IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SHARPE HOLDINGS, INC., a Missouri corporation; OZARK NATIONAL LIFE INSURANCE COMPANY, a Missouri corporation; CNS CORPORATION, a Missouri corporation; NIS FINANCIAL SERVICES, INC., a Missouri corporation; CNS INTERNATIONAL MINISTRIES, INC., a Missouri non-profit corporation; HEARTLAND CHRISTIAN COLLEGE, a Missouri non-profit corporation; CHARLES N. SHARPE; JUDY DIANE SCHAEFER; RITA JOANNE WILSON,

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 Eastern District of Missouri No. 12-cv-92 (Noce, Mag. J.)

BRIEF FOR THE APPELLANTS

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SUMMARY OF THE CASE PURSUANT TO EIGHTH CIR. R. 28A(i)

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.

The government believes that oral argument would aid in the consideration of this appeal, and respectfully suggests that twenty minutes be allotted per side to allow sufficient time for the presentation of the case.

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INTRODUCTION

Plaintiffs challenge regulations that establish minimum health coverage requirements under the Affordable Care Act insofar as they include contraceptive coverage as part of women's preventive-health coverage. Plaintiffs acknowledge, however, that they are not required to provide contraceptive coverage. Plaintiffs may opt out of the coverage requirement by informing their 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 do not object to informing their third party administrators of their decision not to provide contraceptive coverage. They object, instead, to requirements imposed not on themselves, but on the third party administrators that administer their self-insured plans. In the case of an insured plan (which is not at issue here), when an eligible organization elects not to provide contraceptive coverage for religious reasons, the insurance company that issues the policy for that organization's employees is required to provide separate payments for contraceptive services for the employees. *See* 45 C.F.R. § 147.131(c)(2)(i)(B), (c)(2)(ii), and (f). In the case of a self-insured plan, this requirement generally must be met by the third party administrator that administers the plan. *See* 29 C.F.R. § 2590.715-2713A(b)(3). In all cases, the organization eligible for a religious accommodation does not administer this coverage and does not bear any direct or indirect costs of the coverage.

Although plaintiffs are thus free to opt out of providing contraceptive coverage, they nevertheless claim that the challenged regulations impermissibly burden their exercise of religion in violation of the Religious Freedom Restoration Act ("RFRA"). But plaintiffs cannot transform their right, as eligible organizations, *not* to provide coverage into a substantial burden by characterizing their decision to opt out as "facilitating" others to provide contraceptive coverage. *E.g.,* A27. Eligible organizations that opt out do not "trigger" or "facilitate" third parties to provide contraceptive coverage, just as they do not "trigger" or "facilitate" 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. 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), *rehearing en banc denied*, No. 13-3853, ECF 64 (May 7, 2014).

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1343, 1346, 1361, 2201, 2202 and 42 U.S.C. § 2000bb-1. A19. The district court granted plaintiffs' motion for a preliminary injunction on December 30, 2013, A61-65, and defendants filed a timely notice of appeal on February 22, 2014, A66-68. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

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

A. *University of Notre Dame* v. *Sebelius*, 743 F.3d 547 (7th Cir. 2014), *rehearing en banc denied*, No. 13-3853, ECF 64 (May 7, 2014); *Bowen* v. *Roy*, 476 U.S. 693 (1986); *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *United States* v. *Lee,* 455 U.S. 252 (1982).

B. 42 U.S.C. § 2000bb-1.

2. Whether such regulations violate plaintiffs' rights under the Free Exercise Clause of the First Amendment.

A. *Employment Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872 (1990); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993).

B. U.S. Const. amend. I.

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). "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,

[1] An employer is said to have an "insured" plan if it contracts with an insurance company that bears the financial risk of paying health insurance claims. An employer is said to have a "self-insured" plan if it bears the financial risk of paying claims. Many self-insured employers use insurance companies or other third parties to administer their plans, performing functions such as developing networks of providers, negotiating payment rates, and processing claims. In that context, the insurance company or other third party is called a third party administrator or TPA. Employers may be regarded as self-insured even if they purchase a separate insurance policy (known as reinsurance or "stop loss" coverage), which is not a form of health insurance, to protect themselves against unusually high claims costs. *See generally* Congressional Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 6 (2008).

