[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.

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

Defendants-Appellants.

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

BRIEF FOR THE APPELLANTS

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STATEMENT OF RELATED CASES

This case presents the question whether regulations that allow plaintiffs to opt out of providing contraceptive coverage violate plaintiffs' rights under the Religious Freedom Restoration Act. Substantially the same issues are presently pending before this Court in *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, No. 13-1540 (10th Cir.), and *S. Nazarene Univ.* v. *Sebelius*, No. 14-6026 (10th Cir.), and before other courts of appeals in:

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

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

/s/ *Patrick G. Nemeroff*
Patrick G. Nemeroff

GLOSSARY

ERISA	Employee Retirement Income Security Act
HHS	U.S. Department of Health and Human Services
HRSA	Health Resources and Services Administration, a component of HHS
RLUIPA	Religious Land Use and Institutionalized Persons Act
RFRA	Religious Freedom Restoration Act
TPA	Third party administrator

INTRODUCTION

Plaintiffs challenge regulations that establish minimum health coverage requirements under the Affordable Care Act insofar as they include contraceptive coverage as part of women's preventive-health coverage. Plaintiffs acknowledge, however, that they are not required to provide contraceptive coverage. Plaintiffs are either not subject to any contraceptive coverage requirement or may opt out of the coverage requirement by informing their third party administrators that they are eligible for a religious accommodation set out in the regulations and therefore are not required "to contract, arrange, pay, or refer for contraceptive coverage." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013).

Plaintiffs object, instead, to the fact that after they opt out, federal regulations will authorize the government to reimburse their third party administrators if they choose to make or arrange separate payments for contraception. Were plaintiffs' third party administrators to do so, the employer plaintiffs would not administer this coverage or bear any direct or indirect costs of this coverage.

Although plaintiffs are thus free to opt out of providing contraceptive coverage, they nevertheless claim that the challenged regulations impermissibly burden their exercise of religion in violation of the Religious Freedom Restoration Act ("RFRA"). But plaintiffs cannot transform their right, as eligible organizations, *not* to provide coverage into a substantial burden by characterizing their decision to opt out as "contracting for," "arranging for," or "facilitating" others to provide

contraceptive coverage *E.g.,* A30. Eligible organizations that opt out do not "contract[] for" or "arrang[e] for" third parties to provide contraceptive coverage, just as they do not "contract[] for" or "arrang[e] for" the federal government to reimburse third party administrators for the cost of providing such coverage. If third parties step in and provide coverage, they do so as a result of legal obligations imposed by the government or the availability of reimbursement by the government. Plaintiffs are "free to opt out of providing the coverage [themselves], but [they] can't stop anyone else from providing it." *University of Notre Dame* v. *Sebelius*, _ F. Supp. 2d. _, 2013 WL 6804773, at *1 (N.D. Ind. Dec. 20, 2013), *aff'd*, 743 F.3d. 547 (7th Cir. 2014).

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1361, 2201, 2202 and 42 U.S.C. § 2000bb-1. A14. The district court granted plaintiffs' motion for a preliminary injunction on December 20, 2013, A579, and defendants filed a timely notice of appeal on February 22, 2014, A580-581. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

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

STATEMENT OF THE CASE

A. Regulatory Background

1. Congress has long regulated employer-sponsored group health plans. In 2010, the Patient Protection and Affordable Care Act established certain additional minimum standards for group health plans as well as health insurance issuers that offer coverage in the group and the individual health insurance markets. The Act requires non-grandfathered group health plans and health insurance issuers offering non-grandfathered health insurance coverage to cover four categories of recommended preventive-health services without cost sharing, that is, without requiring plan participants and beneficiaries to make copayments or pay deductibles or coinsurance. 42 U.S.C. § 300gg-13. As relevant here, these services include preventive care and screenings for women as provided for in comprehensive guidelines supported by the Health Resources and Services Administration ("HRSA") (a component of the Department of Health and Human Services ("HHS")). *Id.* § 300gg-13(a)(4).

HHS requested the assistance of the Institute of Medicine in developing such comprehensive guidelines for preventive services for women. 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012). Experts, "including specialists in disease prevention, women's health issues, adolescent health issues, and evidence-based guidelines," developed a list of services "shown to improve well-being, and/or decrease the likelihood or delay the onset of a targeted disease or condition." Institute of Medicine, *Clinical Preventive*

Services for Women: Closing the Gaps 2-3 (2011). These included the "full range" of "contraceptive methods" approved by the Food and Drug Administration, *id.* at 10; *see id.* at 102-110, which the Institute found can greatly decrease the risk of unwanted pregnancies, adverse pregnancy outcomes, and other adverse health consequences, and vastly reduce medical expenses for women. *See id.* at 102-07.

Consistent with those recommendations, the HRSA guidelines include "'[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,' as prescribed" by a health care provider. 77 Fed. Reg. at 8725 (quoting the guidelines). The relevant regulations adopted by the three Departments implementing this portion of the Act (HHS, Labor, and Treasury) require coverage of, among other preventive services, the contraceptive services recommended in the HRSA guidelines. 45 C.F.R. § 147.130(a)(1)(iv) (HHS); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. § 54.9815-2713(a)(1)(iv) (Treasury).

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

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

After notice and comment rulemaking, the Departments published the current regulations, challenged here, in July 2013. *See* 78 Fed. Reg. at 39,874-39,886; 45 C.F.R. § 147.131(b) (HHS); 29 C.F.R. § 2590.715-2713A(a) (Labor); 26 C.F.R. § 54.9815-2713A(a) (Treasury). The regulations provide religion-related accommodations for group health plans established or maintained by "eligible organizations" (and group health insurance coverage provided in connection with such plans). An "eligible organization" is an organization that satisfies the following criteria:

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

E.g., 45 C.F.R. § 147.131(b); *see also* 78 Fed. Reg. at 39,874-75.

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

If an eligible organization chooses not to provide contraceptive coverage, the plan's participants and beneficiaries will generally have access to contraceptive coverage without cost sharing through alternative mechanisms established by the regulations.

When an eligible organization that chooses not to provide contraceptive coverage has a "self-insured" plan, the regulations generally require the third party administrator to provide or arrange separate payments for contraceptive services for plan participants and beneficiaries.[1] 29 C.F.R. § 2590.715- 2713A(b)(2). (As discussed

[1] An employer is said to have an "insured" plan if it contracts with an insurance company that bears the financial risk of paying health insurance claims. An employer is said to have a "self-insured" plan if it bears the financial risk of paying claims. Many self-insured employers use insurance companies or other third parties to administer their plans, performing functions such as developing networks of providers, negotiating payment rates, and processing claims. In that context, the insurance company or other third party is called a third party administrator or TPA. Employers may be regarded as self-insured even if they purchase a separate insurance

Continued on next page.

below, these requirements do not apply when the third party administrator is administering a "church plan" that ERISA does not cover, which is the only type of plan at issue here.) "The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services." *Id.* § 2590.715- 2713A(b)(1)(ii)(A). The regulations bar the third party administrator from imposing any premium, fee, or other charge, directly or indirectly, on the eligible organization or the group health plan with respect to payments for contraceptive services. *Id.* § 2590.715-2713A(b)(2). The third party administrator may seek reimbursement for payments for contraceptive services from the federal government through an adjustment to federally-facilitated Exchange user fees. *Id.* § 2590.715-2713A(b)(3); *see* 45 C.F.R. § 156.50(d).[2]

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policy (known as reinsurance or "stop loss" coverage), which is not a form of health insurance, to protect themselves against unusually high claims costs. *See generally* Congressional Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 6 (2008).

