NO. _____

In the
Supreme Court of the United States

GRACE SCHOOLS & BIOLA UNIVERSITY,
Petitioners,

v.

SYLVIA MATHEWS BURWELL, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The text of the Affordable Care Act says nothing about contraceptive coverage, but it does require employers to "provide coverage" for certain "preventive services," including "preventive care" for women. The Department of Health and Human Services ("HHS") has interpreted that statutory mandate to require employers, through their healthcare plans, to provide without cost sharing the full range of FDA-approved contraceptives, including some that cause abortions. Despite the obvious implications for many employers of deep religious conviction, HHS decided to exempt only some nonprofit religious employers from compliance. As to all other religious employers, HHS demanded compliance, either by the employers instructing their insurers to include coverage in their plans, or via a regulatory mechanism through which the employers must execute documents that authorize, obligate, and/or incentivize their insurers or plan administrators to use their plans to provide cost-free contraceptive coverage to their employees. In the government's view, either of those actions constitutes compliance with the statutory "provide coverage" obligation by these religious employers and their plans.

This Court has already concluded that the threatened imposition of massive fines for failing to comply with this contraceptive mandate imposes a substantial burden on religious exercise, and that the original method of compliance violates the Religious Freedom Restoration Act ("RFRA"). And it is undisputed that this case involves the same

mandate and the same fines, and that nonexempt religious employers, such as Petitioners, hold sincere religious objections to their role in providing objectionable drugs and devices to their employees and students.

The questions presented are:

1. Does the availability of a regulatory method for nonprofit religious employers to comply with HHS's contraceptive mandate eliminate either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)?

2. Has HHS proven both that forcing Petitioners to comply with the mandate actually advances a sufficiently specific governmental interest that is compelling, and that no less restrictive means for furthering that interest is available?

PARTIES TO THE PROCEEDING

Petitioners, which were the Plaintiffs below, are Grace Schools and Biola University.

Respondents, who were Defendants below, are Sylvia Mathews Burwell, in her official capacity as Secretary of the United States Department of Health and Human Services; the United States Department of Health and Human Services; Thomas E. Perez, in his official capacity as Secretary of the United States Department of Labor; the United States Department of Labor; Jacob J. Lew, in his official capacity as Secretary of the United States Department of the Treasury; and the United States Department of the Treasury.

CORPORATE DISCLOSURE STATEMENT

Both Petitioners are nonprofit religious corporations. Petitioners do not have parent corporations. No publicly held corporation owns any portion of either Petitioner.

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INTRODUCTION

The Seventh Circuit's decision that the Mandate does not substantially burden Petitioners' religious exercise rests on two fundamental errors.

First, the court of appeals second-guessed Petitioners' moral conclusion about their role in providing abortifacients. It did so by implausibly claiming to question Petitioners' understanding of the law and/or facts rather than their ethical conclusion. And it essentially held that the connection between (a) what Petitioners must do, and (b) the immoral use of abortifacients was "too attenuated" to be a substantial burden under RFRA. The Seventh Circuit thus disregarded this Court's directive in *Hobby Lobby* that courts must accept RFRA claimants' sincerely held religious convictions. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2777-79 (2014).

Second, the lower court's conclusion—that Petitioners play no role in the provision of abortifacients—is demonstrably false. Petitioners are legally obliged to offer the employee health plans through which abortifacient drugs will be provided. The form or notice Petitioners must complete under the alternative compliance mechanism alters their health plans and becomes "an instrument under which that plan is operated." *See* Dep't of Labor, EBSA Form 700, *available at* http://www.dol.gov/ebsa/preventiveserviceseligibleorganizationcertificationform.doc (last visited Feb. 2, 2016). For the sponsor of a self-insured plan, submitting the form

or notice designates its third-party administrator as "plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39,879; 29 C.F.R. § 2510.3-16(b)&(c). This written delegation is essential to "ensure[] that there is a party with legal authority" under ERISA to pay for contraceptive services under religious nonprofits' self-funded health care plans. 78 Fed. Reg. at 39,880; *see also* 29 U.S.C. § 1102(a)(1) (requiring that self-funded health plans be modified in writing). And, as the government recently conceded, the form or notice a self-insured plan sponsor must execute ensures that "the contraceptive coverage provided by its TPA is . . . *part of the same ERISA plan* as the coverage provided by the employer." No. 15-35 Br. in Opp. 19 (emphasis added).

In short, en route to erroneously finding that no substantial burden existed, the Seventh Circuit not only undertook an examination forbidden by this Court, but also answered that inquiry incorrectly.

DECISIONS BELOW

The panel opinion of the court of appeals is reported at 801 F.3d 788 (7th Cir. 2015), and reprinted in Pet. App. at 1a-80a. The district court's opinion is reported at 988 F. Supp. 2d 935 (N.D. Ind. 2013), and reprinted in Pet. App. at 81a-127a.

JURISDICTION

The Seventh Circuit's judgment was entered on September 4, 2015. Pet. App. 130a-131a. The Seventh Circuit denied Petitioners' petition for rehearing en banc on November 6, 2015. Pet. App. 128a-129a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY AND REGULATORY PROVISIONS

The Religious Freedom Restoration Act of 1993 provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb–1(a), unless "it demonstrates that the 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," 42 U.S.C. § 2000bb–1(b).

"[T]he term 'exercise of religion' means religious exercise, as defined in section 2000cc–5 of this title." 42 U.S.C. § 2000bb–2(4). "The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc–5(7). "Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb–3(b).

The Patient Protection and Affordable Care Act of 2010 ("ACA") states, in relevant part, that "[a]

group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum, provide coverage for and shall not impose any cost sharing requirements for . . . (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph." 42 U.S.C. § 300gg–13(a)&(a)(4).

The following pertinent provisions are reproduced in the Petition Appendix ("Pet. App.") at 132a-172a: 42 U.S.C. §§ 2000bb-1, 2000bb-2, 2000cc-5, 300gg-13(a); 26 U.S.C. §§ 4980D, 4980H; 26 C.F.R. § 54.9815-2713AT; 29 C.F.R. § 2510.3-16; 29 C.F.R. § 2590.715-2713A; 45 C.F.R. § 147.131.

STATEMENT OF THE CASE

I. Factual Background

Petitioners Grace Schools and Biola University (collectively, "the Schools") are religious institutions of higher learning. Pet. App. 91a. The Schools require anyone seeking entry into and participation in their communities to hold certain Christian beliefs, including respect for the dignity and worth of human life from the moment of conception. Pet. App. 91a-95a. The Schools' mission includes promoting their members' spiritual maturity by fostering obedience to, and love for, their understanding of God's laws, including condemnation of the taking of innocent human life. *Id.*

As a matter of religious conviction, the Schools believe that it is sinful and immoral for them to provide, participate in, facilitate, enable, or otherwise support access to abortion-inducing drugs and devices, and related counseling. Pet. App. 93a, 98a. The government does not contest the sincerity of their religious beliefs. Pet. App. 114a

Here, the Schools' religious objection to the Mandate is limited to providing access to Plan B (the "morning after pill"), ella (the "week after pill"), certain IUDs, and related counseling—the same items objected to in *Hobby Lobby*. Pet. App. 96a; 134 S. Ct. at 2765-66. The Schools do not object to covering the other sixteen FDA-approved methods of birth control. *See Hobby Lobby*, 134 S. Ct. at 2766. They simply object, on religious grounds, to including in, or enabling in connection with, their health plans drugs or devices—either directly under the Mandate or through the government's alternative compliance mechanism—that may stop the implantation of fertilized eggs and thus have an abortifacient effect. Pet. App. 97a; *see also Hobby Lobby*, 134 S. Ct. at 2762 (recognizing that four FDA-approved contraceptives may inhibit an egg's "attachment to the uterus").

The Schools believe that they have a religious duty to care for their members' physical well-being by providing generous health insurance benefits. Pet. App. 91a. Grace has a self-insured group plan for its employees. Pet. App. 93a. It also provides an insured student health plan. *Id.* Biola offers insured plans for its employees and students. Pet. App. 95a-96a. Consistent with their religious

beliefs, the Schools' healthcare plans excluded the four methods of FDA-approved contraceptives that may have an abortifacient effect. Pet. App. 93a, 96a.

The Mandate prohibits the Schools from continuing to provide health plans that comport with their religious beliefs. Instead, they are faced with four untenable options: (1) include abortifacient coverage in their health plans in compliance with the Mandate and violate their religious faith, (2) violate the Mandate and incur penalties of $100 per day for each affected individual, (3) discontinue all health plan coverage, violate their religious beliefs, and pay $2,000 per year per employee (after the first thirty), or (4) execute and deliver the self-certification, which then includes abortifacient coverage in or under the auspices of their health plans in violation of their beliefs. Pet. App. 109a-112a.

The spiritual cost of violating the Schools' religious beliefs and participating in the provision of drugs and items they reasonably believe to have an abortifacient effect is incalculable. But the ruinous financial penalties the Schools would incur by violating the Mandate are not. Annually, refusing to comply with the Mandate would subject the Schools to fines running into the millions of dollars. Pet. App. 8a, 90a, 108a, 132a-139a. Dropping health insurance altogether would not only violate the Schools' religious beliefs, drive up costs, and seriously compromise the Schools' competitiveness in the marketplace, but also result in collective annual fines totaling at least $2.6 million: at least $900,000 for Grace and at least $1.7 million for Biola. Pet. App. 140a-146a.

II. Regulatory Background

In 2010, Congress passed the ACA. Pub. L. No. 111–148, 124 Stat. 119 (2010). The ACA mandates that many health insurance plans cover preventive care and screenings without requiring recipients to share the costs. 42 U.S.C. § 300gg–13(a)(4). Though Congress did not require contraceptive coverage in the ACA's text, the Department of Health and Human Services ("HHS") incorporated guidelines formulated by the private Institute of Medicine (IOM) into its preventive-care regulations. *See Hobby* Lobby, 134 S. Ct. at 2762. The IOM guidelines mandate that Petitioners include all FDA-approved contraceptives, sterilization procedures, and related counseling in their healthcare plan. *See id.*

The government's Mandate scheme makes enrollment in group health plans a prerequisite to the receipt of objectionable contraceptives. Individuals have no right to contraceptive coverage under the Mandate absent group plan enrollment. *See* 29 C.F.R. § 2590.715-2713A(d) (explaining that contraceptives are available only "so long as [beneficiaries] are enrolled in [a] group health plan").

Employers that violate the Mandate face lawsuits under ERISA and fines of up to $100 per plan affected beneficiary per day. 29 U.S.C. § 1132; 26 U.S.C. § 4980D; *Hobby Lobby*, 134 S. Ct. at 2762. These fines would quickly destroy the Schools' religious ministries and the hundreds of jobs that go with them, even though all members of the Schools'

communities share their beliefs and opposition to the four forms of contraception in question. Pet. App. 91a-95a. *See also* Pet. App. 167a.