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]

Regardless of the type of plan that it sponsors, 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.*

[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).

B. Factual Background and Prior Proceedings

1. The plaintiffs involved in this appeal are CNS International Ministries, Inc. and Heartland Christian College, two non-profit organizations that offer health coverage to their employees through a self-insured plan. A15-16. CNS International Ministries, Inc. has more than 50 employees, *ibid.*, and Heartland Christian College has fewer than 50 employees, A36. The remaining plaintiffs in this case are for-profit entities that challenge the contraceptive coverage provision and do not claim entitlement to an accommodation described above. The district court addressed the for-profit plaintiffs' claims in a separate temporary restraining order (A49-58) and preliminary injunction order (A59-60), neither of which is at issue in this appeal.

The non-profit 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. They argue that opting out of the coverage requirement substantially burdens their religious exercise because doing so "facilitat[es] free access" to contraception. A39. They also allege constitutional claims under the First Amendment.[3]

[3] While plaintiffs have alleged additional constitutional and statutory violations, A41-47, their motion for a preliminary injunction invoked only their RFRA and First Amendment Free Exercise Clause claims, ECF 64.

2. The district court granted the non-profit plaintiffs' motion for a preliminary injunction. A61-65.[4] The court relied on its earlier order granting a preliminary injunction to the for-profit plaintiffs, reasoning that "the arguments for those plaintiffs are substantially similar to the arguments now before the court." A64. The court did not specify whether it granted the preliminary injunction on the basis of the non-profit plaintiffs' RFRA claim or their First Amendment Free Exercise Clause claim. *Ibid.*

SUMMARY OF ARGUMENT

I. The non-profit plaintiffs are not required to provide contraceptive coverage to their employees. As eligible organizations, they can opt out of the coverage requirement by completing a form and providing a copy to their third party administrators. They object to opting out on the ground that, once they have done so, third parties will separately provide payments for contraceptive services without cost to or involvement by plaintiffs.

Plaintiffs cannot convert their opt-out right into a substantial burden by characterizing the opt-out as "facilitating" the provision of contraceptive coverage by others. Eligible organizations that opt out do not "facilitate" the provision of contraceptive coverage by third parties, just as they do not "facilitate" the federal government's reimbursement of third party administrators for the cost of providing

[4] With the consent of the parties, this case was assigned to Magistrate Judge Noce to conduct all proceedings. *See* ECF 12.

such coverage. If third parties step in and provide coverage, they do so as a result of legal obligations placed on them by the government.

Even if the accommodation were subject to RFRA's compelling-interest test, the plaintiffs' claim would fail because the accommodation furthers compelling interests. First, the government has a compelling interest in being able to accommodate religious concerns in this and other schemes by asking religious objectors to identify themselves and by then filling the gaps created by the accommodations. Second, the contraceptive-coverage provision, and the broader framework of which it is part, advance the government's compelling interests in providing uniform insurance benefits, protecting the public health, and providing equal access for women to health-care services. It is difficult to conceive of a regulation that would achieve these compelling interests that is less restrictive than an opt-out option.

II. Plaintiffs' First Amendment Free Exercise Clause claim is similarly without merit. The requirement that non-grandfathered plans cover recommended preventive-health services without cost sharing, including preventive services recommended for women, does not target religious practices in contravention of the Free Exercise Clause. This case bears no resemblance to *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520 (1993), in which a state statute targeted the ritual animal sacrifices by members of a particular church.

