014)).

Plaintiffs' position is at odds with our Nation's long history of allowing religious objectors to opt out and then having others fill the objectors' shoes. *See, e.g., Notre Dame*, 743 F.3d at 556 (giving the example of conscientious objection to the draft); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 71-82 (1977) (under Title VII, employees with religious objections to working on particular days may ask to opt out and have other employees take their place where practicable).

Plaintiffs are thus quite wrong to insist that the burden on their exercise of religion is the same as the burden placed on the plaintiffs in *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013). Unlike the plaintiffs in cases like *Hobby Lobby*, 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 they furnish to their employees. *Priests for Life* v. *U.S. Dep't of Health & Human Servs.* _ F. Supp. 2d _, No. 13-cv-1261, 2013 WL 6672400, at *10 (D.D.C. Dec. 10, 2013) (quoting *Gilardi* v. *U.S. Dep't of*

Health & Human Servs., 733 F.3d 1208, 1217 (D.C. Cir. 2013), *cert. petns. pending*, Nos. 13-567, 13-915); *see also Notre Dame*, 743 F.3d at 558 (explaining that the plaintiffs that could opt out "can derive no support from [the] decision in *Korte* v. *Sebelius*, 735 F.3d 654 (7th Cir. 2013)," in which the for-profit plaintiffs could *not* opt out). In other words, plaintiffs used to provide health coverage that excluded coverage of certain contraceptive services, and they may continue to do so.

This Court did not suggest in *Hobby Lobby* that the burden of a coverage requirement is substantial under RFRA whether or not an entity may decline to provide coverage. By plaintiffs' reasoning, a conscientious objector could object not only to his own military service, but also to opting out, on the theory that his opt out would "'trigger' the drafting of a replacement who was not a conscientious objector." *Notre Dame*, 743 F.3d at 556.[1] Similarly, on plaintiffs' reasoning, the plaintiff in *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), could have demanded not only that he not make weapons but also that he not opt out of doing so, because someone else would take his place on the assembly line.

Plaintiffs' view that they need only point to any act (including the act of opting out) is also at odds with cases like *Tilton* v. *Richardson*, 403 U.S. 672 (1971), in which the

[1] Although plaintiffs may not consider the conscientious objector to be impermissibly "triggering" the government's subsequent actions, Br. 36 n.8, under plaintiffs' understanding of RFRA, a conscientious objector with different beliefs could point to the act of opting out and declare that he must "'engage in conduct contrary to a sincerely held religious belief.'" Br. 28-29 (quoting *Hobby Lobby*, 723 F.3d at 1138).

plaintiffs urged that "the Free Exercise Clause [was] violated because they [we]re compelled to pay taxes, the proceeds of which in part finance[d] grants" to religiously-affiliated colleges, and the Court held that the plaintiffs were "unable to identify any coercion directed at the practice or exercise of their religious beliefs." 403 U.S. at 689; *see also Bd. of Educ.* v. *Allen*, 392 U.S. 236, 248-249 (1968); Br. of Appellants 35, *Allen*, *supra* (No. 660) (arguing that they were "forced to contribute" and comparing the burden to "forcing a man to attend a church"). The question whether there is a substantial burden under RFRA turns not just on whether there is "substantial pressure" on plaintiffs (*e.g.*, Br. 28-30), but also on the nature of the burden. *See, e.g., Mich. Catholic Conference,* _ F.3d _, 2014 WL 2596753, at *7-12 (whether a burden is "substantial" under RFRA is a question of law, not a "'question[] of fact, proven by the credibility of the claimant'") (quoting *Mahoney* v. *Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011)); *Notre Dame*, 743 F.3d at 558 ("substantiality—like compelling governmental interest—is for the court to decide"); *Kaemmerling* v. *Lappin*, 553 F.3d 669, 673-674, 678-679 (D.C. Cir. 2008) ("[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"); *see also Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448 (1988) (program that would destroy place where plaintiffs' religion required them to pray did not impose burden covered by Free Exercise Clause); *Bowen* v. *Roy*, 476 U.S. 693, 701 n.6 (1986) ("Roy's religious views may not accept this distinction

between individual and governmental conduct," but the law "recognize[s] such a distinction.").