[2] When an eligible organization that chooses not to provide contraceptive coverage has an "insured" plan, the health insurance company that issues the policy for that organization is required by regulation to provide separate payments for contraceptive services for plan participants and beneficiaries. *See* 45 C.F.R. § 147.131(c)(2). The insurance issuer may not impose any premium, fee, or other charge, directly or indirectly, on the eligible organization or the group health plan with respect to the issuer's payments for contraceptive services. *See id.* § 147.131(c)(2)(ii). The insurance issuer must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the . . . plan," *id.* § 147.131(c)(2)(i)(A), and "segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services," *id.* § 147.131(c)(2)(ii).

Regardless of the type of plan, an eligible organization that opts out of providing contraceptive coverage has no obligation to inform plan participants and beneficiaries of the availability of these separate payments made by third parties. Instead, the health insurance issuer or third party administrator itself provides this notice, and does so "separate from" materials that are distributed in connection with the eligible organization's group health coverage. 45 C.F.R. § 147.131(d); 29 C.F.R. § 2590.715-2713A(d). That notice must make clear that the eligible organization is neither administering nor funding the contraceptive benefits. *Ibid.*

B. Factual Background and Prior Proceedings

1. The named plaintiffs are GuideStone Financial Resources of the Southern Baptist Convention, which states that it is a tax-exempt organization that provides a health care plan called the GuideStone Plan to organizations affiliated with the Southern Baptist Convention, A20-23; Reaching Souls International, a non-profit organization that offers health coverage through the GuideStone Plan to its 10 full-time employees and is concededly eligible for the accommodations described above, A15-17, 180; and Truett-McConnell College, a non-profit organization that offers health coverage through the GuideStone Plan to its 78 full-time employees and is concededly eligible for the accommodations described above, A15-17, 192. Plaintiffs assert that the GuideStone Plan is a self-insured church plan that is exempt from ERISA. A22. Plaintiffs have also sought to certify a class of all present or future

employers that provide group health coverage through the GuideStone Plan and are eligible for a religious accommodation. A17.

Plaintiffs contend that the religious accommodations set out above violate their rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, which provides that the government "shall not substantially burden a person's exercise of religion" unless the application of that burden is the least restrictive means to advance a compelling governmental interest. Plaintiffs argue that opting out of the coverage requirement substantially burdens their religious exercise because doing so "triggers the third party administrator's obligation to make 'separate payments for contraceptive services directly for plan participants and beneficiaries.'" A38 (citation omitted). Plaintiffs also allege constitutional claims under the First Amendment.[3]

2. The district court granted plaintiffs' motion for a preliminary injunction. A564-579. The court accepted as sincere plaintiffs' religious beliefs and deferred to plaintiffs' assertion that the religious accommodation imposes a "substantial burden" on their exercise of religion under RFRA. A576-578. The court reasoned "that participating in the accommodation would endorse contraceptive services [plaintiffs] deem morally problematic." A576. The court held that, under *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114 (10th Cir.) (en banc), *cert. granted,* 134 S. Ct. 678 (2013), the

[3] While plaintiffs have alleged additional statutory violations. A75-81, their motion for a preliminary injunction invoked only their RFRA and constitutional claims, A123-156.

accommodation could not satisfy RFRA's compelling-interest test. A574. The court did not reach plaintiffs' First Amendment claims. A578 n.9

SUMMARY OF ARGUMENT

The employer plaintiffs are not required to provide contraceptive coverage to their employees. As eligible religious organizations, Reaching Souls and Truett-McConnell can opt out of the coverage requirement by completing a form and providing a copy to their third party administrators. And because their self-insured plan, the GuideStone Plan, is a church plan, plaintiffs' third party administrators would not be required to provide contraceptive coverage.

Plaintiffs insist that their third party administrators are subject to regulations that require them to make or arrange separate payments for contraception (at government expense), and plaintiffs argue that it is, in any event, immaterial whether coverage is provided or not. They argue that when Reaching Souls and Truett-McConnell decline to provide coverage to their employees, these employers are, in fact, directing their third party administrators to provide coverage, and that doing so burdens their practice of religion in violation of RFRA.

Plaintiffs cannot transform their right, as eligible organizations, not to provide coverage into a substantial burden by characterizing their decision to opt out as "triggering" others to provide contraceptive coverage. *E.g.*, A140. Eligible organizations that opt out do not "trigger" third parties to provide contraceptive coverage, just as they do not "trigger" the federal government to reimburse third party

administrators for the cost of providing such coverage. If third parties step in and provide coverage, they do so as a result of legal obligations or offers of payment made to them. The sweep of plaintiffs' argument is particularly remarkable because it would convert a right to opt out of providing coverage into a burden on their practice of religion even when no entity is required to provide coverage.

Moreover, the district court erred by ignoring the burden on plaintiffs' students and employees that would result from accepting plaintiffs' claim, despite pre-*Smith* jurisprudence that emphasized the importance of third-party interests to the free-exercise analysis. The district court also erred by deferring to plaintiffs' characterization of the certification as a "substantial burden" on their exercise of religion. It is for courts, not plaintiffs, to decide whether opting out of providing contraceptive coverage affirmatively furthers the provision of contraceptive coverage and therefore burdens plaintiffs' exercise of religion.

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

STANDARD OF REVIEW

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

ARGUMENT

THE CHALLENGED REGULATIONS DO NOT IMPERMISSIBLY BURDEN PLAINTIFFS' EXERCISE OF RELIGION UNDER RFRA.

A. The Challenged Accommodations, Which Allow Plaintiffs to Opt Out of Providing Contraceptive Coverage, Do Not Substantially Burden Plaintiffs' Religious Exercise Under RFRA.

1. Plaintiffs are either not required to provide contraceptive coverage or permitted to opt out of providing such coverage.

Congress enacted RFRA to restore the state of Free Exercise law that prevailed prior to *Employment Division* v. *Smith*, 494 U.S. 872 (1990). *See* 42 U.S.C. § 2000bb(a)(4), (5), and (b)(1). In *Smith*, the Supreme Court held that the Free Exercise Clause does not require religion-based exemptions from neutral laws of general applicability. *See* 494 U.S. at 876-90. RFRA later "adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006).

The initial version of RFRA prohibited the government from imposing any "burden" on free exercise. Congress added the word "substantially" "to make it clear that the compelling interest standards set forth in the act" apply "only to Government

actions [that] place a substantial burden on the exercise of" religion, as contemplated by pre-*Smith* case law. 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); *see ibid.*(statement of Sen. Hatch). *See also Henderson* v. *Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001) ("[O]nly *substantial* burdens on the exercise of religion trigger the compelling interest requirement.") (emphasis added). Consistent with RFRA's restorative purpose, Congress expected courts considering RFRA claims to "look to free exercise cases decided prior to *Smith* for guidance." S. Rep. No. 111, 103d Cong., 1st Sess. 8-9 (1993) (Senate Report); *see* H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993) (same). Whether a burden is "substantial" under RFRA is a question of law, not a "question[] of fact, proven by the credibility of the claimant." *Mahoney* v. *Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011); *see, e.g.*, *Bowen* v. *Roy*, 476 U.S. 693, 701 n.6 (1986) ("Roy's religious views may not accept this distinction between individual and governmental conduct," but the law "recognize[s] such a distinction.").

None of the plaintiffs here is required to provide contraceptive coverage. The only plaintiffs that are subject to the contraceptive coverage requirement concede that they satisfy the criteria for the religious accommodations under which they do not have to provide contraceptive coverage. *See* 45 C.F.R. § 147.131(b), (c)(1); 29 C.F.R. § 2590.715-2713A(a), (b)(1). To opt out of this coverage requirement, Reaching Souls and Truett-McConnell need only complete a form stating that they are eligible and

provide a copy to their third party administrators.[4] *See* 78 Fed. Reg. 39,870-01, 39,874-75 (July 2, 2013); *see, e.g.*, 45 C.F.R. § 147.131(c)(1); 29 C.F.R. § 2590.715-2713A(a)(4), (b)(1), (c)(1); *see also Michigan Catholic Conference* v. *Sebelius*, _ F. Supp. 2d _, 2013 WL 6838707, *7 (W.D. Mich. Dec. 27, 2013), *appeal pending*, No. 13-2723 (6th Cir.) (eligible organizations need only "attest to [their] religious beliefs and step aside"). Indeed, plaintiffs presumably would need to inform their third party administrators of their objection even if they were automatically exempt from the coverage requirement, to ensure that they would not be contracting, arranging, paying, or referring for such coverage. *Univ. of Notre Dame* v. *Sebelius*, _ F. Supp. 2d _, 2013 WL 6804773, *8, *aff'd*, 743 F.3d 547 (7th Cir. 2014).