STANDARD OF REVIEW

The grant of a request for a preliminary injunction is reviewed for abuse of discretion. *S.J.W. ex rel. Wilson* v. *Lee's Summit R-7 School Dist.*, 696 F.3d 771, 776 (8th Cir. 2012). A district court abuses its discretion by granting a preliminary injunction based on an error of law. *Ibid.*

ARGUMENT

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

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

1. Plaintiffs are permitted to opt out of providing such coverage.

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

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

actions [that] place a substantial burden on the exercise of" religion, as contemplated by pre-*Smith* case law. 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); *see ibid.*(statement of Sen. Hatch). 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); *see also* 146 Cong. Rec. S7774, 7776 (July 27, 2000) (joint statement of Sens. Hatch and Kennedy) (explaining that, for purposes of the Religious Land Use and Institutionalized Persons Act of 2000, which was modeled on RFRA, "[t]he term 'substantial burden' . . . is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise"). 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 non-profit plaintiffs here is required to provide contraceptive coverage. Rather, they concede that they satisfy the criteria for the religious accommodation 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, the non-profit plaintiffs need only complete a form stating

that they are eligible and provide a copy to their third party administrators. *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 (N.D. Ind. Dec. 20, 2013), *aff'd*, 743 F.3d 547 (7th Cir. 2014), *rehearing en banc denied*, No. 13-3853, ECF 64 (May 7, 2014).

2. Plaintiffs object to requirements imposed on third parties, not on themselves.

The responsibilities that the regulations place on insurance issuers and third party administrators require no action by the non-profit plaintiffs. Those plaintiffs will not "contract, arrange, pay, or refer" for such coverage, 78 Fed. Reg. at 39,874, and the regulations bar insurance issuers and third party administrators from passing along any costs, directly or indirectly, with respect to payments for contraceptive services. *See* 45 C.F.R. § 147.131(c)(2)(ii) (insured plans) ("With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or

other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries."); 29 C.F.R. § 2590.715-2713A(b)(2)(i) and (ii) (same for self-insured plans); *see also* 45 C.F.R. § 147.131(c)(2)(i)(A) (separate coverage must be "[e]xpressly exclude[d] . . . from the group health insurance coverage provided in connection with [plaintiffs'] group health plan[s]"); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(A) ("Obligations of the third party administrator" are imposed by regulation, and the employer does "not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services.").

Insurance issuers and third party administrators—rather than the eligible organizations—must notify plan participants and beneficiaries of the availability of separate payments for contraceptive services, and "[t]he notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services[.]" 45 C.F.R. § 147.131(d) (insured plans); 29 C.F.R. § 2590.715-2713A(d) (same for self-insured plans).

The non-profit plaintiffs do not contend that their religious exercise is burdened by completing a form that states that they are religious non-profit organizations with religious objections to providing contraceptive coverage. Their objection is instead that federal law requires insurers and third party administrators to provide coverage after plaintiffs declare that they will not provide coverage

themselves. *See* A39 (objecting that the non-profit plaintiffs will "play a central role in facilitating free access" to contraception); A41 (asserting that "a religious organization's decision to offer health insurance . . . and its self-certification continue to serve as the sole triggers for creating access" to contraception).

Plaintiffs' decision to opt out of providing contraceptive coverage does not "trigger" third parties to perform duties established by federal law any more than it "triggers" the United States to reimburse a third party administrator for its payments on behalf of individuals availing themselves of contraceptive coverage. If, after an eligible employer opts out, an insurance issuer or third party administrator makes separate payments due to an obligation imposed by the government or the availability of reimbursement by the government, employees will receive coverage for contraceptive services *despite* plaintiffs' religious objections, not *because* of them.

In plaintiffs' view, it is immaterial whether they are required to offer and pay for contraceptive coverage or whether they may decline to do so. On this reasoning, a conscientious objector could object not only to his own military service, but also to opting out, on the theory that his opt-out would "'trigger' the drafting of a replacement who was not a conscientious objector." *University of Notre Dame* v. *Sebelius*, 743 F.3d 547, 556 (7th Cir. 2014), *rehearing en banc denied*, No. 13-3853, ECF 64 (May 7, 2014). "That seems a fantastic suggestion," yet, "confronted with this hypothetical at the oral argument" in *Notre Dame*, the plaintiff's counsel "acknowledged its applicability and said that drafting a replacement indeed would substantially burden

the [conscientious objector's] religion." *Ibid.* Similarly, on plaintiffs' reasoning here, the plaintiff in *Thomas* v. *Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), could have demanded not only that he not make weapons but also that he not *opt out* of doing so, because someone else would then take his place on the assembly line.[5]