The government completely exempts thousands of religious orders and churches and their integrated auxiliaries from the Mandate for exactly this reason, but it refuses to extend this "religious employer" exemption to Petitioners and other religious nonprofits. 78 Fed. Reg. 39,870, 39,874 (July 2, 2013); (opining that churches "are more likely than other employers to employ people of the same faith who share the same objection"). Religious entities that meet the government's narrow definition of a "religious employer" are not required to take any action to obtain an exemption from the Mandate. 45 C.F.R. § 147.131(a). Nor are these entities required to object to providing contraceptive coverage in connection with their healthcare plans. They simply exist outside of the Mandate's bounds.

The government exempts thousands of non-religious employers from the Mandate as well. Employers that hire fewer than fifty employees are not required to provide health insurance at all, and thus can avoid compliance with the Mandate that way. 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d). This is true despite the fact that such small businesses employ approximately 34 million people. *Hobby Lobby*, 134 S. Ct. at 2764.

Employers with certain grandfathered healthcare plans that have only changed minimally since 2010 are also exempt from the Mandate. 42 U.S.C. § 18011; *see also Hobby Lobby*, 134 S. Ct. at

2763-64. Roughly 46 million people are enrolled in these healthcare plans. HHS, ASPE Data Point, *The Affordable Care Act is Improving Access to Preventive Services for Millions of Americans* 3 (May 14, 2015), *available at* http://aspe.hhs.gov/pdf-report/affordable-care-act-improving-access-preventive-services-millions-americans (last visited Jan. 31, 2016). And "there is no legal requirement that grandfathered plans ever be phased out." *Hobby Lobby*, 134 S. Ct. at 2764 n.10.

Rather than exempting religious nonprofits from the Mandate, as it did thousands of other religious and non-religious organizations, the government created an alternative method of compliance with the Mandate. This so-called "accommodation" is merely a substitute form of compliance with the Mandate. *See* 45 C.F.R. § 147.131(c)(1) (noting that "an eligible organization . . . complies with any requirement . . . to provide contraceptive coverage if [it] furnishes a copy of the self-certification" to its insurance issuer); 78 Fed. Reg. 39,870, 39,879 (July 2, 2013) (explaining that "an eligible organization" that fulfills the alternative method of compliance "is considered to comply with section 2713 of the PHS Act"). Importantly, the government does not exempt religious nonprofits from the Mandate's scope as it does churches, their integrated auxiliaries, and even many for-profit employers.

If a religious organization with an insured or self-insured group health plan (1) has religious objections to providing some or all contraceptives required by the Mandate, (2) is organized and operates as a nonprofit entity, (3) holds itself out as

a religious organization, and (4) self-certifies that it meets the first three criteria, it is eligible for this alternate means of compliance. *Id.* at 39,874-80. The self-certification requirement can be accomplished in two ways, but both methods have the same result. *See* Dep't of Labor, EBSA Form 700 (recognizing that the "form or a notice to the Secretary [becomes] an instrument under which the plan is operated").

First, a religious nonprofit may complete the Employee Benefits Security Administration's Form 700 ("EBSA Form 700" or the "Form") and provide the Form to its health insurance issuer, for insured plans, or TPA, for self-insured plans. *Id.* The Form clarifies that TPAs then bear a new burden to provide contraceptive coverage without cost sharing to religious nonprofits' plan beneficiaries if they voluntarily decide to continue administrating services for religious nonprofits' self-insured healthcare plans. *Id.*; *see also* 26 C.F.R. § 54.9815-2713A; 29 C.F.R. § 2510.3-16; 29 C.F.R. § 2590.715-2713A.

Second, a religious nonprofit may mail or email HHS a notice that it objects to providing some or all contraceptive services required by the Mandate (the "Notice"). 79 Fed. Reg. 51,092, 51,094-95 (Aug. 27, 2014). This notice must contain (a) the name of the organization and the basis on which it qualifies for the so-called "accommodation," (b) a description of its objection based on sincerely held religious beliefs to providing coverage of some or all contraceptives, (c) the name and type of group health plan it possesses, and (d) the name and contact information

for its health insurance issuers or TPAs. *Id.* at 51,094-95. HHS then sends a notification to the religious nonprofits' insurers and/or TPAs on their behalf informing the insurers and/or TPAs of their new "obligations" to provide contraceptive coverage to plan participants. *Id.* at 51,095; 29 C.F.R. § 2510.3-16(b).

Both alternative methods of compliance with the Mandate have significant legal and practical effects. Legally speaking, they alter a nonprofit religious organization's health plan and become "an instrument under which that plan is operated." EBSA Form 700. For self-insured plans, submitting either the Form or Notice serves as a special designation of a religious nonprofits' TPA as "plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39,879; 29 C.F.R. § 2510.3-16(b)&(c). This written delegation is essential to "ensure[] that there is a party with legal authority" under ERISA to pay for contraceptive services under religious nonprofits' self-funded health care plans. 78 Fed. Reg. at 39,880; *see also* 29 U.S.C. § 1102(a)(1) (requiring, that self-funded health plans be modified in writing).

Practically speaking, religious nonprofits with self-insured plans normally pay their own claims. Only by virtue of a religious nonprofit's submission of the Form or Notice does a TPA become obligated and possess the authority to pay for abortifacient contraceptives that violate the organization's religious beliefs. 45 C.F.R. § 156.50(d)(1)-(3). Furthermore, the government incentivizes TPAs to

continue servicing nonprofit religious organizations' health plans by reimbursing them at a rate of 115% of their costs. *Id.*

But if a religious nonprofit's existing TPA is unwilling to provide contraceptives to plan participants on their behalf, the TPA may decline to service their self-insured plans. 26 C.F.R. § 54.9815-2713A; 29 C.F.R. § 2510.3-16; 29 C.F.R. § 2590.715-2713A. In this situation, government regulations force a religious nonprofit to seek out a TPA that is willing to provide the very abortifacient contraceptives that violate its faith. *See* 78 Fed. Reg. at 39,880 (imposing no obligation on TPAs "to enter into or remain in a contract with" an objecting religious organization); 26 C.F.R. § 54.9815-2713AT(b)(1)(i) (requiring that a self-insured organization "contract[] with one or more third party administrators" to qualify for the alternative mechanism for complying with the Mandate).

The practical ramifications of executing and submitting the Form or Notice are equally significant in regard to insured plans. Under this Court's holding in *Hobby Lobby*, the government may not apply the Mandate to force closely-held for-profit religious employers or nonprofit religious employers to cover religiously-objectionable contraceptives in their health plans. *See* 134 S. Ct. at 2785 ("[U]nder the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful"). The government's only means of Mandate enforcement against religious nonprofits is thus via the alternative methods of compliance outlined above. Absent the government's imposition

of a Form or Notice requirement to ensure Mandate compliance, religious nonprofits would be as free as churches (and many secular employers) to offer health plans that comply with their religious beliefs and do not provide contraceptives with abortifacient effects.

III. Proceedings Below

Petitioners filed suit in the U.S. District Court for the Northern District of Indiana, challenging the application of the Mandate under RFRA and seeking preliminary injunctive relief. They moved for a preliminary injunction before their health plans were set to renew in 2014. Pet. App. 82a & n.2.

The district court granted Petitioners' request for a preliminary injunction and enjoined and restrained Respondents "[a]pplying or enforcing against Plaintiffs Grace Schools and Biola University, Inc. or their employee or student health insurance plans, including their plan brokers, plan insurers, or third party administrators, the requirements set out in 42 U.S.C. § 300gg-13(a)(4) and 45 C.F.R. § 147.130(a)(1)(iv), corresponding guidelines, and corresponding press releases to provide, pay for, or otherwise facilitate access to coverage for FDA approved contraceptive methods, abortion-inducing drugs, sterilization procedures, and related patient education and counseling." Pet. App. 126a-127a. It reasoned, like this Court in *Hobby Lobby*, that "the pertinent inquiry for the substantial burden test under RFRA is whether the claimant has an honest conviction that what the government is requiring or pressuring him to do

conflicts with his religious beliefs and whether the governmental pressure exerts a sufficiently coercive influence on the plaintiffs' religious practice." Pet. App. 107-108a.

Accordingly, the district court held that the Mandate imposed a substantial burden on Petitioners' free exercise of religion because "[b]y completing the self certification, plaintiffs sincerely believe that they will be facilitating, and actually supporting, a step in the process by which their employees and students will eventually secure access to free contraceptive services." Pet. App. 114a. The court declined to second-guess the Schools' conclusion that "this makes them complicit in the provision and use of such services." *Id.*

Faithfully applying a prior decision by the Seventh Circuit, the district court concluded that the government failed to prove that imposing the Mandate upon the Schools was the least restrictive means of advancing a compelling governmental interest. Pet. App. 114a-121a.

The district court observed that the Schools' employees and students shared their religious beliefs and thus were unlikely to use morally objectionable abortifacients. Pet. App. 118a. The court noted that the government justified its narrow religious exemption on the ground that churches, denominations, religious orders, and integrated auxiliaries possessed precisely this characteristic, rendering inexplicable the government's decision to deny the Schools the same exemption. *Id.*

The court also held that "there are certainly other ways to promote public health and gender equality less burdensome on religious liberty, and the government has not carried its burden of demonstrating that it cannot achieve its policy goals in ways less damaging to religious-exercise rights." Pet. App. 119a.

Respondents appealed. A divided panel of the court of appeals reversed the district court's grant of a preliminary injunction to the Schools. Pet. App. 1a *et seq*. The panel majority held that the alternative mechanism of compliance with the Mandate for religious nonprofits does not impose a substantial burden on Petitioners' religious exercise. Pet. App. 2a.

Rather than asking whether the Mandate imposed substantial pressure on Petitioners to violate their religious beliefs, which the government conceded are sincere, the panel majority instead second-guessed Petitioners' conclusion about their complicity in the provision and use of morally objectionable drugs. Pet. App. 32a *et seq*. The majority purported to disagree with Petitioners' factual and/or legal conclusions about their role in the abortifacient provision scheme. *Id.* But the parties do not disagree about how the alternative compliance mechanism works; they instead disagree about the moral significance of Petitioners' role in the scheme—whether the actions the Mandate compels them to take are causally close enough to immoral acts to "count" as a substantial burden under RFRA. The panel's willingness to ask and answer this question flatly contradicts this Court's

rejection of the government's "attenuation" argument in *Hobby Lobby*.

Judge Manion dissented. Pet. App. 42a *et seq*. Correctly applying *Hobby Lobby*, he declared that courts determine whether a burden on religious exercise is substantial "by examining the level of coercion applied to compel compliance, not what is required by that compliance and to what extent it violates the person's religion." Pet. App. 45a. He identified the foundational error in the majority's reasoning: "the court rejects the nonprofits' sincere belief that compliance with the HHS accommodation is prohibited by their religion by holding that the nonprofits misunderstand the manner in which the accommodation operates. Then, acting as an expert theologian, the court holds that the accommodation's operation as understood by the court is not a substantial burden to the nonprofits' religious exercise." Pet. App. 45a-46a. Judge Manion stated that the majority improperly judged the nonprofits' religious beliefs and ignored the penalties for non-compliance. Pet. App. 46a.