Plaintiffs' argument is particularly anomalous because the third party administrators in this case are not required to provide contraceptive coverage upon plaintiffs' decision to opt out. Because plaintiffs offer health coverage through a self-insured church plan that is exempt from ERISA, the government has no authority to require third party administrators to provide contraceptive coverage. *See* 29 U.S.C. § 1003(b)(2). Plaintiffs' assertion that the government has the authority that it disclaims, Br. 38, rests on a misunderstanding of the Internal Revenue Code, which confers authority to regulate employers that sponsor group health plans, but provides no authority separately to impose obligations on third party administrators. *See generally* 26 U.S.C. §§ 9815, 4980D. The government would offer reimbursements to third party administrators that offer contraceptive coverage following plaintiffs' opt out. 29 C.F.R. § 2590.715-2713A(b)(3). But plaintiffs' third party administrators would not be obligated to provide contraceptive coverage. And, while plaintiffs speculate that some third party administrators might choose to offer such coverage upon receipt of plaintiffs' self-certification forms, Br. 38-39, a private party's independent choice to provide contraceptive coverage cannot constitute a government-imposed "substantial burden" for purposes of RFRA.

Plaintiffs note that the opt-out form "will be treated as a designation of the third party administrator(s) as plan administrator and claims administrator for

contraceptive benefits," for purposes of ERISA, 78 Fed. Reg. at 39,879, and will serve as "an instrument under which the plan is operated," 29 C.F.R. § 2510.3-16(b). This contention has no apparent relevance to plaintiffs' own circumstances because, as discussed, plaintiffs' church plan is exempt from ERISA.

In any event, plaintiffs misunderstand the regulations and their relationship to ERISA. The section of the preamble from which plaintiffs quote explains that the self-certification is "a document notifying the third party administrator(s) that the eligible organization will not provide, fund, or administer payments for contraceptive services," and therefore is "one of the instruments under which the employer's plan is operated under ERISA section 3(16)(A)(i)." 78 Fed. Reg. at 39,879. The form directs third party administrators to their own "obligations set forth in the[] final regulations" and makes clear that the eligible organization has no such obligations. *Ibid.*; *see also* 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(A), (B) (form "shall include notice" that "[t]he eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services" and that "[o]bligations of the third party administrator are set forth in [Department of Labor regulations]"). The preamble explains that the third party administrator's legal obligations derive from ERISA section 3(16). Insofar as the result of an eligible organization opting out is that, under ERISA, the regulations impose legal obligations on the third party administrator to act in the employer's stead, the form "*will be treated* as a designation of the third party administrator(s) as

plan administrator and claims administrator for contraceptive benefits[.]" 78 Fed. Reg. at 39,879 (emphasis added). The preamble notes that "[t]he Departments have determined that the ERISA section 3(16) approach most effectively enables eligible organizations to avoid contracting, arranging, paying, or referring for contraceptive coverage after meeting the self-certification standard, while also creating the fewest barriers to or delays in plan participants and beneficiaries obtaining contraceptive services without cost sharing." *Ibid.*

An employer that objects to particular aspects of the accommodation for *self-insured* plans, would, in any event, be free to offer its employees an *insured* plan. This option obviates any objection that is based on the particulars of the accommodation for self-insured organizations. *See Tony & Susan Alamo Found.* v. *Sec'y of Labor*, 471 U.S. 290, 303-05 (1985) (option to compensate employees by furnishing room and board obviates religious objection to paying cash wages); *cf. Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961) (rejecting Orthodox Jewish merchants' free exercise challenge to Sunday closing law that "operates so as to make the practice of their religious beliefs more expensive").