Nothing in the cases on which plaintiffs rely, or in the pre-*Smith* case law that RFRA restored, supports the contention that opting out of an obligation may itself be deemed a substantial burden if someone else will take the objector's place. *See, e.g.*, *Notre Dame*, 743 F.3d at 557 (noting the "novelty of [the] claim—not for the exemption . . . but for the right to have it without having to ask for it"); *Korte* v. *Sebelius*, 735 F.3d 654, 687 (7th Cir. 2013) (emphasizing that the plaintiff corporations

[5] Instead of opting out of contraceptive coverage, plaintiffs also could choose to discontinue offering health coverage. In that scenario, plaintiffs' 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 constitute "facilitating" contraceptive coverage; but it also would not constitute the kind of burden that is "substantial" under RFRA. This is yet another means by which plaintiffs could avoid providing the coverage to which they object. *See Tony & Susan Alamo Found.* v. *Sec'y of Labor*, 471 U.S. 290, 303-305 (1985) (option to compensate employees by furnishing room and board obviates religious objection to paying cash wages). In that scenario, plaintiffs would save the cost of providing health coverage and instead may be subject to a tax of $2,000 per full-time employee (Heartland Christian College presumably would not be subject to any tax because it has fewer than 50 full-time-equivalent employees). *See* 26 U.S.C. § 4980H(a) and (c)(1). Even were the expense greater, a burden is not substantial when it merely "operates so as to make the practice of their religious beliefs more expensive" or inconvenient. *See Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961).

"are asking for relief from a regulatory mandate that coerces *them* to pay for something—insurance coverage for contraception") (court's emphasis); *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 710-712 (1981) (explaining that the plaintiff was substantially burdened because he was not able to opt out of the job in which he was "engaged directly in the production of weapons"); *see also Tilton* v. *Richardson*, 403 U.S. 672, 689 (1971) (plurality opinion) (rejecting the plaintiffs' claim that "the Free Exercise Clause is violated because they are compelled to pay taxes, the proceeds of which in part finance grants" to religiously-affiliated colleges to which they objected, on the ground that the plaintiffs were "unable to identify any coercion directed at the practice or exercise of their religious beliefs"); Senate Report 12 (expressly stating that RFRA was not intended to "change the law" as articulated in *Tilton*)[6]; *Kaemmerling* v. *Lappin*, 553 F.3d 669, 673-674, 678-679 (D.C. Cir. 2008) (rejecting RFRA challenge to requirement that prisoner give tissue sample on which DNA analysis would later be carried out because the prisoner did not object in and of

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

itself to bodily violation of giving sample but only to the government's later extracting DNA information).

Unlike the plaintiffs in cases like *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013), the non-profit plaintiffs here need not "contract, arrange, pay, or refer for contraceptive coverage" to which they have religious objections. 78 Fed. Reg. at 39,874. They "need not place contraceptive coverage into 'the basket of goods and services that constitute [their] healthcare plan[s].'" *Priests for Life* v. *U.S. Dep't of Health & Human Servs.* __ F. Supp. 2d __, No. 13-cv-1261, 2013 WL 6672400, at *10 (D.D.C. Dec. 19. 2013) (quoting *Gilardi* v. *U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), *cert. petn. pending*, No. 13-567). Indeed, the district court in *Notre Dame* observed that the 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."), *rehearing en banc denied*, No. 13,3853, ECF 64 (May 7, 2014).

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

Plaintiffs assert that, for purposes of RFRA, their exercise of religion is burdened by the provision of health care coverage to their employees by third party administrators as a result of government regulations. 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 to which they are entitled by law.