Judge Manion observed that the majority not only failed to follow *Hobby Lobby*'s approach to substantial burden analysis, but also reached an incorrect conclusion about Petitioners' role in the abortifacient provision scheme. Pet. App. 48a-53a. He correctly observed that Petitioners' required actions create access to abortifacients and that the government is hijacking their health plans to provide that access. Pet. App. 53a-56a. He also concluded that the government failed to prove that imposing the Mandate upon Petitioners is the least

restrictive way of advancing a sufficiently specific interest that is compelling. Pet. App. 60a-77a.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit failed to follow this Court's decision in *Hobby Lobby*. Instead of accepting Petitioners' contention that complying with the Mandate violated their religious beliefs and then assessing the magnitude of the government pressure to comply, the court of appeals second-guessed and rejected Petitioners' moral assessment of their role in the scheme. The court's assertion that it was merely disagreeing with Petitioners' legal or factual conclusions does not bear scrutiny. This transparent repackaging does not conceal the panel majority's resurrection of the "attenuation" argument this Court rejected in *Hobby Lobby*.

Essentially identical RFRA challenges to the alternative compliance mechanism are now pending before this Court in *Zubik v. Burwell*, No. 14-1418, and six consolidated cases. *See Priests for Life v. HHS*, 772 F.3d 229 (D.C. Cir. 2014), *cert. granted*, No. 14-1453 (Nov. 6, 2015); *Roman Catholic Archbishop of Washington v. Burwell*, 772 F.3d 229 (D.C. Cir. 2014), *cert. granted*, No. 14-1505 (Nov. 6, 2015); *East Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir.), *cert. granted*, No. 15-35 (Nov. 6, 2015); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir.), *cert. granted*, No. 15-105 (Nov. 6, 2015); *Southern Nazarene Univ. v. Burwell*, 794 F.3d 1151 (10th Cir.) *cert. granted*, No. 15-119 (Nov. 6, 2015); and *Geneva Coll. v. Burwell*,

778 F.3d 422 (3d Cir.), *cert. granted*, No. 15-191 (Nov. 6, 2015).

Petitioners therefore respectfully request that the Court hold their petition for a writ of certiorari pending the Court's decision in *Zubik* and the consolidated cases, and then dispose of the petition as appropriate in light of the Court's decision in those cases.

CONCLUSION

This Court should hold the petition for a writ of certiorari in this case pending the Court's decision in *Zubik v. Burwell*, cert. granted, No. 14-1418 (Nov. 6, 2015), and the consolidated cases, and then dispose of the petition as appropriate in light of the Court's decision in those cases.

Respectfully submitted,

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February 3, 2016

APPENDIX

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In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 14-1430 &14-1431

GRACE SCHOOLS, et al., AND DIOCESE OF FORT WAYNE-SOUTH BEND, INC., *et. al.*,

Plaintiffs-Appellees,

v.

SYLVIA MATTHEWS BURWELL, *et. al.*,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Indiana.
Nos. 3:12-cv-00459-JD-CAN and 1:12-cv-00159-JD-RBC
Jon E. DeGuilio, *Judge.*

Argued December 3, 2014
Decided September 4, 2015

BEFORE MANION, ROVNER, AND HAMILTON,
Circuit Judges.

ROVNER, *Circuit Judge*. The district court entered a preliminary injunction in favor of the plaintiffs, a number of religious, not-for-profit organizations, preventing the defendants from applying or enforcing the so-called "contraceptive

mandate" of the Patient Protection and Affordable Care Act of 2010 ("ACA") to the plaintiffs. *See* 42 U.S.C. § 300gg-13(a)(4); Pub. L. No. 111-148, 124 Stat. 119 (2010). The plaintiffs contend that the ACA's accommodations for religious organizations impose a substantial burden on their free exercise of religion, and that the ACA and accompanying regulations are not the least restrictive means of furthering a compelling government interest, in violation of the plaintiffs' rights under the Religious Freedom Restoration Act of 1993 ("RFRA"). *See* 42 U.S.C. § 2000bb *et seq*. The defendants, several agencies of the United States government, appeal. We conclude that ACA does not impose a substantial burden on the plaintiffs' free exercise rights and so we reverse and remand. However, we will maintain the injunction for a period of sixty days in order to allow the district court adequate time to address additional arguments made by the parties but not addressed prior to this appeal.

I.

The ACA requires group health plans and third-party administrators of self-insured plans to cover preventive care for women under guidelines supported by the Health Resources and Services Administration ("HRSA"), a component of the Department of Health and Human Services ("HHS"). 42 U.S.C. § 300gg-13(a)(4); 45 C.F.R. § 147.130(a)(1)(iv); *University of Notre Dame v. Burwell*, 786 F.3d 606, 607 (7th Cir. 2015) (hereafter "*Notre Dame II*"); *University of Notre Dame v. Sebelius*, 743 F.3d 547, 548 (7th Cir. 2014), *vacated*

by 135 S. Ct. 1528 (2015) (hereafter "*Notre Dame I*"). The relevant guidelines include "all Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." 77 Fed. Reg. 8725-26. The regulations adopted by the three Departments implementing this part of the ACA require coverage of, among other things, all of the contraceptive methods described in the guidelines. *See* 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).[1]

In anticipation of objections from religious organizations to these requirements, the Departments provided an exemption from the contraception coverage provision for religious employers. 45 C.F.R. § 147.131(a). A religious employer is defined as "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." 45 C.F.R. § 147.131(a); 26 U.S.C. § 6033(a)(3)(A). That provision of the Internal Revenue Code, in turn,

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[1] All three of these regulations have been amended since this suit was filed. The most recent amendments, which are scheduled to take effect Sept. 14, 2015, address accommodations for closely-held for-profit corporations whose owners have religious objections to some or all of the contraceptive coverage requirements of the ACA. *See Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014). Because these most recent amendments are not relevant to the issues raised here, we will be referring to the version of the regulations in effect at the time this suit was filed, unless we state otherwise.

refers to "churches, their integrated auxiliaries, and conventions or associations of churches," and "the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A)(i) and (iii). But the exemption did not cover religiously-affiliated non-profit corporations such as schools and hospitals that did not meet the IRS guidelines for religious employers. The Departments therefore adopted additional regulations providing accommodations for group health plans provided by these non-profit religious corporations, called "eligible organizations" in the regulations:

> (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.

45 C.F.R. § 147.131(b).[2] *See also* 78 Fed. Reg. 39,874-75.

Eligible organizations are not required "to contract, arrange, pay, or refer for contraceptive coverage" to which they have religious objections. 78 Fed. Reg. 39,874. The government developed a two-page form for eligible organizations to use to comply with this accommodation, the "EBSA Form 700 – Certification."[3] The short form requires the eligible organization to supply its name, the name and title of the individual authorized to make the certification on behalf of the organization, and a mailing address and telephone number for that individual. The form also requires a signature verifying the statement, "I certify the organization is an eligible organization (as

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[2] This regulation will also be updated as of Sept. 14, 2015. Again, we cite to the earlier version.

[3] The form can be found at http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf, last visited September 3, 2015.

described in 26 CFR 54.9815-2713A(a), 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)) that has a religious objection to providing coverage for some or all of any contraceptive services that would otherwise be required to be covered." The organization must then provide a copy of the certification to the organization's health insurance issuer or, for self-insured plans, to its third-party administrator. The insurer or administrator receiving the certification is obligated to provide (or arrange for the provision of) contraception coverage for the health plan's participants without cost sharing through alternate mechanisms established by the regulations. 45 C.F.R. § 147.131(c). The insurer[4] may not impose a charge of any variety, either directly or indirectly, on the eligible organization for the provision of contraception services.[5] The insurer must also inform plan participants that the eligible organization will

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[4] From this point forward, when we use the term "insurer," we mean to include third-party administrators in those instances where the plan is self-insured unless we state otherwise.

[5] Insurers are expected to recoup the costs of contraceptive coverage from savings on pregnancy medical care as well as from other regulatory offsets. *See Notre Dame* II, 786 F.3d at 609–10; 78 Fed. Reg. 38977-78 ("Issuers are prohibited from charging any premium, fee, or other charge to eligible organizations or their plans, or to plan participants or beneficiaries, for making payments for contraceptive services, and must segregate the premium revenue collected from eligible organizations from the monies they use to make such payments. In making such payments, the issuer must ensure that it does not use any premiums collected from eligible organizations."). Third-party administrators may seek reimbursement of up to 110% of their costs from the government. *Notre Dame II*, 786 F.3d at 609; 45 C.F.R. § 156.50(d)(3).

not provide or fund any contraception coverage. 45 C.F.R. § 147.131(d). As we will discuss below, since the filing of this suit, these regulations have been amended to allow a second method of objecting to contraceptive coverage, by notifying HHS directly of any religiously-based objection.

The plaintiffs are various religiously-based non-profit organizations including the Diocese of Fort Wayne-South Bend, Inc. ("Diocese"); Catholic Charities of the Diocese of Fort Wayne-South Bend, Inc. ("Catholic Charities"); Saint Anne Home & Retirement Community of the Diocese of Fort Wayne-South Bend, Inc. ("St. Anne Home"); Franciscan Alliance, Inc.; Specialty Physicians of Illinois LLC ("Specialty Physicians"); University of Saint Francis ("St. Francis"); Our Sunday Visitor, Inc. ("Sunday Visitor"); Biola University, Inc. ("Biola") and Grace Schools. The plaintiffs objected below to the regulatory scheme, which they characterize as a "contraceptive services mandate," on numerous grounds. Primarily, they asserted that the regulations force them to participate in a system that contravenes their religious beliefs in violation of the RFRA. 42 U.S.C. § 2000bb *et seq*.[6] In particular,

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[6] The plaintiffs also allege that the challenged statute and regulations violate their rights under the First Amendment and under the Administrative Procedures Act, 5 U.S.C. § 500 *et seq*. Because the district court issued the injunction after considering only the RFRA, and because neither side has briefed the other issues, we will confine our discussion to the RFRA. On remand, the plaintiffs are free to pursue their other theories for relief and, in fact, we will leave the injunction in place for a limited time in order to allow the court to consider those additional claims.

they are forced to contract with insurers or third-party administrators that will provide their employees (and, in some cases, their students) with coverage for contraceptives, sterilization, and abortion-inducing products, all in violation of their deeply held religious beliefs. The accommodation provides them no relief, they contended below, because it causes them to trigger and facilitate the same objectionable services for their employees and students. A non-complying employer[7] who does not meet an exemption faces fines of $2000 per year per full time employee[8] for not providing insurance that meets coverage requirements, 26 U.S.C. § 4980H(c), or $100 per day per employee for providing insurance that excludes the required contraceptive coverage, 26 U.S.C. § 4980D, and will face the risk of other enforcement actions.

The Diocese itself is exempted from challenged requirements under the religious employer exemption,[9] and the remaining plaintiffs are subject

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[7] The disputed regulations apply equally to employers providing insurance to employees and to institutions of higher education providing student health insurance. *See* 45 C.F.R. § 147.131(f). Some of the plaintiffs provide both employee and student health coverage.

[8] When calculating the number of employees for the purpose of assessing this penalty, the statute directs that thirty employees be subtracted from the total number of employees, essentially reducing the penalty by $60,000 per year for affected employers. 26 U.S.C. § 4980H(c)(2)(D)(i).