2. After an eligible organization opts out, contraceptive coverage may be provided independently, by law, without cost to or involvement by the eligible organization.

After the employer plaintiffs, Reaching Souls and Truett-McConnell, decline to offer contraceptive coverage, the third party administrators that administer their self-insured church plan may choose—but are not required—to provide such coverage.

Even were plaintiffs' group health plan not a church plan, the responsibilities that the regulations would place on insurance issuers and third party administrators would require no action by any employer. Employers who opt out will not "contract,

[4] GuideStone does not identify any action it would need to take in order for employers that offer health care coverage through the GuideStone Plan to opt out of contraceptive coverage.

arrange, pay, or refer" for such coverage, 78 Fed. Reg. at 39,874, and the regulations bar insurance issuers and third party administrators from passing along any costs, directly or indirectly, with respect to payments for contraceptive services, *see* 45 C.F.R. § 147.131(c)(2)(ii) (insured plans) ("With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries."); 29 C.F.R. § 2590.715-2713A(b)(2)(i) and (ii) (same for self-insured plans); *see also* 45 C.F.R. § 147.131(c)(2)(i)(A) (separate coverage must be "[e]xpressly exclude[d] . . . from the group health insurance coverage provided in connection with [plaintiffs'] group health plan[s]"); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(A) ("Obligations of the third party administrator" are imposed by regulation, and the employer does "not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services.").

Further, insurance issuers and third party administrators—rather than the eligible organizations—must notify plan participants and beneficiaries of the availability of separate payments for contraceptive services, and "[t]he notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services[.]"

45 C.F.R. § 147.131(d) (insured plans); 29 C.F.R. § 2590.715-2713A(d) (same for self-insured plans).

In this case, moreover, Reaching Souls and Truett-McConnell offer health coverage through the GuideStone Plan, which plaintiffs state is a self-insured church plan that is exempt from ERISA. A20-23. *See* 29 U.S.C. § 1003(b)(2); *see also* 29 U.S.C. § 1002(33) (definition of church plan). ERISA provides no authority to regulate such a church plan or the plan's third party administrators. And no such authority can be derived from the Internal Revenue Code, which confers authority to regulate group health plans but confers no authority separately to regulate third party administrators. *See generally* 26 U.S.C. §§ 9815, 4980D. That authority derives only from ERISA. *See generally* 29 U.S.C. §§ 1135, 1002(16). Thus, plaintiffs' third party administrators will not be obligated to provide contraceptive coverage.

3. Plaintiffs do not object to requirements placed on themselves, but instead to the possibility that the government will pay third parties to provide contraceptive coverage.

Plaintiffs do not contend that their religious exercise is burdened by completing a form that states that they are religious non-profit organizations with religious objections to providing contraceptive coverage. Their objection is instead that after they opt out, federal law requires insurers and third party administrators (other than those administering exempt church plans) to provide coverage independently.

Plaintiffs' attempt to collapse the provision of contraceptive coverage by third parties with their own decision not to provide such coverage fails. Plaintiffs

mistakenly characterize their decision to opt out as "facilitat[ing]," "trigger[ing]," and "designating" others to provide contraceptive coverage. *E.g.*, A140 (characterizing the decision to opt out of providing contraceptive coverage as "providing paperwork that will trigger such benefits; designating another party to provide such benefits; and/or making certifications that would create a duty for third party administrators to provide such benefits."). Employers who decline to provide coverage do not facilitate or trigger insurers or third party administrators to provide coverage. Ordinarily, health insurance issuers and third party administrators make payments for all covered health services. If, after an eligible employer opts out, a third party administrator makes separate payments due to an obligation imposed by the government or the availability of reimbursement by the government, employees and covered dependents will receive coverage for contraceptive services *despite* plaintiffs' religious objections, not *because* of them. Plaintiffs' argument is particularly anomalous because, as discussed, the third party administrators in this case are not required to provide coverage.[5]

The district court was similarly mistaken in characterizing "the acts of executing the form and providing it to a TPA" as "convey[ing] support for the accommodation program and its goal of carrying out ACA's contraceptive mandate."

[5] Plaintiffs contend that one of their third party administrators, Highmark Inc., has indicated it would elect to provide contraceptives upon receipt of plaintiffs' self-certification forms. A317. Even assuming that to be the case, a private third party's independent and voluntary choice to provide contraceptives cannot constitute a government imposed "substantial burden" on plaintiffs' exercise of religion for purposes of RFRA.

A577. The decision to opt out of providing contraceptive coverage cannot be understood to convey support for contraceptives. Indeed, plaintiffs themselves have not made that argument. *See, e.g.*, A38-41 (objecting to "[c]ontracting or [a]rranging for," "[f]acilitating," or "[p]aying for" contraceptives).

In plaintiffs' and the district court's view, it is immaterial whether they are required to offer and pay for contraceptive coverage or whether they may decline to do so. On this reasoning, a conscientious objector could object not only to his own military service, but also to opting out, on the theory that his opt-out would "'trigger' the drafting of a replacement who was not a conscientious objector," *Notre Dame*, 743 F.3d at 556, or, in the district court's view, on the theory that his opt-out would convey support for the draft. "That seems a fantastic suggestion," yet, "confronted with this hypothetical at the oral argument" in *Notre Dame*, the plaintiff's counsel "acknowledged its applicability and said that drafting a replacement indeed would substantially burden the [conscientious objector's] religion." *Ibid.* Indeed, on plaintiffs' theory here, a conscientious objector could object to opting out on the theory that with one more space available in the barracks, the Army would offer to pay an additional soldier to take his place.[6]

[6] Instead of opting out of contraceptive coverage, the employer plaintiffs also could choose to discontinue offering health coverage. In that scenario the employees could purchase health insurance, which covers all essential health benefits including contraceptive benefits, on exchanges where many may qualify for subsidies. *See* 26 U.S.C. § 36B. It is not clear whether plaintiffs believe that this too would "facilitate"

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Nothing in the cases on which plaintiffs rely, or in the pre-*Smith* case law that RFRA restored, supports the remarkable contention that opting out of an obligation may itself be deemed a substantial burden if someone else will take the objector's place. *See, e.g.*, *Notre Dame*, 743 F.3d at 557 (noting the "novelty of [the] claim—not for the exemption . . . but for the right to have it without having to ask for it"); *Korte* v. *Sebelius*, 735 F.3d 654, 687 (7th Cir. 2013) (emphasizing that the plaintiff corporations "are asking for relief from a regulatory mandate that coerces *them* to pay for something—insurance coverage for contraception") (court's emphasis); *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 710-712 (1981) (explaining that the plaintiff was substantially burdened because he was not able to opt out of the job in which he was "engaged directly in the production of weapons"); *see also Tilton* v. *Richardson*, 403 U.S. 672, 689 (1971) (plurality opinion) (rejecting the plaintiffs' claim that "the Free Exercise Clause is violated because they are compelled to pay taxes, the proceeds of which in part finance grants" to religiously-affiliated colleges to which

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or "trigger" contraceptive coverage; but it also would not constitute the kind of burden that is "substantial" under RFRA. This is yet another means by which the employer plaintiffs could avoid providing the coverage to which they object. *See Tony & Susan Alamo Found.* v. *Sec'y of Labor*, 471 U.S. 290, 303-05 (1985) (option to compensate employees by furnishing room and board obviates religious objection to paying cash wages). In that scenario, the employers would save the cost of providing health coverage and instead may be subject to a tax of $2,000 per full-time employee (Reaching Souls presumably would not be subject to any tax because it has only 10 full-time employees). *See* 26 U.S.C. § 4980H(a) and (c). Even were the expense greater, a burden is not substantial when it merely "operates so as to make the practice of their religious beliefs more expensive" or inconvenient. *See Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961).

they objected, on the ground that the plaintiffs were "unable to identify any coercion directed at the practice or exercise of their religious beliefs"); Senate Report 12 (expressly stating that RFRA was not intended to "change the law" as articulated in *Tilton*)[7]; *Kaemmerling* v. *Lappin*, 553 F.3d 669, 673-674, 678-679 (D.C. Cir. 2008) (rejecting RFRA challenge to requirement that prisoner give tissue sample on which DNA analysis would later be carried out because the prisoner did not object in and of itself to bodily violation of giving sample but only to the government's later extracting DNA information).