The employer plaintiffs also have the option of choosing to discontinue health coverage. Were they to do so, their employees could purchase health insurance, which covers all essential health benefits including contraceptive benefits, on exchanges where many may qualify for subsidies. *See* 26 U.S.C. § 36B; *see also id.*

§ 36B(c)(2)(B), (C) (employees are generally ineligible for subsidies if they are offered health coverage by employers).

If the employer plaintiffs were to pursue that course, they would save the cost of providing health coverage and may be subject to a tax of $2,000 per full-time employee. *See* 26 U.S.C. § 4980H(a), (c)(1). Reaching Souls presumably would not be subject to any tax because it has only 10 full-time employees. *See* 26 U.S.C. § 4980H(c)(2). While plaintiffs assert that this course would harm the employer plaintiffs' ability to hire and retain employees, A168, the Supreme Court has made clear that a burden is not substantial when it merely "operates so as to make the practice of [an adherent's] religious beliefs more expensive." *Braunfeld*, 366 U.S. at 605; *see, e.g., Tony & Susan Alamo Found.*, 471 U.S. at 303-305 (plaintiffs must compensate employees by furnishing room and board rather than having them work for free); *Pinsker* v. *Joint Dist. No. 28J,* 735 F.2d 388, 391 (10th Cir. 1984) (requiring teacher to take unpaid leave to celebrate religious holiday is not a substantial burden). This is so even if it "put[s] [them] at a serious economic disadvantage." *Braunfeld*, 366 U.S. at 602.

Although plaintiffs object that "they have a religious obligation to care for the employees" who work for them, Br. 29-31, they cannot claim that choosing not to provide health coverage for employees would itself substantially burden their exercise of religion. While plaintiffs "provide[] [their] employees with comprehensive health benefits" "[a]s part of [their] religious belief that [they] must promote the spiritual

and physical well-being of [their] employees," A178; A190, it is insufficient for RFRA analysis that their decision to provide health coverage to employees is "religiously motivated." *See, e.g.*, *Henderson* v. *Kennedy,* 253 F.3d 12, 17 (D.C. Cir. 2001) ("To make religious motivation the critical focus is, in our view, to read out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement."). Providing health coverage for employees is "one of a multitude of means" to achieve the goal of furthering those employees' well-being and health. *Ibid.* ("Because the Park Service's ban on sales on the Mall is at most a restriction on one of a multitude of means, it is not a substantial burden on their vocation."). Among other things, plaintiffs could further the same goal by paying higher salaries and wages, thereby helping their employees purchase individual health insurance through the exchanges. *See* A168 (explaining that if they were to drop health coverage, they would increase compensation).[2]

Finally, plaintiffs are mistaken in urging that the Supreme Court's order in *Little Sisters of the Poor, Home for the Aged* v. *Sebelius*, 134 S. Ct. 1022 (Jan. 24, 2014) (mem.), should govern here. The Supreme Court explicitly stated that the "order should not

[2] Any "adverse financial impact on the Guidestone Plan" from losing plan participants (A401) does not bear on Guidestone's or the employer's exercise of religion. To the extent that Guidestone has a religious motivation for providing health coverage to as many organizations and employees as possible, (*see* Br. 29-30), Guidestone still can "[a]ssist" organizations "by making available . . . health coverage," (A164, 168), regardless of whether employers choose to provide health coverage. And as noted, it is of no matter to the RFRA inquiry that GuideStone's provision of health coverage is religiously motivated. *See Henderson*, 253 F.3d at 17.

be construed as an expression of the Court's views on the merits." *Ibid.* The Court also made clear that the order was issued "based on all of the circumstances of the case," *ibid.,* which are different from the circumstances of this case. In *Little Sisters*, the third party administrator (which was also a plaintiff) made clear that it "does not intend" to provide payments for contraceptive services voluntarily. *See Little Sisters of the Poor*, __ F. Supp. 2d __, No. 13-cv-2611, 2013 WL 6839900, at *10-11, *13 (D. Colo. Dec. 27, 2013); *see also id.* at *15 (explaining that, if plaintiffs certify that they are eligible for the accommodation, "[i]t is clear that these services will not be offered to the[ir] employees"); Order, *Little Sisters of the Poor* v. *Sebelius*, No. 13-1540 (10th Cir. Dec. 31, 2013). Thus, the Supreme Court's order did not alter whether the employees would receive coverage. In contrast, plaintiffs here have stressed that at least one of their third party administrators would voluntarily provide contraceptive coverage after plaintiffs opt out. Br. 39. Therefore, unlike in *Little Sisters*, an injunction here would deprive employees and their families of medical coverage.