[9] Although the Diocese is itself exempt, the Diocesan Health Plan insures employees of the non-exempt Catholic Charities. In order to protect Catholic Charities from having to comply

to the accommodation for nonprofit, religiously-affiliated employers. The government does not contest the sincerity of the plaintiffs' religious objections to the required contraceptive coverage. Moreover, all of the plaintiffs consider the provision of health insurance for their employees and students to be part of their religious mission.

Although the plaintiffs concede that they are not required to pay for the objectionable services, they contended in the district court that being forced to contract with insurers or third-party administrators who must then provide those services makes them a facilitator of objectionable conduct, complicit in activity that violates their core religious beliefs. The plaintiffs also asserted below that the government's interest in providing contraceptive services is not compelling and that the means the government employed are not the least restrictive available to achieve the government's goals. On those bases, the plaintiffs sought and received a preliminary injunction in the district court.

The district court noted that the RFRA prohibits the federal government from placing substantial burdens on a person's exercise of religion unless it can demonstrate that applying the burden is "in

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with either the contraceptive mandate or the accommodation, the Diocese has forgone almost $200,000 annually in increased premiums in order to maintain its grandfathered status under the ACA. *See* 42 U.S.C. § 18011. Grandfathered plans are those health plans that need not comply with the coverage requirements of the ACA because they were in existence when the ACA was adopted and have not made certain changes to the terms of their plans.

furtherance of a compelling governmental interest," and is the "least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a) and (b). The court first considered whether the contraception regulations create a substantial burden on eligible employers in light of the accommodation provided by the regulations. Citing our opinion in *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2903 (2014), the court noted that "the pertinent inquiry for the substantial burden test under RFRA is whether the claimant has an honest conviction that what the government is requiring or pressuring him to do conflicts with his religious beliefs and whether the governmental pressure exerts a sufficiently coercive influence on the plaintiffs' religious practice." *Grace Schools v. Sebelius*, 988 F. Supp. 2d 935, 950 (N.D. Ind. 2013); *Diocese of Fort Wayne-South Bend, Inc. v. Sebelius*, 988 F. Supp. 2d 958, 972 (N.D. Ind. 2013). The court found that the plaintiffs sincerely believe that the accommodation compels them to facilitate and serve as a conduit for objectionable contraceptive services for their employees and students. If the plaintiffs want to provide health insurance for their students and employees as part of their religious mission (and in order to avoid the fines imposed by the ACA on employers who fail to meet coverage requirements), the court reasoned, then they must either provide the objectionable coverage themselves or comply with the accommodation.

And the plaintiffs sincerely believe that invoking the accommodation facilitates and enables the

provision of contraceptive services to their employees and students; the accommodation, in short, makes them complicit in the provision of services to which they possess a religious objection. That they need not pay for the services provides no relief from their religious dilemma, the district court reasoned, because they must violate their religious beliefs by either forgoing providing health insurance to their employees and students, or they must take critical steps (*i.e.* comply with the accommodation) to facilitate a third party's provision of the objectionable coverage. Because failure to take either of these equally objectionable routes would result in the imposition of large financial penalties, the district court found that the plaintiffs demonstrated that the ACA imposes a substantial burden on their free exercise rights in contravention of the RFRA. The court then assumed that the government possessed a compelling interest in providing seamless contraceptive services to women in group health plans, but found that the accommodation was not the least restrictive means of accomplishing that goal. The court therefore enjoined the defendants from enforcing against the plaintiffs the requirements "to provide, pay for, or otherwise facilitate access to coverage for FDA approved contraceptive methods, abortion-inducing drugs, sterilization procedures, and related patient education and counseling." *Grace Schools*, 988 F. Supp. 2d at 958; *Diocese of Fort-Wayne-South Bend*, 98 F. Supp. 2d at 980. The government appeals.

II.

Several months after the district court entered the injunctions for the plaintiffs here, we issued our opinion in *Notre Dame I*, where we affirmed the denial of a motion for a preliminary injunction under strikingly similar circumstances to those presented by these appeals. The government asserts that our decision in *Notre Dame I* controls the result here and requires that we reverse the preliminary injunctions granted by the district court. The plaintiffs argue that *Notre Dame I* is distinguishable and that application of the substantial burden test from *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and *Korte* requires that we affirm the preliminary injunctions here. After this appeal was fully briefed and argued, the Supreme Court vacated and remanded our opinion in *Notre Dame I* "for further consideration in light of *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)." *University of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015). We recently issued a new opinion addressing the effect of *Hobby Lobby* on Notre Dame's appeal. *See Notre Dame II*, 786 F.3d at 615–19. We will begin our analysis with our original *Notre Dame I* opinion, which continues to apply to some of the questions raised here, before we turn to *Notre Dame II*. "We review the district court's findings of fact for clear error, its balancing of the factors for a preliminary injunction under the abuse of discretion standard, and its legal conclusions *de novo*." *United Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 563 F.3d 257, 269 (7th Cir. 2009). To obtain a preliminary injunction, a party must establish that it is likely to

succeed on the merits, that it is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in its favor, and that issuing an injunction is in the public interest. *Smith v. Executive Dir. of Ind. War Mem'ls Comm'n*, 742 F.3d 282, 286 (7th Cir. 2014).

A.

In *Notre Dame I*, a non-profit Catholic university moved to enjoin the enforcement of the ACA's contraception provisions against it. 743 F.3d at 551. Notre Dame provides health benefits to its employees and students. The university self-insures the employees and utilizes a third-party administrator to manage the plan. It contracts directly with an insurance provider for the student health plan. 743 F.3d at 549. The ACA requires the university, as an eligible organization, either to provide contraceptive coverage for its employees or to comply with the accommodation by opting out through the use of the EBSA Form 700 certification ("Form 700"), which we described above. 743 F.3d at 550. The relevant regulations required Notre Dame to provide the completed Form 700 to its third-party administrator and to the insurer of the student plan. Notre Dame filed suit shortly before the deadline for complying with the accommodation and moved for a preliminary injunction. The district court denied the motion and Notre Dame appealed, with fewer than two weeks left to meet the deadline for compliance. We denied the university's motion for an injunction pending the appeal but ordered expedited briefing. On the last day to comply with the regulations,

Notre Dame signed the Form 700 and supplied it to its insurer and third-party administrator. 743 F.3d at 551. The appeal proceeded. We noted that Notre Dame's primary objection was to the regulations surrounding the Form 700 certification. One regulation provides that:

> the copy of the self-certification [EBSA Form 700] provided by the eligible [to opt out] organization [Notre Dame] to a third party administrator [Meritain] (including notice of the eligible organization's refusal to administer or fund contraceptive benefits) … shall be an instrument under which the plan is operated, [and] shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds.

Notre Dame I, 743 F.3d at 552–53 (quoting 29 C.F.R. § 2510.3-16). Notre Dame interpreted that regulation as if its mailing of the Form 700 to its insurer and its third-party administrator were the cause of the provision of contraceptive services to its employees and students, in violation of its religious beliefs. We noted that was not the case. Instead, the Form 700 allows the university to opt out of the provision of objectionable services entirely and the law then places the burden of providing the services on the

insurer and the third-party administrator. 743 F.3d at 553.

In assessing the likelihood of Notre Dame's success on the merits, we considered and rejected the school's claim that filling out and mailing the Form 700 is a "substantial burden" on the university's exercise of religion. 743 F.3d at 554. Notre Dame complained that completing the form and distributing it to the insurer and third-party administrator triggered contraceptive coverage for employees and students, making the university complicit in the provision of objectionable services and burdening the university's religious exercise. We found that the Form 700 self-certification does not trigger, cause or otherwise enable the provision of contraceptive services:

> Federal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services. By refusing to fill out the form Notre Dame would subject itself to penalties, but Aetna [the insurer] and Meritain [the third-party administrator] would still be required by federal law to provide the services to the university's students and employees unless and until their contractual relation with Notre Dame terminated.

Notre Dame I, 743 F.3d at 554. We also rejected Notre Dame's argument that its insurer and third-party administrator would not have been authorized as plan fiduciaries to provide the contraceptive services until the school executed Form 700. 743 F.3d at 554–55. The law and the regulations (and not the Form 700) designate the insurer and third-party administrator as plan fiduciaries who are then obligated by federal law to provide the contraceptive services. 743 F.3d at 555. We also concluded that the contraception regulations do not impose a substantial burden simply because the university must contract with a third party willing to provide (at the behest of the government) the services that Notre Dame finds objectionable. Because that third party did not object to providing the services, we called any such claim speculative and not a ground for equitable relief. We emphasized, in the end, that it was not the Form 700 or anything that Notre Dame was required to do by the regulatory accommodation that caused the university's employees and students to receive the objectionable coverage; rather it was federal law that authorized, indeed required, insurers and third-party administrators to provide coverage. 743 F.3d at 559. Because the true objection was not to actions that the school itself was required to take but rather to the government's independent actions in mandating contraceptive coverage, we concluded that there was no substantial burden on the university's religious exercise. 743 F.3d at 559.

B.

As litigation on the ACA's contraception requirements has progressed in other cases and other circuits, new regulations have been issued in response to interim orders from the Supreme Court. In *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius*, 134 S. Ct. 1022 (2014), after a district court declined to enjoin the operation of the ACA against a religious organization that did not wish to file the Form 700, the Court entered an injunction pending the appeal of that decision:

> If the employer applicants inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicants the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit. To meet the condition for injunction pending appeal, applicants need not use the form prescribed by the Government and need not send copies to third-party administrators. The Court issues this order based on all the circumstances of the case, and this order

> should not be construed as an expression of the Court's views on the merits.

Little Sisters, 134 S. Ct. at 1022. The order, in short, relieved the Little Sisters of their obligation to file the Form 700 so long as they directly notified the government of their objection.

Subsequently, the Court entered a similar injunction in a case within our circuit. *See Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014). After essentially repeating the language from the very short order in *Little Sisters*, the Court clarified:

> Nothing in this interim order affects the ability of the applicant's employees and students to obtain, without cost, the full range of FDA approved contraceptives. The Government contends that the applicant's health insurance issuer and third-party administrator are required by federal law to provide full contraceptive coverage regardless whether the applicant completes EBSA Form 700. The applicant contends, by contrast, that the obligations of its health insurance issuer and third-party administrator are dependent on their receipt of notice that the applicant objects to the contraceptive coverage requirement. But the applicant has already notified the Government—without using EBSA Form 700—that it meets the requirements for exemption from the contraceptive coverage requirement on

> religious grounds. Nothing in this order precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act.

Wheaton College, 134 S. Ct. at 2807. As with *Little Sisters*, the order relieved Wheaton College of its obligation to file Form 700 as long as it notified the government directly of its objection. But the government was permitted to use this direct notice to facilitate the coverage required by the ACA.