Unlike the plaintiffs in cases like *Hobby Lobby Stores*, the plaintiffs here need not "contract, arrange, pay, or refer for contraceptive coverage" to which they have religious objections. 78 Fed. Reg. at 39,874. They "need not place contraceptive coverage into 'the basket of goods and services that constitute [their] healthcare plan[s].'" *Priests for Life* v. *U.S. Dep't of Health & Human Servs.* __ F. Supp. 2d __, No. 13-cv-1261, 2013 WL 6672400, at *10 (D.D.C. Dec. 19. 2013) (quoting *Gilardi* v. *U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), *cert. petn. pending*, No.

[7] Likewise, in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), the plaintiffs challenging a state program providing textbooks to religious schools contended that the program violated the Free Exercise Clause because, "[t]o the extent books are furnished for use in a sectarian school operated by members of one faith, members of other faiths and non-believers are thereby forced to contribute to the propagation of opinions which they disbelieve" and that this was "no less an interference with religious liberty than forcing a man to attend a church." Br. of Appellants 35, *Allen*, *supra* (No. 660). The Court rejected that contention, holding that such a claim of indirect financial support did not constitute coercion of the plaintiffs "as individuals in the practice of their religion." *Allen*, 392 U.S. at 249.

13-567). Indeed, the district court in *Notre Dame* observed that the Seventh Circuit emphasized this distinction in *Korte*, "when it stated that the lack of an exemption or accommodation for the for-profit plaintiffs was 'notabl[e],' suggesting that the case might well have come out differently had the *Korte* plaintiffs had access to the accommodation now available to [eligible organizations]." *Notre Dame*, _ F. Supp. 2d _, 2013 WL 6804773, *9 (quoting *Korte*, 735 F.3d at 662). The Seventh Circuit directly addressed this issue in *Notre Dame*, where the court of appeals concluded that nothing in *Korte* supported the plaintiff's challenge to the accommodations. 743 F.3d at 558 ("Notre Dame can derive no support from our decision in *Korte* v. *Sebelius*, 735 F.3d 654 (7th Cir. 2013), heavily cited in the university's briefs.").

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

Plaintiffs (and the district court) erroneously assume that the RFRA inquiry should evaluate the nature of the asserted burden placed on their exercise of religion without regard to the burden on third parties that would result from accepting their position. In their view, it is immaterial whether an employer's assertion of a right under RFRA would deprive its employees of health care coverage.

That approach is at odds with the pre-*Smith* jurisprudence incorporated by RFRA and with both of the free-exercise decisions cited in RFRA itself, *see* 42 U.S.C. § 2000bb(b)(1), which emphasized the importance of third-party interests to the free-exercise analysis. In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the Court accepted the free

exercise claim only after stressing that "recognition of the [employee's] right to unemployment benefits under the state statute" did not "serve to abridge any other person's religious liberties." *Id.* at 409. In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), the Court held that the Free Exercise Clause required an exemption from compulsory education laws for Amish parents only after determining that the parents had "carried" the "difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education," thus establishing that there was only a "minimal difference between what the State would require and what the Amish already accept." *Id.* at 235-236; *see id.* at 222. Moreover, the Court in *Yoder* emphasized that its holding would not extend to a case in which an Amish child affirmatively wanted to attend school over his parents' objection. *See id.* at 231-232. And, in *United States* v. *Lee,* 455 U.S. 252 (1982), the Court's rejection of the employer's free-exercise claim relied on the fact that exempting the employer from the obligation to pay Social Security taxes would "operate[] to impose the employer's religious faith on the employees," who would be denied the benefits to which they were entitled by federal law. *Id.* at 261.

RFRA is not properly interpreted to create tension with the approach of these pre-*Smith* cases.[8] Indeed, the Supreme Court has stressed that in "[p]roperly applying"

[8] The types of accommodations cited in the debates prior to enactment of RFRA did not impose substantial costs or burdens on third parties. *See, e.g.*, 139 Cong. Rec. E1234-01 (daily ed. May 11, 1993) (statement of Rep. Cardin) (citing as examples

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the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which was modeled on RFRA, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries[.]" *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005).[9] *Cf. Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 80 (1977) (Title VII's reasonable-accommodation requirement does not entitle employee to a religious accommodation that would come at the expense of other employees).

5. It is the province of this Court to consider whether regulations that allow plaintiffs to decline to provide contraceptive coverage "substantially" burden their exercise of religion under RFRA.

Although a court accepts a litigant's sincerely held religious beliefs, it must assess the nature of a claimed burden on religious exercise to determine whether, as a legal matter, that burden is "substantial" under RFRA. *See, e.g.*, *Bowen* v. *Roy*, 476 U.S. 693, 701 n.6 (1986) ("Roy's religious views may not accept this distinction between

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of contemplated accommodations ensuring burial of veterans in "veterans' cemeteries on Saturday and Sunday . . . if their religious beliefs required it" and precluding autopsies "on individuals whose religious beliefs prohibit autopsies"); 139 Cong. Rec. S14350-01 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (contemplated accommodations include allowing parents to home school their children, allowing individuals to volunteer at nursing homes, and allowing families to decline autopsies). Such accommodations do not require third parties to forfeit federal protections or benefits to which they are entitled.

[9] For this reason, *Cutter* rejected an Establishment Clause challenge to RLUIPA. Indeed, the Supreme Court has held that, under certain circumstances, an accommodation that imposes burdens on employees can violate the Establishment Clause. *See Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 708-11 (1985) (holding that a statute requiring an employer to accommodate an employee's Sabbath observance without regard to the burden such an accommodation would impose on the employer or other employees violated the Establishment Clause).

individual and governmental conduct," but the law "recognize[s] such a distinction.") ; *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448 (1998) (similar); *Kaemmerling*, 553 F.3d at 679 ("[a]ccepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened"). Plaintiffs cannot preclude that inquiry by collapsing the question of substantial burden into the sincerity of their beliefs. Were that the case, any person would be able not only to declare a sincerely held religious belief but also to demand absolute deference to its assessment of what constitutes a substantial burden on that belief.

The district court erred by accepting (A576-577) not only that plaintiffs' religious beliefs are sincere but *also* that the challenged right to opt out creates a "substantial" burden on their "exercise of religion" as contemplated by RFRA. This approach does not accord with settled law. *See, e.g., Bowen*, 476 U.S. at 701 n.6; *Lyng*, 485 U.S. at 448; *Kaemmerling*, 553 F.3d at 679; *Mahoney*, 642 F.3d at 1121; *see* 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (explaining addition of the "substantial burden" requirement); *see also Tilton*, 403 U.S. at 689; *Allen*, 392 U.S. at 248-249. This Court's decision in *Hobby Lobby* does not support plaintiffs' contention that courts are bound by their assertion of a substantial burden. Because the for-profit corporation plaintiffs in that case were not eligible for the accommodations (and thus were required to contract, arrange, and pay for contraceptive coverage), the

Court did not address whether an accommodation that requires a plaintiff to do nothing beyond opting out, after which the government may require or offer to pay *others* to provide coverage, imposes a "substantial" burden as contemplated by RFRA. *See Hobby Lobby Stores, Inc.*, 723 F.3d at 1140-1141.