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 employers provide contraceptive coverage. 723 F.3d at 1143-1145. As the Court is aware, *Hobby Lobby* is pending before the Supreme Court. We respectfully submit that *Hobby*

Lobby's analysis of these 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 by declaring that they are eligible to do so and are exercising that option. This is the way that many opt outs work. The government's ability to accommodate religious concerns in this and other areas depends on its ability to ask that religious objectors that 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.").

Plaintiffs argue that the government could achieve the same goals in this case through less restrictive means than allowing employers to opt out of the requirement and then relying on third parties to provide contraceptive coverage. Plaintiffs' insistence that the government must demonstrate a compelling interest with respect to the government's offering to pay third party administrators to provide contraceptive coverage, after plaintiffs decline to do so, only underscores the fact that plaintiffs' objection is to acts taken by the government as to third parties.

Plaintiffs' sweeping argument also ignores the fact that the government's ability to accommodate religious concerns in this and other areas depends on the

government's ability to fill the gaps created by those accommodations. Plaintiffs' analysis asserts that it is insufficient to permit an objector to opt out of an objectionable requirement; the government also may not place plaintiffs' obligations on a third party without subjecting the entire program to compelling interest analysis.

Plaintiffs suggest that the government could "provide individual subsidies, reimbursements, tax credits or tax deductions" so that third parties "deliver the drugs." Br. 48 n.10. But that is precisely what the accommodation does in this case. The regulations create obligations and incentives so that insurers and third party administrators provide the contraceptive coverage that employers such as plaintiffs decline to provide.

Plaintiffs' suggested alternatives all ignore the government's interest in operating uniform programs while accommodating religious objections. Many people have religious objections to many practices. These persons may object to different features of a requirement or, in this case, of a religious accommodation. But national systems of health and welfare cannot vary from point to point or be based around what, if any, method of provision can be agreed upon by all objecting parties. The challenged accommodation provides an administrable way for organizations to state that they object and opt out, and for the government to require or incentivize third parties to provide contraceptive coverage. 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.

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

Plaintiffs argue, in the alternative, that the district court's preliminary injunction order should be affirmed on the basis of constitutional claims that the district court did not consider. Those claims are meritless and plaintiffs have not identified any violations of their constitutional rights.

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

Plaintiffs take issue with the fact that churches (and other houses of worship) are automatically exempt from the contraceptive-coverage provision, whereas other non-profit religiously affiliated organizations (such as religiously affiliated colleges and universities) may opt out of providing contraceptive coverage by availing themselves of the accommodations. Contrary to plaintiffs' assertions (Br. 48-54), these regulations do not favor some denominations over others in violation of the Establishment Clause or the Free Exercise Clause.

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

churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order.

Although plaintiffs apparently believe that these Internal Revenue Code provisions are unconstitutional, they offer no plausible basis for this contention. Rejecting the same argument, the Seventh Circuit explained that "religious employers, defined as in the cited regulation, have long enjoyed advantages (notably tax advantages) over other entities, 26 U.S.C. §§ 6033(a)(3)(A)(i), (iii), without these advantages being thought to violate the establishment clause." *Notre Dame*, 743 F.3d at 560 (citing *Walz* v. *Tax Comm'n of the City of New York*, 397 U.S. 664, 666 (1970) (upholding property tax exemptions for real property owned by religious organizations and used exclusively for religious worship)).