And finally, after the Third Circuit reversed a temporary injunction sought by a religious employer and granted by a district court, the Court again intervened:

> The application for an order recalling and staying the issuance of the mandate of the Court of Appeals pending the filing and disposition of a petition for a writ of certiorari, having been submitted to Justice Alito and by him referred to the Court, the application as presented is denied. The Court furthermore orders: If the applicants ensure that the Secretary of Health and Human Services is in possession of all information necessary to verify applicants' eligibility under 26 CFR § 54.9815-2713A(a) or 29 CFR § 2590.715-2713A(a) or 45 CFR § 147.131(b) (as applicable), the respondents are enjoined from enforcing against the applicants the

> challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of their petition for certiorari. Nothing in this interim order affects the ability of the applicants' or their organizations' employees to obtain, without cost, the full range of FDA approved contraceptives. Nor does this order preclude the Government from relying on the information provided by the applicants, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act. *See Wheaton College v. Burwell*, 573 U. S. ___ (2014). This order should not be construed as an expression of the Court's views on the merits. *Ibid*. Justice Sotomayor would deny the application.

Zubik v. Burwell, 2015 WL 3947586 (June 29, 2015) (full text found at http://www.supremecourt.gov /search.aspx?filename=/docketfiles/14a1065.htm, last visited September 3, 2015). As a result of these interim orders from the Supreme Court, the regulations have been amended so that objectors may now notify HHS directly rather than filing the Form 700. And the government may, in turn, facilitate the required contraceptive coverage based on such notice.

C.

We turn to our recent decisions in *Notre Dame II* and *Wheaton College v. Burwell*, 791 F.3d 792 (7th Cir. 2015). In *Notre Dame II*, we noted that, shortly after filing its suit and immediately before the regulatory deadline, the university signed the Form 700 and sent it to the insurer of its students and the third-party administrator of its employee plan. That action left us wondering what relief Notre Dame sought. Ultimately, we determined, Notre Dame wanted

> us to enjoin the government from forbidding Notre Dame to bar Aetna and Meritain from providing contraceptive coverage to any of the university's students or employees. Because of its contractual relations with the two companies, which continue to provide health insurance coverage and administration for medical services apart from contraception as a method of preventing pregnancy, Notre Dame claims to be complicit in the sin of contraception. It wants to dissolve that complicity by forbidding Aetna and Meritain—with both of which, to repeat, it continues to have contractual relations—to provide any contraceptive coverage to Notre Dame students or staff. The result would be that the students and staff currently lacking coverage other than from Aetna or Meritain would have to fend for

> themselves, seeking contraceptive coverage elsewhere in the health insurance market.

Notre Dame II, 786 F.3d at 611. The university's primary objection to the ACA was that its contractual relationship with its insurer and third-party administrator made the school a conduit for the provision of objectionable services. According to Notre Dame, the contraception regulations imposed a substantial burden on it by forcing the university to identify and contract with a third party willing to provide objectionable contraceptive services. 786 F.3d at 611–12.

We noted that, although Notre Dame is the final arbiter of its religious beliefs, only the courts may determine whether the law actually forces the university to act in a way that would violate those beliefs. 786 F.3d at 612. The record contained no evidence to support a conduit theory. Nor is it within our usual practice to enjoin non-parties such as Notre Dame's insurer and third-party administrator. We also rejected Notre Dame's claim that the regulation requiring employers to provide Form 700 to its insurers was the *cause* of the provision of contraceptive services; rather the services are provided because federal law requires the insurers to provide them. *Notre Dame II*, 786 F.3d at 613–14 ("It is federal law, rather than the religious organization's signing and mailing the form, that requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services."). Because the insurer must

provide the services no matter what the employer does, we noted that "signing the form simply shifts the financial burden from the university to the government, as desired by the university." 786 F.3d at 615. *See supra* note 5. We thus re-asserted the core reasoning of our earlier opinion before turning to any effect that *Hobby Lobby* had on the case.

Hobby Lobby, we noted, involved closely-held for-profit corporations whose owners objected on religious grounds to the contraceptive mandate. The Supreme Court held that the RFRA applied to nonreligious institutions owned by persons with sincerely held religious objections to the ACA's contraception regulations. *Hobby Lobby*, 134 S. Ct. at 2776–78; *Notre Dame II*, 786 F.3d at 615. The Court noted that the companies' objections could be addressed by allowing them to invoke the same accommodation that the government created for religious non-profit employers, namely signing and filing the Form 700. 134 S. Ct. at 2782. The Court left open the issue of whether the accommodation that was adequate for nonreligious, for-profit corporations would be sufficient to protect the rights of religious non-profit employers. As to that issue, we examined various alternative schemes that Notre Dame proposed as possible accommodations and found each of them lacking. We also noted that the Supreme Court had created an alternative to Form 700 by allowing employers to notify the government directly of its objection to the mandate. *Notre Dame II*, 786 F.3d at 617–18; *Wheaton College*, 134 S. Ct. at 2806. We rejected Notre Dame's objections to the *Wheaton College* alternative notice, citing *Bowen v.*

Roy, 476 U.S. 693 (1986). We noted that the *Roy* Court rejected Roy's religious objection to the government's use of his daughter's Social Security number for its purposes. The Court held "Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets." *Roy*, 476 U.S. at 700. Notre Dame's objection to the government designating insurers as substitutes to provide contraceptive coverage was an analogous challenge to the government's management of its affairs and, accordingly, Notre Dame had not demonstrated a substantial burden to its religious exercise. *Notre Dame II*, 786 F.3d at 618.

In *Wheaton College*, we similarly rejected a religious school's objections to the contraception regulations under the RFRA, the First Amendment and the Administrative Procedures Act. 791 F.3d at 801. The college asserted that the government was using the school's insurance plan and putting additional terms into its contracts with insurers in order to provide the objectionable coverage. The college sought an injunction prohibiting the government's effort to use Wheaton's plans as the vehicle for making contraceptive coverage available to its employees and students. It objected to notifying its insurers or the government that it claimed a religious exemption, and also to providing the government with the names of its insurers so that the government could then implement the coverage separate from the college. We noted that the ACA and accompanying regulations do not alter any

employer's insurance plans or contracts. 791 F.3d at 794. Nor is the college being forced to allow the use of its plan to provide objectionable services. The ACA and regulations require only that the college notify either its insurers or the government that it objects, which takes the school out of the loop. 791 F.3d at 795. As in *Notre Dame II*, we rejected the claim that the provision of notice to insurers or the government somehow triggers or facilitates the provision of objectionable coverage. 791 F.3d at 796. As was the case with Notre Dame, Wheaton also objected to being forced to contract with insurers which, in turn, provided objectionable services, contending that this made the college complicit in the provision of those services. We saw no complicity in the operation of the law, which makes every effort to separate religious employers from the provision of any objectionable services.

We again noted that courts generally do not enjoin nonparties, and Wheaton had not made its insurers parties to the suit. Wheaton also expressed a reluctance to identify its insurers to the government, instead preferring that the government discover through its own research the names of the insurers. But Wheaton made no connection between the means for identifying the insurers and its religious commitments. We also noted Wheaton's assertion that its students and employees sign a covenant agreeing to abide by the school's moral standards, indicating perhaps that Wheaton's concerns about the ACA are largely academic because the employees and students are unlikely to actually use the services offered. Finally, we rejected

Wheaton's claims under the First Amendment, ERISA and the Administrative Procedures Act, all issues which were not argued in the instant appeal, and so we will not address them further. 791 F.3d at 797–800.

Before we move on to the plaintiffs' objections in this case, we note that the case law analyzing the contraceptive mandate is rapidly evolving. Recently, the six other circuits to consider these same issues have all come to the same conclusion as our opinions in *Notre Dame* and *Wheaton College*, namely, that the contraceptive mandate, as modified by the accommodation, does not impose a substantial burden on religious organizations under the RFRA. *See Catholic Health Care System v. Burwell*, — F.3d —, 2015 WL 4665049, *7-*16 (2d Cir. Aug. 7, 2015) (concluding that the accommodation does not impose a substantial burden); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 , 2015 WL 4232096, *16 (10th Cir. 2015), *petition for cert. filed*, 84 USLW 3056 (U.S. July 24, 2015) (No. 15- 105) (concluding that the mandate does not impose a substantial burden on religious exercise under RFRA and affirming the denial of a preliminary injunction in one instance and reversing the grant of preliminary injunctions in two others); *East Texas Baptist University v. Burwell*, 793 F.3d 449, 459 (5th Cir. 2015), *petition for cert. filed*, 84 USLW 3050 (U.S. July 8, 2015) (No. 15-35) (holding that the ACA does not impose a substantial burden under the RFRA and reversing the grant of a preliminary injunction); *Geneva College v. Secretary United States Department of Health & Human Servs.*, 778

F.3d 422, 442 (3d Cir. 2015), *petition for cert. filed*, 83 USLW 3894 (U.S. May 29, 2015) (Nos. 14-1418 & 14A1065), *and stay denied by Zubik v. Burwell*, 135 S.Ct. 2924, 2015 WL 3947586 (June 29, 2015) (reversing grant of preliminary injunction and concluding that the accommodation procedures do not impose a substantial burden on religious exercise); *Priests for Life v. United States Dep't of Health & Human Servs.*, 772 F.3d 229, 256 (D.C. Cir. 2014), *petition for cert. filed*, 83 USLW 3918 (U.S. June 9, 2015) (No. 14-1453) (affirming denial of injunctive relief and concluding that the ACA's mandate does not impose a substantial burden on religious exercise); *Michigan Catholic Conference v. Burwell*, 755 F.3d 372, 390 (6th Cir. 2014), *cert. granted, judgment vacated and remanded*, 135 S. Ct. 1914 (2015), *reissued*, — F.3d — 2015 WL 4979692 (6th Cir. Aug. 21, 2015) (because objectors may obtain the accommodation from the contraceptive-coverage requirement without providing, paying for, and/or facilitating access to contraception, the contraceptive-coverage requirement does not impose a substantial burden on their exercise of religion). [10] No court of appeals has concluded that the

[10] The Sixth Circuit released its opinion a few weeks prior to the issuance of *Hobby Lobby*, but denied rehearing *en banc* several months later. The Supreme Court subsequently granted the petition for certiorari, vacated the opinion and remanded for further consideration in light of *Hobby Lobby*. The Sixth Circuit recently reissued and reaffirmed its earlier opinion and filed a supplemental opinion addressing *Hobby Lobby*. The Sixth Circuit continues to hold that the ACA's contraception provisions do not impose a substantial burden under RFRA. *Michigan Catholic*, 2015 WL 4979692, *6- *15.

contraceptive mandate imposes a substantial burden under the RFRA.

D.

After this court issued its opinion in *Notre Dame II*, we asked the parties to file position statements addressing the effect of that opinion on this appeal. We turn now to the parties' position statements as well as the arguments raised in their original briefs. The government, in its original brief, contended that *Notre Dame I* was controlling. It argued that the plaintiffs are permitted to opt out of providing contraceptive coverage, and that the plaintiffs improperly object to requirements imposed by the accommodation on third parties rather than on themselves. The government also asserted that it is the province of the court rather than the plaintiffs to determine whether a particular regulation or law "substantially" burdens the plaintiffs' free exercise of religion under the RFRA. Finally, the government maintained that, even if we were to determine that the regulations impose a substantial burden on the plaintiffs under the RFRA, the government's interest in providing the coverage is compelling and the regulations are narrowly tailored to meet that interest.