In short, while this Court does not scrutinize the sincerity of plaintiffs' religious beliefs, it properly determines whether the challenged regulations impose a substantial burden on those beliefs as provided for by RFRA and pre-*Smith* free-exercise law. Plaintiffs may decline to provide contraceptive coverage without facing any penalties. RFRA does not allow plaintiffs to block the government and third parties from making payments for contraceptive services.

B. Plaintiffs' Claims Would Fail Even If the Accommodations Were Subject to RFRA's Compelling-Interest Test.

Plaintiffs' claims would fail even if the accommodations were subject to RFRA's compelling-interest test. In *Hobby Lobby*, this Court held that the interests in public health and gender equality did not justify the requirement that employer-sponsored plans cover contraception. 723 F.3d at 1143-1145. As the Court is aware, *Hobby Lobby* is pending before the Supreme Court. We respectfully submit that its analysis of these two compelling interests is incorrect for the reasons set out in the government's Supreme Court briefs, but we recognize that *Hobby Lobby* controls at this juncture with respect to the plans offered by for-profit corporations.

At issue in this case, however, are a far narrower set of regulations, which allow plaintiffs to opt out of providing contraceptive coverage and then provide that the government will pay third parties who voluntarily choose to make or arrange separate payments. Plaintiffs' extraordinarily broad argument is that religious objectors may object not only to *their* complying with legal obligations but also to the fact that only if they decline to comply will the government pursue its policy objectives in another way.

The government's ability to accommodate religious concerns in this and other schemes depends on its ability to ask that religious objectors who do not belong to a pre-defined class (such as exempt organizations under the Internal Revenue Code) certify that they are entitled to the religious exception. *See Notre Dame*, 743 F.3d at 557 ("The novelty of [plaintiff's] claim—not for the exemption, which it has, but for the right to have it without having to ask for it—deserves emphasis."). It also depends on the government's ability to fill the gaps created by the accommodations. Plaintiffs' analysis, on the other hand, asserts that it is insufficient to permit an objector to opt out of an objectionable requirement; the government may not shift plaintiffs' obligations to a third party but must, in their view, fundamentally restructure its operations. As the Supreme Court admonished in its pre-*Smith* decisions, "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen*, 476 U.S. at 699. Plaintiffs' reasoning

would fundamentally undermine the means by which the government accommodates religious concerns and would impair the government's operations.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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APRIL 2014

REQUEST FOR ORAL ARGUMENT

This appeal presents the question whether the Religious Freedom Restoration Act ("RFRA") allows employers not only to opt out of providing federally required health coverage benefits but also to prevent third parties from providing such coverage. The same issue is pending before other circuits. Given the importance of the issue, the government respectfully requests oral argument.

CERTIFICATIONS OF COMPLIANCE

I hereby certify this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 6,628 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 April 14, 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system and caused seven hard copies to be delivered within two business days. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Patrick G. Nemeroff
Patrick G. Nemeroff

ADDENDUM

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45 C.F.R. § 147.131

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

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

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.
>
> (2) The organization is organized and operates as a nonprofit entity.
>
> (3) The organization holds itself out as a religious organization.
>
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

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

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

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

(2) Payments for contraceptive services--

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

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

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

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

(e) Reliance--

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

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

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

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

29 C.F.R. § 2590.715-2713A

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

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

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

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

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

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

(A) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

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

(iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

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

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

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

(4) A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

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

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

(2) Payments for contraceptive services--

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

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

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

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

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

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

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

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

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

26 C.F.R. § 54.9815-2713A

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

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) on account of religious objections.
>
> (2) The organization is organized and operates as a nonprofit entity.
>
> (3) The organization holds itself out as a religious organization.
>
> (4) The organization self-certifies, in a form and manner specified by the Secretaries of Health and Human Services and Labor, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

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

> (i) The eligible organization or its plan contracts with one or more third party administrators.
>
> (ii) The eligible organization provides each third party administrator that will process claims for any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section, which shall include notice that--
>
> > (A) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive

services, or contribute to the funding of contraceptive services; and

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

(iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

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

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

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

(4) A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

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

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

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

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

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

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

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

(e) Reliance--insured group health plans.

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

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

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

42 U.S.C. § 2000bb-1

(a) In general

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

(b) Exception

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

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

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

(c) Judicial relief

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

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

REACHING SOULS INTERNATIONAL, INC., *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. CIV-13-1092-D
KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, *et al.*,	)	
Defendants.	)	

MEMORANDUM DECISION AND ORDER

Before the Court are Plaintiffs' Motion for Preliminary Injunction [Doc. No. 7] and Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction [Doc. No. 51]. Plaintiffs' Motion seeks relief pursuant to Fed. R. Civ. P. 65(a) from federal regulations implementing the Affordable Care Act ("ACA")[1] that provide a mechanism for certain religious employers to avoid the mandate to include contraceptive services in group health plan coverage, by executing a required self-certification form. This mechanism – referred to as the "accommodation" – is now codified in 26 C.F.R. § 54.9815-2713A, 29 C.F.R. § 2590.715-2713A, and 45 C.F.R. § 147.131. Defendants' Motion seeks dismissal of the action pursuant to Fed. R. Civ. P. 12(b)(1) on the ground that Plaintiffs lack constitutional standing to challenge the accommodation. The Motions, which are fully briefed and at issue, were the subject of a hearing held December 16, 2013.[2]

[1] The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

[2] The purposes of the hearing were to receive any relevant evidentiary materials and to hear oral arguments. The parties elected not to present evidence but, instead, relied on written materials submitted with their briefs, except Plaintiffs provided copies of certain regulations and EBSA Form 700.

Background

Plaintiffs Reaching Souls International, Inc. and Truett-McConnell College, Inc. are nonprofit religious organizations that provide benefits to employees through a group health plan sponsored by Plaintiff GuideStone Financial Resources of the Southern Baptist Convention ("GuideStone"). The plan provides group health benefits on a self-insured basis for organizations associated with the Southern Baptist Convention, which share its religious views regarding abortion and contraception, and rely on GuideStone to provide coverage consistent with those views. Defendants are federal agencies and officials responsible for promulgating ACA's implementing regulations.[3] During the rule-making process, the accommodation was adopted as a means for nonexempt religious organizations that provide employee health benefits and have religious objections to some contraceptive methods, to comply with ACA's mandate of contraceptive coverage as a preventive care service for women. *See* 42 U.S.C. § 300gg-13. Plaintiffs' Complaint asserts numerous statutory and constitutional challenges to the accommodation. The primary focus of Plaintiffs' Motion and supporting arguments, however, are the Religious Freedom Restoration Act of 1993 as amended, 42 U.S.C. § 2000bb *et seq*. ("RFRA"), and the Tenth Circuit's decision in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir.), *cert. granted*, 82 U.S.L.W. 3139 (2013). Also, Plaintiffs seek injunctive relief broad enough to protect a putative class of similarly situated employers, as defined in their Complaint. *See* Compl. [Doc. No. 1], ¶ 18.[4]

[3] Defendants are: Kathleen Sebelius, Secretary of the United States Department of Health and Human Services; United States Department of Health and 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; and United States Department of the Treasury.

[4] Alternatively, Plaintiffs have filed a Motion for Class Certification [Doc. No. 8] to obtain class-wide relief from enforcement of the contraceptive mandate against similarly situated, nonexempt religious organizations.