That approach is at odds with the pre-*Smith* jurisprudence incorporated by RFRA and with both of the free-exercise decisions cited in RFRA itself, *see* 42 U.S.C. § 2000bb(b)(1), which emphasized the importance of third-party interests to the free-exercise analysis. In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the Court accepted the free exercise claim only after stressing that "recognition of the [employee's] right to unemployment benefits under the state statute" did not "serve to abridge any other person's religious liberties." *Id.* at 409. In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), the Court held that the Free Exercise Clause required an exemption from compulsory education laws for Amish parents only after determining that the parents had "carried" the "difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education," thus establishing that there was

only a "minimal difference between what the State would require and what the Amish already accept." *Id.* at 235-236; *see id.* at 222. Moreover, the Court in *Yoder* emphasized that its holding would not extend to a case in which an Amish child affirmatively wanted to attend school over his parents' objection. *See id.* at 231-232. And, in *United States* v. *Lee,* 455 U.S. 252 (1982), the Court's rejection of the employer's free-exercise claim relied on the fact that exempting the employer from the obligation to pay Social Security taxes would "operate[] to impose the employer's religious faith on the employees," who would be denied the benefits to which they were entitled by federal law. *Id.* at 261.

RFRA is not properly interpreted to create tension with the approach of these pre-*Smith* cases.[7] Indeed, the Supreme Court has stressed that in "[p]roperly applying" 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,

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

720 (2005).[8] *Cf. Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 80 (1977) (Title VII's reasonable-accommodation requirement does not entitle employee to a religious accommodation that would come at the expense of other employees).

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

Whether a burden is "substantial" under RFRA is a question of law, not a "question[] of fact, proven by the credibility of the claimant." *Mahoney* v. *Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011); *see, e.g., Bowen* v. *Roy*, 476 U.S. 693, 701 n.6 (1986) ("Roy's religious views may not accept this distinction between individual and governmental conduct," but the law "recognize[s] such a distinction"); *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448 (1988) (similar); *Kaemmerling*, 553 F.3d at 679 ("[a]ccepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened").

Although a court accepts a litigant's sincerely held religious beliefs, it must assess the nature of a claimed burden on religious exercise to determine whether, as a

[8] For this reason, *Cutter* rejected an Establishment Clause challenge to RLUIPA. Indeed, the Supreme Court has held that, under certain circumstances, an accommodation that imposes burdens on employees can violate the Establishment Clause. *See Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 708-11 (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).

legal matter, that burden is "substantial" under RFRA. Plaintiffs cannot preclude that inquiry by collapsing the question of substantial burden into the sincerity of their beliefs. Were that the case, any person would be able not only to declare a sincerely held religious belief but also to demand absolute deference to its assessment of what constitutes a substantial burden on that belief.

The district court erred by accepting (A63-64) 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.

In short, while this Court does not scrutinize 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. The non-profit 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.

1. The government has a compelling interest in its ability to operate programs while accommodating religious concerns.

Plaintiffs' claims would fail even if the accommodations were subject to RFRA's compelling-interest test. The non-profit plaintiffs challenge a narrow set of regulations that allow them to opt out of providing contraceptive coverage and then provide that third party administrators that 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, when they are permitted to decline to comply, the government will 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. Under that view, any effort by the government to fill a gap created by an accommodation would, itself, be subject to RFRA's compelling interest test. 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.

2. The contraceptive coverage provision advances compelling governmental interests.

Plaintiffs' claims also fail because the contraceptive-coverage provisions, including the religious accommodations at issue here, advance compelling governmental interests and are the least restrictive means to achieve them.

a. The Affordable Care Act and its preventive-services coverage provision advance the compelling interest of ensuring a "comprehensive insurance system with a variety of benefits available to all participants." *Lee*, 455 U.S. at 258. "While [RFRA] adopts a 'compelling governmental interest' standard, '[c]ontext matters' in the application of that standard." *Cutter*, 544 U.S. at 722-23 (citation omitted; brackets in original). That context here includes not only the Affordable Care Act but also ERISA, "a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans," *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85,

90 (1983). In enacting ERISA, Congress found "that the continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit] plans," which "are affected with a national public interest." 29 U.S.C. § 1001(a). Congress "declared" that ERISA's "policy" was in part to "protect . . . the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b).