In its position statement, the government adds that *Notre Dame II* rejected all of the arguments raised by the plaintiffs here. Specifically, the government again notes that the regulations allow the plaintiffs to opt out of providing the mandated contraceptive services, making them effectively exempt. After objectors opt out, the government

tasks third parties with providing the coverage. Moreover, the opt-out does not operate as a trigger or cause for the coverage; rather federal law imposes on third parties the obligation to provide the coverage. Nothing in the ACA or regulations makes the plaintiffs complicit or allows their contracts with insurers or third party administrators to act as conduits for the provision of contraceptive services. The government repeats that, even if the regulations impose a substantial burden on the plaintiffs' free exercise of religion under the RFRA, the regulations serve a compelling government interest and are the least restrictive means of achieving those interests. According to the government, our opinion in *Notre Dame II* demonstrates that the current regulations are narrowly tailored to achieve the compelling interest, and that none of the plaintiffs' suggested alternatives would be effective.

In their opening brief, the plaintiffs argued, as they did below, that the contraception regulations impose a substantial burden on their exercise of religion. The plaintiffs asserted that they exercise their religion "by refusing to take actions in furtherance of a regulatory scheme to provide their employees with access to abortion-inducing products, contraceptives, sterilization, and related education and counseling." Brief at 29. The plaintiffs maintained that submitting Form 700 renders them complicit in a grave moral wrong because the form has certain legal effects that facilitate the provision of the objectionable services. The accommodation, the plaintiffs added, requires them to amend the documents governing their health plans to provide

the very coverage to which they object. The plaintiffs also objected to contracting with and paying premiums to insurance companies or third party administrators that are authorized to provide their employees with contraceptive coverage. Moreover, the plaintiffs pointed out that if they fail to comply with the regulations, they will face onerous fines. The plaintiffs asserted that *Notre Dame I* is distinguishable on the facts, and that *Notre Dame I* did not address the arguments of the Catholic appellees here that (1) the Diocese is being forced to forgo $200,000 annually in increased premiums in order to maintain its grandfathered status[11] to avoid its plan becoming a conduit for objectionable coverage for the employees of Catholic Charities that are enrolled in the Diocese's health plan; and (2) the mandate has the additional effect of artificially dividing the Catholic Church into a "worship arm" and a "good works arm."

The plaintiffs also maintained in their opening brief that the government's "substantial burden" analysis incorrectly focuses on the nature of the actions that the regulations require plaintiffs to take rather than the pressure the government has placed on the plaintiffs to take those actions. They contended that the focus of the analysis should be on the intensity of the coercion applied by the

[11] "Grandfathered plans" are plans that were in existence when the ACA was adopted and that have not made certain changes to the terms of the plans. Grandfathered plans need not comply with the ACA's coverage requirements. *See* 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T. Certain increases in premiums could cause a plan to lose its grandfathered status and thus become subject to the ACA's coverage requirements.

government to act contrary to their religious beliefs. Finally, they asserted that they object to actions they themselves must take under the regulations, not to the actions of third parties.

In their position statement, the plaintiffs contend that *Notre Dame II* is distinguishable on the facts, that it is not binding here, and that it is based on legal errors. Finally, the plaintiffs argue that the strict scrutiny analysis in *Notre Dame II* is both foreclosed by the government's concession in this case and inconsistent with circuit precedent.

E.

We turn to the specific objections raised by the plaintiffs here. They contend that the accommodation does not operate as a true "opt-out" because it requires them to engage in numerous religiously objectionable actions. The actions to which the plaintiffs object fall under two categories: first, the mandate requires them to contract with insurance companies or third-party administrators that are authorized to provide the objectionable coverage and which will provide that coverage once the plaintiffs communicate their objections. Second, they must submit the Form 700 or notify the government directly of their objection. They sincerely believe that the required actions render them complicit in a grave moral wrong because their insurance contracts serve as conduits for the provision of the objectionable services, and the notification triggers or facilitates the provision of objectionable services. They practice their religion,

they assert, by refusing to take actions "in furtherance of" a scheme to provide the objectionable services. And if they decline to engage in these actions, the mandate subjects them to onerous fines.

The core of the disagreement between the plaintiffs and the government lies in how we apply the substantial burden test. The plaintiffs cite our decision in *Korte* for the proposition that the substantial burden test under the RFRA focuses primarily on the intensity of the coercion applied by the government to act contrary to religious beliefs. *Korte*, 735 F.3d at 683. Citing *Hobby Lobby*, they also assert that the RFRA allows private religious believers to decide for themselves whether taking a particular action (such as filing the Form 700 or contracting with an insurance company) is connected to objectionable conduct in a way that is sufficient to make it immoral. *Hobby Lobby*, 134 S. Ct. at 2778.

In *Korte*, we noted that "exercise of religion" means "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 735 F.3d at 682; 42 U.S.C. § 2000cc–5(7)(A). A substantial burden on free exercise may arise when the government compels a religious person to perform acts undeniably at odds with fundamental tenets of that person's religious beliefs, and also when the government places substantial pressure on a person to modify his or her behavior in a way that violates religious beliefs. *Korte*, 735 F.3d at 682. "Put another way, the substantial-burden inquiry evaluates the coercive effect of the governmental pressure on the adherent's religious practice and

steers well clear of deciding religious questions." *Korte*, 735 F.3d at 683. Relying on *Korte* and *Hobby Lobby*, the plaintiffs urge us to engage in a two-step analysis of first identifying the religious belief at issue, and second, determining whether the government has placed substantial pressure on the plaintiffs to violate that belief.

The plaintiffs are correct that it is not our province to decide religious questions. *Hobby Lobby*, 134 S. Ct. at 2778 (the RFRA presents the question of whether the mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs, but courts have no business addressing whether the religious belief asserted is reasonable); *Notre Dame II*, 786 F.3d at 612 (an objector is the final arbiter of its religious beliefs); *Little Sisters of the Poor*, 794 F.3d at —, 2015 WL 4232096, at *19 (substantiality does not permit a court to scrutinize the theological merit of a plaintiff's religious beliefs); *Geneva College*, 778 F.3d at 436 (courts should defer to the reasonableness of a plaintiff's religious beliefs). The plaintiffs in *Hobby Lobby* were closely-held, for-profit corporations that were required by the ACA to provide and pay for health insurance which included coverage of certain emergency contraceptives that they believed operated as abortifacients. Similar to the plaintiffs here, they believed that providing the required coverage is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. "This belief implicates a difficult and important question of religion and moral

philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Hobby Lobby*, 134 S. Ct at 2778.

So we defer to the plaintiffs' sincerely held beliefs regarding questions of religion and moral philosophy. But whether the government has imposed a substantial burden on their religious exercise is a legal determination. *Notre Dame II*, 786 F.3d at 612; *Little Sisters of the Poor*, 794 F.3d at —, 2015 WL 4232096, at *18; *East Texas Baptist University*, 793 F.3d at 456–59 & n.33; *Geneva College*, 778 F.3d at 436; *Priests for Life*, 772 F.3d at 247–49; *Michigan Catholic*, 755 F.3d at 385. And we are not required to defer to the plaintiffs' beliefs about the operation of the law. *Notre Dame II*, 786 F.3d at 612 (although an objector is the final arbiter of its religious beliefs, it is for the courts to determine whether the law actually forces the objector to act in a way that would violate those beliefs); *Little Sisters of the Poor*, 794 F.3d at —, 2015 WL 4232096, at *18 (courts need not accept the legal conclusion, cast as a factual allegation, that a plaintiff's religious exercise is substantially burdened); *Geneva College*, 778 F.3d at 436 (courts need not accept an objector's characterization of a regulatory scheme on its face but may consider the nature of the action required of the objector, the connection between that action and the objector's beliefs, and law. As many courts have noted, contraceptive coverage under the ACA results from federal law, not from any actions required by objectors under the accommodations. *Notre Dame II*,

786 F.3d at 614; and 786 F.3d at 623 (Hamilton, J., concurring); *Little Sisters of the Poor*, 794 F.3d at —, 2015 WL 4232096, at *16; *East Texas Baptist*, 793 F.3d at 459; *Geneva College*, 778 F.3d at 437; *Michigan Catholic*, 755 F.3d at 387.

The first action to which the plaintiffs object is filing the Form 700. They assert that the Form 700 is far more than a simple notification or objection, that it instead (1) designates the third party administrator as plan administrator and claims administrator for contraceptive benefits; (2) serves as an instrument under which the plans are operated vis-à-vis contraceptive services; and (3) apprises the third party administrator of its obligations to provide contraceptive coverage. We rejected this very argument in *Notre Dame II*, holding that treating the mailing of the Form 700 as the cause of the provision of contraceptive services is legally incorrect. 786 F.3d at 613. The Form 700, we noted, has the effect of throwing the entire administrative and financial burden of providing contraception on the insurer and the third party administrator. 786 F.3d at 613–14. As a result, the burden is lifted from the objector's shoulders. 786 F.3d at 614. "It is federal law, rather than the religious organization's signing and mailing the form, that requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services." 786 F.3d at 614. *See also Little Sisters of the Poor*, 794 F.3d at -- , 2015 WL 4232096 at *16 & *22-24 (finding that plaintiffs do not "trigger" or otherwise cause contraceptive coverage because federal law, not the act of opting out, entitles plan participants and

beneficiaries to coverage); *Geneva College*, 778 F.3d at 437–38 (same); *Michigan Catholic*, 755 F.3d at 387 (same).

Moreover, the regulations have been amended during this litigation, and now employers need not file the Form 700. Instead, consistent with the Supreme Court's interim orders in *Little Sisters of the Poor* and *Wheaton College*, the plaintiffs may contact the Department of Health and Human Services directly, alerting the government that they have a religious objection to providing contraceptive coverage, and providing only the name and contact information for their insurers or third party administrators. 80 Fed. Reg. 41342-47 (July 14, 2015). The burden then falls on the government to make appropriate arrangements with the insurer or third-party administrator to provide coverage for contraceptive services. The plaintiffs object to that action as well, asserting that it also makes them complicit in the provision of coverage. But that notification does nothing more than completely remove an objector from the provision of the objectionable services. *See Geneva College*, 778 F.3d at 436 ("While the Supreme Court reinforced in *Hobby Lobby* that we should defer to the reasonableness of the appellees' religious beliefs, this does not bar our objective evaluation of the nature of the claimed burden and the substantiality of that burden on the appellees' religious exercise."). As we noted in our *Notre Dame* opinions, the plaintiffs are in the strange position of objecting not to the contraceptive mandate itself but to the accommodation that relieves them of any

involvement in the implementation of the contraceptive mandate. *Notre Dame I*, 743 F.3d at 557–58; *Notre Dame II*, 786 F.3d at 621 (Hamilton, J., concurring). *See also Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d —, 2015 WL 4232096, *14-15 (10th Cir. 2015) (noting the unusual nature of a claim that attacks the government's attempt to accommodate religious exercise by providing a means to opt out of compliance with a generally applicable law).