Defendants deny this case is controlled by *Hobby Lobby*, which concerned the contraceptive-coverage mandate rather than the accommodation. Defendants concede, however, that this Court is bound by the Tenth Circuit's decision of certain issues and must find in Plaintiffs' favor on parts of the preliminary injunction analysis. Also, if Plaintiffs' Motion is granted, Defendants "do not object to the scope of the resulting preliminary injunction including the named plaintiffs as well as any members of the class plaintiffs have proposed in their complaint." *See* Defs.' Mem. Opp'n Pls.' Mot. Prelim. Inj. [Doc. No. 50], at 40. The focus of Defendants' Motion, and their opposition to Plaintiffs' Motion for Preliminary Injunction, is a contention that the accommodation will not result in actual injury to Plaintiffs (as required for standing) or substantially burden their religious beliefs (as required to succeed under RFRA). Defendants do not question the sincerity of Plaintiffs' stated beliefs, but Defendants instead argue that any burden on those beliefs is either illusory, speculative, or *de minimis*, for reasons explained *infra*.

Findings of Fact

Many facts relevant to the Court's analysis of the Motions are undisputed. Because the allegations of the Complaint and statements in affidavits regarding Plaintiffs' organizational structure, religious character, and religious beliefs are unchallenged, they are accepted as true for present purposes.

The Southern Baptist Convention is an association of Christian churches that share common religious beliefs, including support for the sanctity of human life from conception to natural death, and opposition to abortion and abortion-inducing drugs. GuideStone is a nonprofit corporation formed and controlled by the Southern Baptist Convention; it is a tax-exempt church benefits board that assists churches and other religious organizations by facilitating retirement plan services, health benefits coverage, risk management, and other benefit programs. GuideStone established the

GuideStone Plan as a multiple-employer, self-insured health plan that qualifies as a "church plan" and thus is not subject to ERISA.[5] Consistent with the religious convictions of the Southern Baptist Convention, the GuideStone Plan does not cover expenses associated with the elective termination of a pregnancy, including contraceptive drugs or devices considered to be abortifacients. GuideStone has agreements with two corporations, one of which is Highmark Health Services, to provide claims administration services.

Reaching Souls International, Inc. ("Reaching Souls") is a nonprofit corporation founded by a Southern Baptist minister for an evangelical purpose. Its principal officers are Southern Baptist ministers and its faith-based ministry includes training and support for missionaries in Africa, India, and Cuba and an orphan-care program. Truett-McConnell College, Inc. ("Truett-McConnell") is a nonprofit corporation owned by the Georgia Baptist Convention that operates a private, Christian liberal arts college. Both organizations have adopted the GuideStone Plan as a means to provide comprehensive health care benefits for their employees. Reaching Souls has approximately 10 full-time employees; Truett-McConnell has approximately 80 full-time employees. Neither organization qualifies for ACA's "religious employer" exemption, *see* 45 C.F.R. §§ 147.130(a)(1)(iv)(B), 147.131(a); and the GuideStone Plan does not qualify for ACA's "grandfathered" health plan exemption, *see* 26 C.F.R. § 54.9815-1251T.

Although the parties disagree whether the contraceptive drugs to be covered under ACA's mandate are abortifacients, it is undisputed that Plaintiffs oppose providing coverage for the same contraceptive methods at issue in *Hobby Lobby*, 723 F.3d at 1123, 1125, on account of religious objections. Thus, under the challenged regulations, Reaching Souls, Truett-McConnell, and other

[5] The Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq*. The definition of "church plan" appears at § 1002(33); the exemption appears at § 1003(b)(2).

similarly-situated employers would qualify as an "eligible organization" for the accommodation if they execute the required self-certification form and provide it to a third party administrator ("TPA") for the GuideStone Plan. *See* 26 C.F.R. § 54.9815-2713A(a)-(b); 29 C.F.R. § 2590.715-2713A(a)-(b); 45 C.F.R. § 147.131(b). Under the accommodation process contemplated by the regulations, a TPA receiving notice of self-certification would provide or arrange payments for mandated contraceptive services (including those objected to by Plaintiffs), and could seek reimbursement for the covered services plus an additional "allowance for administrative costs and margin" of at least 10 percent of total payments. *See* 45 C.F.R. § 156.50(d)(3)(ii). The TPA would also provide notice to plan participants and beneficiaries of the availability of contraceptive coverage, without cost sharing. *See* 26 C.F.R. § 54.9815-2173A(d); 29 C.F.R. § 2590.715-2173A(d).

Reaching Souls, Truett-McConnell, and other employers who have adopted the GuideStone Plan face a deadline of January 1, 2014, to elect among four alternatives: 1) discontinue participation in the GuideStone Plan and secure alternative coverage that complies with ACA's contraceptive mandate; 2) violate the mandate and incur penalties of $100 per day for each affected individual, *see* 26 U.S.C. § 4980D(b)(1); 3) discontinue all health plan coverage for employees;[6] or 4) self-certify that the organization qualifies for the accommodation. Similarly, GuideStone must decide by December 31, 2013, whether to: 1) do nothing and expose nonexempt employers to ACA penalties for failing to provide contraceptive coverage under the GuideStone Plan, unless the employers discontinue participation in the plan; 2) assist eligible organizations with the accommodation process; or 3) discontinue coverage under the GuideStone Plan for organizations

[6] All Plaintiffs state that their religious beliefs require them to provide health care coverage for employees, as a matter of value and respect for employees and commitment to the well-being of employees and their families. Cancellation of health coverage would also subject a "large employer" like Truett-McConnell to an annual penalty of $2,000 per full-time employee. *See* 26 U.S.C. § 4980H(a), (c)(1)-(2).

that do not satisfy ACA's "religious employer" exemption. It is undisputed that complying with the mandate, incurring penalties for noncompliance, or discontinuing coverage would cause actual injury to Plaintiffs and substantially burden their religious beliefs. The questions presented – for purposes of standing and success under RFRA – involve only the impact of the accommodation on eligible organizations that participate in the GuideStone Plan.

All Plaintiffs have presented statements regarding their religious beliefs that reflect religious objections to participating in the accommodation process. Plaintiffs believe that executing the self-certification form, or otherwise assisting in the implementation of ACA's contraceptive mandate, would cause them to facilitate contraceptive coverage and would violate sincere religious principles.

Motion to Dismiss

A. Standard of Decision

Standing to sue is a jurisdictional issue properly raised by a Rule 12(b)(1) motion. *See Wilderness Society v. Kane County*, 632 F.3d 1162, 1168 (10th Cir. 2011) (en banc); *see also Colorado Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1227 (10th Cir. 2004). Defendants' Motion also raises a factual attack on jurisdiction, that is, Defendants "go beyond the allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends." *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1303 (10th Cir. 2001) (internal quotation omitted). Defendants contend the injury alleged in the Complaint – requiring Plaintiffs to trigger or facilitate coverage for contraceptive services – does not actually exist and "there is absolutely no connection between plaintiffs and contraceptive coverage" under the accommodation. *See* Defs.' Mot. Dism. [Doc. No. 51] at 18.