When evaluating a claim under RFRA, a court must consider the impact of granting relief on third parties, a task that is particularly imperative when the requested relief would deprive third parties of right and benefits secured by federal law. *Compare Sherbert*, 374 U.S. at 409 ("recognition of the [employee's] right to unemployment benefits under the state statute" did not "serve to abridge any other person's religious liberties"), and *Yoder*, 406 U.S. at 222, 231-32, 235-36 (finding that parents had "carried" the "difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education" and emphasizing that the holding would not extend to a case in which an Amish child affirmatively wanted to attend school over his parents' objection), *with Lee,* 455 U.S. at 261 (refusing to exempt employer from paying Social Security taxes because that 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). *See also Cutter*, 544 U.S. at 720, 722-23.

The impact on third parties that would result from plaintiffs' position, moreover, would undermine comprehensive efforts to protect the public health, which is unquestionably a compelling governmental interest. "A woman's ability to control whether and when she will become pregnant has highly significant impacts on her health, her child's health, and the economic well-being of herself and her family." *Korte*, 735 F.3d at 725 (Rovner, J., dissenting). Physician and public health organizations, such as the American Medical Association, the American Academy of Pediatrics, and the March of Dimes accordingly "recommend the use of family planning services as part of preventive care for women." IOM Report 104. This is not a "broadly formulated interest[] justifying the general applicability of government mandates," *O Centro*, 546 U.S. at 431, but rather a concrete and specific one, supported by a wealth of empirical evidence.

Use of contraceptives reduces the incidence of unintended pregnancies. IOM Report 102-03. Unintended pregnancies pose special health risks because a woman with an unintended pregnancy "may not immediately be aware that [she is] pregnant, and thus delay prenatal care." 78 Fed. Reg. at 39,872; *see* IOM Report 103. A woman who does not know she is pregnant is also more likely to engage in "behaviors during pregnancy, such as smoking and consumption of alcohol, that pose pregnancy-related risks." 78 Fed. Reg. at 39,872; *see* IOM Report 103. As a result, "[s]tudies show a greater risk of preterm birth and low birth weight among unintended pregnancies." 78 Fed. Reg. at 39,872; *see* IOM Report 103. And, because contraceptives reduce the

number of unintended pregnancies, they "reduce the number of women seeking abortions." 78 Fed. Reg. at 39,872.

Contraceptive use also "helps women improve birth spacing and therefore avoid the increased risk of adverse pregnancy outcomes that comes with pregnancies that are too closely spaced." 78 Fed. Reg. at 39,872; *see* IOM Report 103. In particular, short intervals between pregnancies "have been associated with low birth weight, prematurity, and small-for-gestational age births." 78 Fed. Reg. at 39,872. "[P]regnancy may be contraindicated for women with serious medical conditions such as pulmonary hypertension . . . and cyanotic heart disease, and for women with the Marfan Syndrome." IOM Report 103-04; *see* 78 Fed. Reg. at 39,872. And "there are demonstrated preventive health benefits from contraceptives relating to conditions other than pregnancy." 78 Fed. Reg. at 39,872. For example, contraceptives can prevent certain cancers, menstrual disorders, and pelvic pain. *Ibid.*; *see* IOM Report 107.

The contraceptive-coverage regulations, including the religious accommodations, also advance the government's related compelling interest in assuring that women have equal access to recommended health-care services. 78 Fed. Reg. at 39,872, 39,887; *see Roberts* v. *United States Jaycees*, 468 U.S. 609, 626 (1984) (discussing the fundamental "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women," and

noting that "[a]ssuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests").