> [T]he arrangements the government makes to find substitutes for those given the benefit of a religious exemption are imposed as a matter of federal law, not as a result of the exemption itself. The party claiming the exemption is not entitled to raise a religious objection to the arrangements the government makes for a substitute.

Notre Dame II, 786 F.3d at 623 (Hamilton, J., concurring). In short, requiring an employer to notify the government of its objection to the mandate is no more burdensome than the government's use of a girl's Social Security number in a benefits program even though her father sincerely believed that the use of the number would harm his daughter's spirit. *See Notre Dame II*, 786 F.3d at 618–19 (discussing *Bowen v. Roy*, 476 U.S. 693 (1986)). So too with the plaintiffs here.

The second action to which the plaintiffs object is contracting with insurers and third-party

administrators who will then provide the objectionable coverage, albeit at no cost to, and without further involvement of, the plaintiffs. The plaintiffs admittedly want to provide their employees and students with health insurance; indeed they have said that it is part of their religious mission to do so. But they wish to provide health insurance without the objectionable coverage. Yet this is exactly what the accommodation allows them to do. *Notre Dame II*, 786 F.3d at 621–22 (Hamilton, J., concurring) (once an employer files the Form 700 or notifies the government directly of its religious objection, it can avoid contracting, paying, arranging, or referring for the objectionable contraceptive care); *Wheaton College*, 791 F.3d at 795–96 (once the college notifies its insurer or the government of its religious objections, the college and its health plans are bypassed). As with the notification requirement, the plaintiffs believe that their contracts further the provision of objectionable services. They assert that the government is using their health plans or altering the terms of their health plans to provide contraceptive coverage. But once they have objected, the government does not use the health plans or contracts at all, much less alter any terms. *See Wheaton College*, 791 F.3d at 796 ("Call this 'using' the health plans? We call it refusing to use the health plans."). As we noted in *Wheaton College*:

> The upshot is that the college contracts with health insurers for contraceptive coverage exclusive of coverage for emergency contraceptives, and the Department of Health and Human

> Services contracts with those insurers to cover emergency-contraceptive benefits. The latter contracts are not part of the college's health plans, and so the college is mistaken when it tells us that the government is "interfering" with the college's contracts with its insurers. The contracts, which do not require coverage of emergency contraception, are unchanged. New contracts are created, to which the college is not a party, between the government and the insurers.

Wheaton College, 791 F.3d at 796. We rejected any notion of complicity in the provision of contraceptive services arising from the mere existence of a contract to provide health insurance *without* any contraceptive coverage. 791 F.3d at 797. *See also Little Sisters of the Poor*, 794 F.3d at —, 2015 WL 4232096 at *16 (the *de minimis* administrative tasks required to opt out of the mandate relieves objectors from complicity); *East Texas Baptist*, 793 F.3d at 461 ("Under the accommodation, the contracts are solely for services to which the plaintiffs do not object; the contracts do not provide for the insurers and third-party administrators to cover contraceptives, do not make it easier for those entities to pay for contraceptives, and do not imply endorsement of contraceptives.").

To the extent that the act of opting out causes the legal responsibility to provide contraceptive coverage to shift from the plaintiffs to their insurers or third-party administrators, this feature relieves rather than burdens their religious exercise. *Little*

Sisters of the Poor, 794 F.3d at —, 2015 WL 4232096 at *16. As our colleagues in the Tenth Circuit noted, "An opt out religious accommodation typically contemplates that a non-objector will replace the religious objector and take over any legal responsibilities." *Little Sisters of the Poor*, 794 F.3d at —, 2015 WL 4232096, *16 n.21; *East Texas Baptist*, 793 F.3d at 461–62 (RFRA does not entitle plaintiffs to block third parties such as the government or insurers from engaging in conduct with which the plaintiffs disagree); *Geneva College*, 778 F.3d at 438 n.13 (the provision of contraceptive coverage is not dependent upon the objector's contract with its insurance company); *Michigan Catholic*, 755 F.3d at 388 (the government's imposition of an independent obligation on a third party does not impose a substantial burden on an objector's exercise of religion).

Finally, the Catholic plaintiffs here (namely, the Diocese, Catholic Charities, St. Anne Home, Franciscan Alliance, Specialty Physicians, St. Francis and Sunday Visitor) assert what they characterize as unique RFRA claims that were not presented in the *Notre Dame* appeal and therefore are not resolved by the *Notre Dame* opinions. In particular, they argue that the mandate substantially burdens the Diocese's religious exercise by forcing it to forgo almost $200,000 annually in increased premiums to maintain its grandfathered status so that it may avoid its health plan becoming a conduit for objectionable coverage for Catholic Charities' employees who are enrolled in its health plan. *See* note 11 *supra*. But if the Diocese were to lose its grandfathered status, it would become

exempt from the ACA's contraceptive mandate, and Catholic Charities would be able to opt out of the mandate by employing the accommodation. As we just concluded, that scenario would not impose a substantial burden on the free exercise rights of either the Diocese or Catholic Charities.

The Catholic plaintiffs also contend that the mandate has the effect of artificially dividing the Catholic Church into a "worship" arm (the Diocese) and a "good works" arm (the remaining Catholic plaintiffs). Again, though, groups affiliated with the Diocese may opt out of providing contraceptive coverage using the accommodation and thus continue to provide health coverage under the Diocese's health plan. Both arms of the Church are therefore extricated from the provision of objectionable contraceptive services, albeit through different means. Moreover, any division is created not by the ACA but by the Internal Revenue Code that excepts "churches, their integrated auxiliaries, and conventions or associations of churches" from certain requirements. *See* 26 U.S.C. § 6033(a)(3)(A)(i). It is difficult to see how laws and regulations that grant tax advantages to churches and their integrated auxiliaries somehow impose a substantial burden on affiliates.

III.

The accommodation does not serve as a trigger or a conduit for the provision of contraceptive services. *Notre Dame II*, 786 F.3d at 612–15; *Wheaton College*, 791 F.3d at 795–97. It is the operation of federal law, not any actions that the

plaintiffs must take, that causes the provisions of services that the plaintiffs find morally objectionable. The accommodation has the legal effect of removing from objectors any connection to the provision of contraceptive services. As we noted above, every other circuit court to consider the issue of whether the mandate imposes a substantial burden on religious exercise has come to the same conclusion. As a result, the plaintiffs are not entitled to a preliminary injunction against the enforcement of the ACA regulations. If they wish to object, they may either employ the Form 700 or they may notify the Department of Health and Human Services directly. We extend the injunctions here for 60 days so that the district court may consider in the first instance the additional arguments that plaintiffs raised in support of injunctive relief. We reverse the district court's judgments and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

MANION, *Circuit Judge*, dissenting.

The HHS accommodation is the long and winding extension cord the government uses to power its contraceptive mandate. It winds through regulations and additions and revisions. The court, through a perfunctory examination, interprets the accommodation's twisted framework and holds that it frees the religious nonprofits from having to power the mandate themselves and, thus, does not violate the RFRA. The court is wrong: A thorough examination reveals that the accommodation's tangled mess is hiding the fact that the extension

cord gets its power from the nonprofits' health plans and must be plugged in before it will work. It also exposes the fact that the government is forcing the nonprofits to plug in the accommodation themselves by signing the self-certification or providing the alternative notice.

This dissent, as long and detailed as it is, reveals that the accommodation never relieves the religious nonprofits or their health plans from the provision of contraceptive services which burdens their religious exercise. Section I explains how the court, as many others have before it, uses a caricature of the HHS accommodation to avoid accepting the nonprofits' sincerely held religious belief as required by the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). Section II shows that the nonprofits correctly understand the accommodation's operation, so that the court must accept their sincerely held religious belief and hold that the accommodation imposes a substantial burden on their religious exercise. Section III demonstrates that the government has utterly failed to prove that the HHS accommodation furthers a compelling governmental interest: The government has failed to establish any of the causal links necessary to prove that increasing the availability of contraceptive services will improve the health of women generally, let alone that of the nonprofits' employees. Furthermore, the government's stated interest is overbroad, underinclusive, and marginal at best. Section IV demonstrates that, even if the government had a compelling interest, the accommodation is not the least restrictive means. For these reasons, Section V concludes that the HHS

accommodation violates RFRA, which means the nonprofits have a significant likelihood of success on the merits of their claim and the district court's preliminary injunction should be affirmed. For the many reasons that follow, I dissent.

I. The court refuses to apply RFRA.

RFRA prevents the government from substantially burdening a person's religious exercise unless the burden on the person is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000bb-1. The Supreme Court has made it abundantly clear that courts are wholly incompetent to decide whether a governmental action burdens a person's religious exercise. Rather, courts must accept a person's sincere belief that it is a burden. *Hobby Lobby*, 134 S. Ct. at 2778–79. Courts determine whether the burden is substantial, but they do so by examining the level of coercion applied to compel compliance, not what is required by that compliance and to what extent it violates the person's religion. *Id*. at 2779; *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013). Thus, the proper analysis is to determine first, that the nonprofits have a sincere belief that compliance with the law would violate their religion, and second, that the pressure applied by the government to coerce compliance with the law is substantial. The outcome of a thorough and proper analysis is ultimately simple and straightforward: As in Hobby Lobby, the government concedes the sincerely held religious belief and the fines imposed for noncompliance are "enormous." Hobby Lobby, 134 S. Ct. at 2779. So, following Hobby Lobby, the

accommodation imposes a substantial burden. That the government labels it an accommodation makes no difference to the burden it imposes on the nonprofits. The analysis remains the same.

The court does not apply these straightforward steps because it balks at the idea that we must accept a person's assertion that a law burdens their religion. The court fears that such a rule will allow a person to escape any number of regulations, including this brave new world of free and universal contraceptives, unless the government can meet the strict scrutiny test laid down by RFRA.[1] This was the same concern that prompted the Supreme Court's decision to limit free exercise protections in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). *Hobby Lobby*, 134 S. Ct. at 2761–62. Nevertheless, when it enacted RFRA, Congress meant to restore exactly the level of protection to religious exercise that now so concerns the court. *Id*. at 2761– 62; *Korte*, 735 F.3d at 671–72. So, foreclosed by the Supreme Court, the court rules as it and many others have before: The court rejects the nonprofits' sincere belief that compliance with the HHS accommodation is prohibited by their religion by holding that the nonprofits misunderstand the manner in which the accommodation operates. Then, acting as an expert theologian, the court holds that the accommodation's operation as understood by the court is not a

[1] What goes unsaid by this critique is the conclusion that the nonprofits' religious beliefs are less deserving of protection than the government's scheme to marginally increase the availability of contraceptive services for certain employees.

substantial burden to the nonprofits' religious exercise. *Ante*, at 38; *see also Wheaton Coll. v. Burwell*, 791 F.3d 792 (7th Cir. 2015); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606 (7th Cir. 2015) (*Notre Dame II*); *Michigan Catholic Conference v. Burwell*, 2015 WL 4979692 (6th Cir. Aug. 21, 2015); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. Jul. 14, 2015); *East Texas Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. Jun. 22, 2015); *Geneva College v. Secretary United States Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015); *Priests for Life v. United States Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014). *But cf. Notre Dame II*, 786 F.3d at 626 (Flaum, J., dissenting); *Little Sisters*, 794 F.3d 1151, 2015 WL 4232096, *41 (Baldock, J., dissenting); *Priests for Life v. United States HHS*, 2015 U.S. App. LEXIS 8326, *16 (D.C. Cir. May 20, 2015) (en banc denied) (Brown, J. and Kavanaugh, J., dissenting); *Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1340 (11th Cir. 2014) (Pryor, J., concurring).