Plaintiffs' reliance (Br. 50-54) on cases such as *Larson* v. *Valente*, 456 U.S. 228, 244-246 (1982), is entirely misplaced. The statute held unconstitutional in that case was "drafted with the explicit intention" of requiring "particular religious denominations" to comply with registration and reporting requirements while excluding other religious denominations. *Id.* at 254; *see also id.* at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). The Supreme Court in *Larson* contrasted the case with its earlier decision upholding an exemption from the draft, where "conscientious objector status was available on an equal basis to both the Quaker and the Roman Catholic." *Id.* at 246 n.23 (discussing *Gillette* v. *United States*, 401 U.S. 437 (1971)).

Here, too, the religious employer exemption does not grant any denominational preference or otherwise discriminate among religions. As the Sixth Circuit explained, "[b]ecause the exemption and accommodation arrangement distinguishes between entities based on organizational form, not denomination, it does not express an unconstitutional state preference on the basis of religion." *Mich. Catholic Conference*, _F.3d_, 2014 WL 2596753, at *16.

B. The Regulations Do Not Violate Plaintiffs' Freedom of Speech.

Plaintiffs also allege two free speech violations.

1. Plaintiffs first argue that the accommodation compels speech in violation of the First Amendment because the act of opting out of providing contraceptive coverage is itself speech with which they disagree. They claim the accommodation "compels [plaintiffs] to engage in speech they wish to avoid: speech furthering a message and activities that contradict their public witness to their religious faith." Br. 55. This assertion is inexplicable. The requirement to complete an opt-out form does not constrain plaintiffs' speech on any topic, and "does not deprive [plaintiffs] of the freedom to speak out about abortion and contraception on their own terms." *Mich. Catholic Conference*, _F.3d_, 2014 WL 2596753, at *13. "Nothing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." 78 Fed. Reg. at 39,880 n.41. Moreover, by opting out, plaintiffs would explicitly proclaim their objection to contraception. "The form requires the

appellants to assert their opposition to contraception," and therefore does not compel "speech that [plaintiffs] disagree with and so cannot be the basis of a First Amendment claim." *Mich. Catholic Conference*, _F.3d_, 2014 WL 2596753, at *13. 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, at *8, *aff'd*, 743 F.3d 547 (7th Cir. 2014).

2. Plaintiffs are also mistaken in claiming that, if they opt out, they are prohibited from engaging in protected speech. Br. 58-59. The relevant regulations state that an eligible organization that is self-insured "must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries," and "must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements." 29 C.F.R. § 2590.715-2713A(b)(1)(iii).

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

contraceptive coverage that is contemplated by the rest of the regulations. But no such obligation exists for third party administrators that are administering an ERISA-exempt church plan.

The two parts of the regulation address two different types of improper conduct. The first part, addressing efforts "to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries," prohibits an employer from obstructing the provision of benefits that the third party administrator is attempting to provide. The second part, addressing efforts to "influence the third party administrator's decision to make any such arrangements," is meant only to prevent a self-certifying organization from using its economic power to coerce a third party administrator into not fulfilling its legal obligation to provide contraceptive coverage. That second part does not prohibit protected speech. *See* 78 Fed. Reg. at 39,880 n.41. And it assumes (like the rest of the regulations) that a third party administrator would be legally obligated to provide contraceptive coverage, which is not the case where, as here, there is an ERISA-exempt church plan. It thus in no way infringes on protected speech. *See NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (rejecting First Amendment challenge to prohibition on "threat of reprisal or force or promise of benefit" intended to "coer[ce] . . . employees in the exercise of their right to self-organization" (internal quotation marks omitted)); *see also United States* v. *Williams*, 553

U.S. 285, 298 (2008) (no First Amendment protection for direct inducement of illegal conduct).

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

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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
/s/ Patrick G. Nemeroff
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

JUNE 2014

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)(B), because it contains 4,719 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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

/s/ Patrick G. Nemeroff
PATRICK G. NEMEROFF

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 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