Congress enacted the women's preventive-services coverage provision because "women have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. 29,070 (2009) (statement of Sen. Feinstein); *see* IOM Report 18. Prior to the Affordable Care Act, "[w]omen of childbearing age spen[t] 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. at 29,070 (statement of Sen. Feinstein); *see* Ctrs. for Medicare & Medicaid Servs., *National Health Care Spending By Gender and Age: 2004 Highlights*, ("Females 19-44 years old spent 73 percent more per capita [on health care expenses] than did males of the same age."). These disproportionately high costs had a tangible impact: women often found that copayments and other cost sharing for important preventive services "[were] so high that they avoid[ed] getting [the services] in the first place." 155 Cong. Rec. at 29,302 (statement of Sen. Mikulski); *see* IOM Report 19 ("[W]omen are consistently more likely than men to report a wide range of cost-related barriers to receiving or delaying medical tests and treatments and to filling prescriptions for themselves and their families."). Studies have demonstrated that "even moderate copayments for preventive services" can "deter patients from receiving those services." IOM Report 19.

b. In granting the non-profit plaintiffs' preliminary injunction motion, the district court did not address the compelling interests served by the contraceptive-

coverage provision. *See* A64. To the extent the court implicitly relied on its previous order granting a temporary restraining order to the for-profit plaintiffs, A54-55, that order offers no reason to discount the government's asserted interests.

While the Affordable Care Act's grandfathering provision has the effect of allowing a transition period for compliance with a number of the Act's requirements (including, but not limited to, the contraceptive-coverage and other preventive-services coverage provisions), 42 U.S.C. § 18011; 45 C.F.R. § 147.140(g), the compelling nature of an interest is not diminished because the government phases in a regulation advancing it in order to avoid undue disruption. *Cf. Heckler* v. *Mathews*, 465 U.S. 728, 746-48 (1984) (noting that "protection of reasonable reliance interests is . . . a legitimate governmental objective" that Congress may permissibly advance through phased implementation of regulatory requirements). In enacting the Americans with Disabilities Act, for example, Congress imposed different requirements on existing grandfathered facilities than on later-constructed facilities, *see* 42 U.S.C. §§ 12183(a)(1), 12182(b)(2)(A)(iv), but that reasonable distinction did not undermine the interests served by the law. And, in fact, under the Affordable Care Act's grandfathering provision, the percentage of employees in grandfathered health plans is steadily declining, having dropped from 56% in 2011 to 48% in 2012 to 36% in 2013. *See* Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits 2013 Annual Survey* 7, 196.

Similarly, it is irrelevant that employers with fewer than 50 full-time-equivalent employees are exempt from a different provision, 26 U.S.C. § 4980H, which subjects certain large employers to a possible tax if they fail to offer full-time employees (and their dependents) adequate health coverage, 26 U.S.C. § 4980H(c)(2)(A). The preventive-services coverage requirements apply to any employer that provides coverage without regard to its size. 42 U.S.C. § 300gg-13. Moreover, federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by those statutes. *See, e.g.*, *Arbaugh* v. *Y&H Corp.*, 546 U.S 500, 504-505 & n.2 (2006) (explaining that, when Title VII was first enacted, the statute's prohibitions on employment discrimination did not apply to employers with fewer than 25 employees, and those prohibitions still do not apply to employers with fewer than 15 employees); *Lee*, 455 U.S. at 258 n.7 (noting ways in which Social Security Act's coverage was "broadened" over the years).

c. The district court also did not identify any less restrictive means for the government to advance its interests. *See* A64. In its order granting relief to the for-profit plaintiffs, the district court noted the argument advanced by those plaintiffs that the government could offer incentives for third parties to provide contraceptive coverage. *See* A55. In the regulations at issue here, the government *is* working with third parties to provide contraceptive coverage, and it offers reimbursement to third party administrators for providing such coverage. The non-profit plaintiffs do not "actively participate" and only declare that they are *not* providing coverage. Under

plaintiffs' theory, any scheme in which coverage is provided after an organization opts out would be infirm. Many people have religious objections to many practices. These persons may object to different features of a requirement or, in this case, of a religious accommodation. But national systems of health and welfare cannot vary from point to point or be based around what, if any, method of provision can be agreed upon by all objecting parties. The challenged accommodations provide an administrable way for organizations to state that they object and opt out, and for third parties to provide contraceptive coverage.