"In addressing a factual attack, the court does not presume the truthfulness of the complaint's factual allegations, but has wide discretion to allow affidavits, other documents, and a limited

evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *see E.F.W.*, 264 F.3d at 1303 (internal quotation omitted). In the context of this case, however, there are no disputed jurisdictional facts. As discussed *infra*, Defendants' Motion is based on a contention that the challenged regulations do not have the legal effect alleged by Plaintiffs and, even if Plaintiffs could establish their factual allegations, they cannot show an injury that would establish standing. Therefore, Defendants' Motion may properly be resolved under Rule 12(b)(1).[7]

B. Plaintiffs' Standing

Defendants' Motion challenges Plaintiffs' Article III standing. To overcome the Motion, Plaintiffs "must show an injury that is '[1] concrete, particularized, and actual or imminent; [2] fairly traceable to the challenged action; and [3] redressable by a favorable ruling.'" *Hobby Lobby*, 723 F.3d at 1126 (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013)) (internal quotation omitted). The first element requires that Plaintiffs "must have suffered an 'injury in fact' – an invasion of a legally protected interest." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

The asserted injury in this case flows from the accommodation's requirement that eligible religious organizations, like Reaching Souls and Truett-McDonnell, must execute the self-certification form and initiate a process by which contraceptive services that they oppose on

[7] Under the law of this circuit, a Rule 12(b)(1) motion that raises a factual attack on subject matter jurisdiction must be converted to a Rule 56 motion for summary judgment "when resolution of the jurisdictional question is intertwined with the merits of the case." *See Pringle v. United States*, 208 F.3d 1220, 1222 (10th Cir. 2000); *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995); *see also Los Alamos Study Group v. United States Dep't of Energy*, 692 F.3d 1057, 1063-64 (10the Cir. 1012). In this case, however, Defendants maintain that the jurisdictional issue of standing may be resolved "on the pleadings, documents incorporated by reference into the complaint, and judicially noticeable matters – all of which the Court may consider in reviewing defendants' motion to dismiss." *See* Defs.' Reply Supp. Mot. Dism. [Doc. No. 59] at 2-3. Thus, the Court finds no need to treat Defendants' Motion as a summary judgment motion. Further, any factual disputes are not germane to the Court's jurisdictional analysis, discussed *infra*.

religious grounds may be provided free of charge to female employees and dependents who are health plan beneficiaries. Defendants' position in this case is that a TPA of a church plan, like the GuideStone Plan, is not required to cover contraceptive services because ERISA provides the only implementing or enforcement authority for the accommodation, and church plans are not subject to ERISA. Defendants thus argue that the accommodation regulations do not apply to the GuideStone Plan as a matter of law, and Plaintiffs' (or a TPA's) mistaken legal view that the regulations do apply cannot create an actual or imminent injury. Defendants' litigation position in this case has been taken in only one other case for which a written decision is available, *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12 Civ. 2542, 2013 WL 6579764, *6 (E.D.N.Y Dec. 16, 2013) (to be published), and was first asserted on October 31, 2013. *See* Defs.' Resp. Pls.' Mot. Accelerated Briefing Sched. [Doc. No. 19] at 2-3 n.1. Upon consideration, the Court is not persuaded that Defendants' position deprives Plaintiffs of standing.

Plaintiffs' religious beliefs – the sincerity of which is unchallenged – prevent them from participating in a regulatory process designed to provide health care coverage that they oppose on religious grounds, even if the extent of their participation is taking the first step required by the regulations and permitting the remaining process to play out through other actors. By signing the form, an eligible organization self-certifies that it qualifies for the accommodation and, thus, that its employees and their dependents qualify for contraceptive coverage outside of their health plan. After signing the self-certification form, Plaintiffs must provide it to a TPA for the GuideStone Plan in order to satisfy ACA's contraceptive mandate through the accommodation process formulated by Defendants to extend contraceptive coverage to employees of nonexempt religious organizations. The self-certification form itself notifies a TPA of the obligations set forth in federal regulations regarding the accommodation. These obligations include providing written notice to health plan

participants and beneficiaries of the availability of contraceptive coverage without cost sharing. Regardless whether the notice actually results in the provision of contraceptive services to which Plaintiffs object, the accommodation requires that Plaintiffs either participate in a procedure devised by federal officials to implement ACA's mandate of contraceptive coverage, or incur substantial penalties. Either spiritual or financial harm is sufficient, by itself, to establish an actual injury, traceable to Defendants, and redressable by a ruling in Plaintiffs' favor.

The Court reaches the same conclusion as the district judge in *Roman Catholic Archdiocese of New York*, the Honorable Brian M. Cogan, who capably expressed the analysis of Plaintiffs' injury-in-fact:

> [P]laintiffs' alleged injury is that the [accommodation] renders them complicit in a scheme aimed at providing coverage to which they have a religious objection. This alleged spiritual complicity is independent of whether the scheme actually succeeds at providing contraceptive coverage. It is undisputed that all of the non-exempt plaintiffs will still have to either comply with the Mandate and provide the objectionable coverage or self-certify that they qualify for the accommodation. Plaintiffs allege that their religion forbids them from completing this self-certification, because to them, authorizing others to provide services that plaintiffs themselves cannot is tantamount to an endorsement or facilitation of such services. Therefore, regardless of the effect on plaintiffs' TPAs, the regulations still require plaintiffs to take actions they believe are contrary to their religion.

Roman Catholic Archdiocese of New York, 2013 WL 6579764 at *7 (citations omitted).

In short, the alleged fact that the accommodation requires Plaintiffs to take action that is repugnant to their sincere religious beliefs constitutes a sufficient injury to satisfy the constitutional minimum of standing. Therefore, the Court finds that Plaintiffs have standing to challenge the accommodation.

Motion for Preliminary Injunction

To prevail on their Motion, Plaintiffs must establish: a) they are likely to succeed on the merits; b) they are likely to suffer irreparable harm in the absence of preliminary relief; c) the

balance of equities tips in their favor; and d) an injunction is in the public interest. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011); *see also Hobby Lobby*, 723 F.3d at 1128. In this federal circuit, courts generally apply a modified standard under which, if a movant establishes that other requirements tip strongly in his favor, the movant "may meet the requirement for showing success on the merits by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1255-56 (10th Cir.2003); *see O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 976 (10th Cir. 2004) (en banc), *aff'd sub nom.*, 546 U.S. 418 (2006). The modified standard does not apply, however, to certain types of "historically disfavored" preliminary injunctions. *See O Centro*, 389 F.3d at 975; *see also Attorney General v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009); *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). Also, the modified standard does not apply where the movant seeks "to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme." *See Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003); *see also Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1298 n.6 (10th Cir. 2006); *Aid for Women v. Foulston*, 441 F.3d 1101, 1115 (10th Cir. 2006). Courts "presume that all governmental action pursuant to a statutory scheme is 'taken in the public interest.'" *See Aid for Women*, 441 F.3d at 1115 n.15.

In this case, Plaintiffs are seeking to restrain action of federal agencies taken in the public interest, and therefore, the modified standard does not apply. Thus, Plaintiffs "must meet the traditional 'substantial likelihood of success' standard." *Nova Health Sys.*, 460 F.3d at 1298 n.6.

A. Likelihood of Success on the Merits

RFRA prohibits the federal government from substantially burdening a person's exercise of religion, unless the government demonstrates that the application of the burden to the person is the least restrictive means of furthering a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1. To establish a claim under RFRA, a plaintiff must prove "the following three elements: (1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion." *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001); *see Hobby Lobby*, 723 F.3d at 1125-1126. The burden then shifts to the government, even at the preliminary injunction stage, to show that the compelling interest test is satisfied. *See Hobby Lobby*, 723 F.3d at 1126; *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). There is no question in this case that Plaintiffs' religious beliefs are sincere and that their opposition to ACA's contraceptive mandate is a religious exercise. Defendants also concede that, under the holding of *Hobby Lobby*, the federal government cannot satisfy the compelling interest test. *See* Defs.' Mem. Opp'n Pls.' Mot. Prelim. Inj. [Doc. No. 50], at 21. Thus, Plaintiffs' likelihood of success on the merits of their RFRA claim hinges on their ability to establish a substantial burden.

According to the Tenth Circuit, the substantial burden test has three prongs:

> [A] government act imposes a "substantial burden" on religious exercise if it: (1) "requires participation in an activity prohibited by a sincerely held religious belief," (2) "prevents participation in conduct motivated by a sincerely held religious belief," or (3) "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief."

Hobby Lobby, 723 F.3d at 1138 (quoting *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010)). The court of appeals found in *Hobby Lobby* that ACA's coverage mandate substantially burdens the religious exercise of persons who oppose covered contraceptive services on religious grounds under the third, "substantial pressure" prong. Although *Hobby Lobby* is factually

distinguishable, the court of appeals' decision teaches the proper framework for a "substantial pressure" analysis.

"First, we must identify the religious belief in this case." *Id*. at 1140. Like the corporate employers in *Hobby Lobby*, Plaintiffs have religious objections to contraceptive methods that they believe cause the death of a fertilized human embryo, and to providing access to or otherwise supporting contraceptive services related to these methods. Further, in this case, Plaintiffs assert that "as a matter of religious faith, Plaintiffs may not participate in any way in the government's program to provide access to these services." *See* Pls.' Mot. Prelim. Inj. [Doc. No. 7] at 11; *see also* Compl. [Doc. No. 1], ¶¶ 177-78. Defendants dispute whether the specific tasks to which Plaintiffs object, such as signing the self-certification form or providing it to a TPA, constitute "participation" in the program or facilitate access to contraceptive services, but Defendants acknowledge the strength of Plaintiffs' opposition to ACA's contraceptive mandate and the faith-based nature of their opposition.

"Second, we must determine whether this belief is sincere." *Hobby Lobby*, 723 F.3d at 1140. Here, as in *Hobby Lobby*, Plaintiffs' sincerity is unquestioned.

"Third, we turn to the question of whether the government places substantial pressure on the religious believer." *Id*. Here, as in *Hobby Lobby*, Plaintiffs contend that the pressure on their religious beliefs is substantial because participation in the accommodation would violate their beliefs, but refusing to participate will expose them to substantial financial penalties or losses. In response, Defendants contend Plaintiffs' view that participating in the accommodation – by self-certifying their eligibility and providing the self-certification form to a TPA – is legally flawed and misguided because their participation would not actually facilitate access to contraceptive coverage for participants and beneficiaries of the GuideStone Plan. Because, according to Defendants, the accommodation does not apply to church plans and a TPA under the GuideStone Plan need not offer

or provide contraceptive coverage, Plaintiffs' self-certification forms would not actually trigger the accommodation process or carry out ACA's contraceptive mandate, and, thus, Plaintiffs' opposition to signing the form is unfounded.

Upon consideration, the Court finds Defendants' argument to be simply another variation of a proposition rejected by the court of appeals in *Hobby Lobby*. In that case, the government argued that complying with the contraceptive mandate was not a substantial burden on the employers' beliefs because the burden arose from the independent acts of third parties, such as employees or dependents who utilized the coverage. This argument was found to be "fundamentally flawed because it advances an understanding of 'substantial burden' that presumes 'substantial' requires an inquiry into the theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs." *Id*. at 1137 (emphasis in original). The court determined that the question for decision was "not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity." *Id*.

In this case, Plaintiffs have measured their complicity in facilitating ACA's contraceptive mandate and determined that participating in the accommodation would endorse contraceptive services they deem morally problematic. As discussed *supra*, Plaintiffs' religious beliefs do not permit them to take the affirmative steps necessary to qualify their employees for certain contraceptive services under ACA's coverage scheme. Regardless whether the self-certification form actually results in the provision of such contraceptive coverage or services,[8] Plaintiffs believe

[8] Evidence was presented by Plaintiffs, without effective response by Defendants, that the largest GuideStone TPA, Highmark Inc. ("Highmark"), will provide the objected-to contraceptives upon receipt of the self-certification form. *See* Pls.' Combined Reply Br., Ex. 1, Ormont Decl. [Doc. No. 56-1]. Defendants' (continued...)

that the acts of executing the form and providing it to a TPA convey support for the accommodation program and its goal of carrying out ACA's contraceptive mandate. The self-certification form states it certifies that the organization's health plan qualifies for the accommodation with respect to the mandate, and it provides notice to a TPA of obligations under the accommodation regulations. In addition, the model language of the written notice that a TPA must give to plan beneficiaries states that their employer has provided the certification, and so separate contraceptive coverage is available from a third party. *See* 26 C.F.R. § 54.9815-2713A(d). Further, as noted, at least one TPA for GuideStone, Highmark, has adopted a plan to carry out the accommodation. Regardless whether Highmark is compelled to comply or does so voluntarily, Plaintiffs' concern for apparent complicity in the accommodation is not unfounded. In short, this Court, like Judge Cogan, rejects Defendants' "it's just a form" argument. *See Roman Catholic Archdiocese of New York*, 2013 WL 6579764 at *14.

Under *Hobby Lobby*, the Court's "only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." *Hobby Lobby*, 723 F.3d at 1137. Upon consideration of the record, the Court finds the accommodation scheme applies substantial pressure on Plaintiffs to violate their belief that participating in or facilitating the accommodation is the moral equivalent of directly complying with the contraceptive mandate. By refusing to participate, Reaching Souls, Truett-College, and similarly situated organizations face substantial financial penalties, and their refusal will cause a substantial financial loss to GuideStone if it excludes nonexempt, noncompliant organizations from the

[8](...continued)
litigation position that there is no ERISA enforcement mechanism regarding self-insured church plans utterly fails to address the real potential for voluntary compliance by TPAs such as Highmark.

GuideStone Plan. Here, as in *Hobby Lobby*, the Court finds that Plaintiffs have made a threshold showing of a substantial burden, and, thus, a likelihood of success on their RFRA claim.[9]

B. Remaining Requirements

The Tenth Circuit has held that "establishing a likely RFRA violation satisfies the irreparable harm factor." *Hobby Lobby*, 723 F.3d at 1146; *see Kikumura*, 242 F.3d at 963. The Court further finds that the harm to Plaintiffs without the injunction outweighs any harm to Defendants' interest in carrying out the accommodation. As noted in *Hobby Lobby*, the government has already granted an exemption from the contraceptive mandate to many religious organizations, and only a small number of contraceptive services covered by the mandate are at issue. In addition, the government has taken the position in this case that the accommodation is not enforceable against the GuideStone Plan anyway. On the other hand, Plaintiffs face the real dilemma of violating their religious beliefs or incurring financial penalties. Finally, in light of the current legal uncertainty regarding the enforceability of the contraceptive mandate in light of *Hobby Lobby* and other federal appellate decisions, the Court finds that the public interest lies in preserving the status quo and preventing enforcement of the accommodation until Plaintiffs' claims are resolved.

Conclusion

In summary, the Court concludes that Plaintiffs have satisfied their burden to establish standing to challenge the accommodation and that a preliminary injunction should issue to prevent the federal government from enforcing the accommodation and contraceptive mandate against them.[10]

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[9] In light of this conclusion, the Court need not reach the First Amendment claims on which Plaintiffs also rely in their Motion.

[10] Plaintiffs have offered to provide security, as required by Fed. R. Civ. P. 65(c), by posting a bond (continued...)

ORDER

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Preliminary Injunction [Doc. No. 7] is GRANTED, and that Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction [Doc. No. 51] is DENIED. The following preliminary injunction is issued:

PRELIMINARY INJUNCTION

Defendants, their agents, officers, and employees are hereby enjoined and restrained from taking any enforcement action against Plaintiffs, or any employers who provide medical coverage to employees under the GuideStone Plan and who are "eligible organizations" as defined by 26 C.F.R. § 54.9815-2713A(a), 29 C.F.R. § 2590.715-2713A(a), and 45 C.F.R. § 147.131(b), for not providing coverage for contraceptive services as required by 42 U.S.C. § 300gg-13(a)(4) and related regulations, including any penalties, fines and assessments for noncompliance with that statute, until further order of the Court.

IT IS SO ORDERED this 20th day of December, 2013.

TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE

[10](...continued)
in an amount to be determined by the Court. Defendants have not requested security, and this issue was not addressed in further briefing or argument. In this circuit, "trial courts have 'wide discretion under Rule 65(c) in determining whether to require security.'" *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009) (quoting *Winnebago Tribe of Nebraska v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003)). Under the circumstances presented, the Court finds that Defendants are unlikely to suffer monetary harm if it is later determined they were wrongfully enjoined, and thus, no security is necessary.