II. The Regulations Do Not Violate the Free Exercise Clause of the First Amendment.

The Free Exercise Clause is not implicated by laws that are neutral and generally applicable.[9] *See Employment Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 879 (1990). It prohibits only laws with "the unconstitutional object of targeting religious beliefs and practices." *City of Boerne* v. *Flores*, 521 U.S. 507, 529 (1997); *see id.* at 530 (Free Exercise clause prohibits "laws passed because of religious bigotry"); *id.* at 535 (explaining that if a law "disproportionately burdened a particular class of religious observers," the relevance under the Free Exercise clause is to suggest "an impermissible legislative motive"). "Neutrality and general applicability are interrelated." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531

[9] It is not clear whether the district court relied on its Free Exercise Clause ruling with regard to the for-profit plaintiffs. *See* A63-64. In any case, that reasoning furnishes no basis for affirmance.

(1993). A law is not neutral "if the object of the law is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. A law is not generally applicable if it "in a selective manner impose[s] burdens only on conduct motivated by religious belief." *Id.* at 543.

Even assuming *arguendo* that the contraceptive-coverage provision burdens plaintiffs' exercise of religion, there would be no violation of the Free Exercise Clause because that burden is imposed by a neutral and generally applicable requirement. Although plaintiffs focus on the contraceptive-coverage provision, the women's preventive-health care coverage requirements include coverage of many services unrelated to contraception, many of which plaintiffs do not appear to contest. The comprehensive approach to women's health issues laid out in the Affordable Care Act demonstrates that there is no intent to regulate religion or target religious exercise.

The purpose of the preventive-services coverage provision is "to advance the goals of safeguarding public health and ensur[e] that women have equal access to health care." *Catholic Diocese of Nashville* v. *Sebelius*, _ F. Supp. 2d _, 2013 WL 6834375, *6 (M.D. Tenn. Dec. 26, 2013), *appeal pending*, No. 13-6640 (6th Cir.) (citing 78 Fed. Reg. at 39,872); *see, e.g.,* 155 Cong. Rec. S11985, S11986 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski) (sponsor explaining that purpose is to "guarantee[] women access to lifesaving preventive services and screenings," and to remedy the fact that "[w]omen are more likely than men to neglect care or treatment because of cost"); 155 Cong. Rec. S12265, S12271 (daily ed. Dec. 3, 2009) (statement of Sen.

Franken) ("The problem [with the current bill] is, several crucial women's health services are omitted. [The Women's Health Amendment] closes this gap."); 155 Cong. Rec. S12021-02, S12027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand) ("[I]n general women of childbearing age spend 68 percent more in out-of-pocket health care costs than men. . . . This fundamental inequity in the current system is dangerous and discriminatory and we must act.").

The neutral purpose of the regulations also is not altered by statutory provisions that pertain to small businesses and grandfathered plans. These provisions "apply to all employers, including religious employers" and "are not imposed selectively against conduct motivated by religious belief." *Michigan Catholic Conference*, _ F. Supp. 2d _, 2013 WL 6838707, *9. The fact that "'categorical exemptions exist does not mean that the law does not apply generally.'" *Ibid.*; *see Lee*, 455 U.S. at 260-61 (finding that social security tax requirements were generally applicable although there were categorical exemptions); *see also Olsen* v. *Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008) ("General applicability does not mean absolute universality.").

Plaintiffs find no support in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520, 531 (1993). In that case, the legislature specifically targeted the religious exercise of members of a single church (Santeria) by enacting ordinances that used terms such as "sacrifice" and "ritual," 508 U.S. at 533-34, and prohibited few, if any, animal killings other than Santeria sacrifices, *id.* at 535-36. The statute was drawn so "that few if any killings of animals are prohibited other than Santeria

sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering to the orishas, not food consumption." *Id.* at 536. "Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished." *Ibid.* *Lukumi* does not remotely suggest that an exemption from the contraceptive-coverage provision for plans offered by churches and other houses of worship is evidence that the government targeted the religious practices of any church or denomination.

CONCLUSION

The judgment of the district court should be reversed.

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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 8,732 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

I certify, in compliance with 8th Circuit Local Rule 28A(h)(2), that this brief and addendum have been scanned for viruses and are virus free.

/s/ Patrick G. Nemeroff
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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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