The court does this by improperly judging the nonprofits' religious beliefs and ignoring the penalties used for compliance. Had the nonprofits said that they sincerely believe that the HHS accommodation violates their religion and left it at that, perhaps the injunction would remain in place because there would be nothing for the court to attack. But since the nonprofits said that they sincerely believe that the accommodation violates their religion *because* the accommodation makes them complicit in the provision of contraceptive services, the court has attacked their claim that the

law makes them complicit. The court is right that it is "not required to defer to the plaintiffs' beliefs about the operation of the law." *Ante*, at 31. Nevertheless, it is the nonprofits that are right about the operation of the law, not the court.

II. The accommodation imposes a substantial burden on the nonprofits' religious exercise.

The court denies that the self-certification and alternative notice process trigger the provision of contraceptive coverage. According to the court, it is federal law, not the self-certification form or alternative notice, which results in the contraceptive coverage. The court says that self-certification throws the burden of contraceptive coverage on to the nonprofits' health insurance issuers (insurers) and third party administrators (TPAs). *Ante*, at 32. But how does this lift the burden off the nonprofits when the accommodation imposes the "free" contraceptive coverage requirement only on the insurers and TPAs that the nonprofits have hired? In spite of that imposition, the court also denies that the accommodation uses the nonprofits' health plans to provide the contraceptive coverage. Instead, it says that the government contracts with the insurers and TPAs to provide the coverage to only the beneficiaries on the nonprofits' health plans. *Ante*, at 35. But, given that connection with the nonprofits' health plans, how can the provision of coverage be completely independent of those same plans?

The court can only make such sweeping claims by ignoring the true operation of the accommodation

and the legal consequences the government has attached to the self-certification and alternative notice. The court may think that the nonprofits "throw" their burden onto their insurers and TPAs, but it ignores who is forced to do the throwing and who *ultimately* carries the burden once thrown. A close examination of the manner in which the regulations actually operate reveals that the government's promise of accommodation is illusory. The nonprofits' claim that the HHS accommodation makes them complicit in the provision of contraceptive coverage becomes obvious.

A. The self-certification form and alternative notice trigger the coverage of contraceptive services.

The court holds that the self-certification and alternative notice are simply signs that the nonprofits have opted out of providing contraceptive coverage, and once the sign is made known the law obliges the nonprofits' insurers and TPAs to provide the unwanted coverage. *Ante*, at 32–33. In reality, once the nonprofits formally object, they are opted in. The self-certification and alternative notice do more than give notice of the nonprofits' objections. And they are much more than *de minimis* paperwork necessary to effectuate the nonprofits' objection. They create the insurers' and TPAs' obligation to provide the contraceptive coverage.[2] For a nonprofit

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[2] 45 C.F.R. § 147.131(c)(2)(i) ("A group health insurance issuer *that receives a copy of the self-certification or notification* … must … [p]rovide separate payments for any contraceptive services for plan participants and beneficiaries for so long as they remain enrolled in the plan." (emphasis added)); 29 C.F.R.

with a self-insured plan, the effect of the self-certification and alternative notice is abundantly clear: the government makes them legal instruments under which the nonprofit's health plan is operated. This then allows the regulations to treat them as legal designations of the TPA as plan administrator and claims administrator for coverage of contraceptive services under the nonprofit's health plan.[3] Only a nonprofit can designate its plan administrator.[4] The government's ability to define *how* a plan administrator is designated does not give it the power to designate *who* will be a plan administrator.[5] For the TPA to have the necessary authority to provide coverage for contraceptive

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§ 2590.715–2713A(c)(2)(i) (identical requirement for TPAs); 78 Fed. Reg. 39878 (listing among the key elements of the accommodation the need for eligible organizations with insured group health plans to self-certify and that it is the "issuer that receives a self-certification" that must comply with the accommodation's requirements); 78 Fed. Reg. 39880 ("A third party administrator that receives a copy of the self-certification … must provide or arrange separate payments for contraceptive services … .").

[3] 78 Fed. Reg. 39879 ("The self-certification … will be treated as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits pursuant to section 3(16) of ERISA."); 29 C.F.R. § 2510.3–16 (defining the term plan administrator to include the regulatory treatment of the self-certification and alternative notice as acts of designation and declaring that each "shall be an instrument under which the plan is operated").

[4] 29 U.S.C. § 1102(a)(2).

[5] 29 U.S.C. § 1002(16)(A).

services, *the nonprofit must designate* the TPA as a plan administrator.[6] Such an act would obviously violate the nonprofit's religion. So the government has loaded the self-certification and alternative notice with the legal significance of designating the TPA. It is not the operation of law. It is the acts of self-certification and alternative notice that designate the TPA and facilitate the provision of the unwanted contraception coverage. Without possession of the self-certification or alternative notice, the TPA cannot receive reimbursement for the provision of contraceptives.[7] In sum, the government can only require the nonprofits' TPAs to cover contraceptive services if the nonprofits give the government the legal authority to do so. The government has hidden that legal authority in self-certification and alternative notice.

For insurers the situation is not as clear, but it is not the less burdensome. The law requires insurers to include contraceptive coverage in every health plan they offer.[8] (Insurers will not, however, provide something for which they are not paid.[9]) The

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[6] 78 Fed. Reg. 39880 ("The third party administrator serving as the plan administrator for contraceptive benefits ensures that there is a party with legal authority to arrange for payments for contraceptive services and administer claims in accordance with ERISA's protections for plan participants and beneficiaries.").

[7] *See infra* note 18.

[8] 45 C.F.R. § 147.131(a)(1).

[9] *See infra* note 21.

self-certification and alternative notice *permit* an insurer to offer a health plan that appears not to include contraceptive coverage. But this is on the condition that the insurer still provides the coverage itself in the form of direct payments.[10] The assertion that it is the operation of law that designates an objecting nonprofit's insurer as the replacement is misleading. It ignores the fact that *but for* the nonprofit's hiring of the insurer, and the nonprofit's continuing contractual relationship with it, the government (or the operation of law) would not make any designation. Without the objection and designation by the nonprofits, the insurer is not required to act at all, despite the court's claim to the contrary. The government has turned the act of objecting into the act of designating and it cannot escape the consequences of that conflation by calling it an act of law.

This is not like the case of a conscientious objector who objects and the government finds a replacement. Under the regulations, the government does not find the replacement, the nonprofit does. The designation does not take place unless the nonprofit either delivers the self-certification form to its insurer or TPA, or uses the alternative notice to inform the government who its insurer or TPA is and which health plan is at issue. By insisting that the nonprofit deliver the form or supply the plan information for the government's use, the government uses the objecting nonprofit to do its dirty work. The government has not provided an

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[10] *See supra* note 2.

exit—it offers a revolving door with only one opening.[11]

Furthermore, this is not like the case of a conscientious objector who refuses to object and goes to jail, and the government still finds a replacement. If the nonprofits refuse to self-certify or provide the alternative notice and instead pay the huge fines, their insurers and TPAs will not automatically provide the contraception coverage. To comply with the law, the insurers would refuse to sell plans without the coverage, while the TPA would refuse to provide their services. In spite of the huge monetary penalties, the nonprofits would still be prevented from providing health plans for their employees, which they have asserted is also a violation of their religious beliefs. So the no-win substantial burden would hit them on both sides.

The court has implied that requiring the nonprofit to identify its insurer (or TPA) is merely the most efficient means for the government to achieve its objective, *Wheaton*, 791 F.3d at 798, but efficiency does not excuse the substantial burden imposed by the requirement. Identifying its insurer

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[11] This is not the case of a conscientious objector walking into the draft board, voicing his objection, being excused, and walking out. For the analogy to fit the HHS accommodation, the draft board must decide that every objector will be replaced by the objector's friend, and the objector's objection is only effective if the objector delivers written notice of his objection to his friend or tells the draft board who his friend is and where the board can find him. Then, the objector must send his friend money so that that his friend will remain his friend for the purpose of being his replacement.

so that the government can instruct that insurer to provide contraceptive coverage is just as burdensome to the nonprofit as if it had to pick its own replacement, because it has done just that by hiring its insurer and then objecting to the coverage requirement. That the nonprofits could not object if the government, on its own, were to find a replacement insurer and discover to which employees it had to provide the coverage is not relevant. Of course the nonprofits would not have an objection to the government contracting with a third party to provide the contraceptive coverage to other third parties. They believe the provision of objectionable contraceptives is always immoral, but they know they have no legal means to stop the government from contracting with third parties. That is not what is happening here. The government is using the nonprofits, their health plans, and their contractual relationships with their insurers and TPAs, to provide the contraception coverage to which they object.

B. The accommodation uses the nonprofits' health plans.

The HHS accommodation requires significantly more involvement on the part of the nonprofits and their health plans than the court relates. For starters, the accommodation does not create independent policies or contracts. In fact, as the nonprofits assert, the accommodation relies wholly on the existing contract between the nonprofits and the insurers and TPAs to provide separate payments

directly to the nonprofits' health plan beneficiaries.[12] The accommodation must use the existing insurance contracts to issue payments because separate policies would violate insurance laws.[13] The separate payments are only provided so long as an employee is enrolled in the nonprofit's health plan, thus requiring the nonprofits' health plans to determine eligibility.[14] The accommodation also relies on the nonprofits' health plans' enrollment procedures. The insurers and TPAs must provide notice of the separate payments when they provide notice of the other benefits under the nonprofits' health plans.[15] The separate payments can be limited to the same

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[12] 78 Fed. Reg. 39874 ("[T]he accommodations established under these final regulations *do not require the issuance of a separate excepted benefits individual health insurance policy* covering contraceptive services … but instead require a simpler method of providing direct payments for contraceptive services." (emphasis added)).

[13] 78 Fed. Reg. 39876 ("As the payments at issue derive solely from a federal regulatory requirement, not a health insurance policy, they do not implicate issues such as issuer licensing and product approval requirements under state law … ").

[14] 45 C.F.R. § 147.131(c)(2)(i)(B) (insurers must "[p]rovide separate payments for any contraceptive services … for plan participants and beneficiaries for so long as they remain enrolled in the plan."); 29 C.F.R. § 2590.715–2713A(c)(2)(i)(B) (identical regulatory requirements for TPAs).

[15] 78 Fed. Reg. 39881 ("The notice [regarding the provision of contraceptive services] must be provided *contemporaneous with* (to the extent possible), but separate from, *any application materials distributed in connection with enrollment* (or re-enrollment) in coverage … ." (emphasis added)).

provider network as the other plan benefits.[16] The end result is that the contraceptive services become a *de facto* benefit under the nonprofits' health plans.[17] The government admitted as much when it stated that it was by design that the accommodation makes the provision of contraceptive coverage "seamless[]" with the other plan benefits. Gov't Supp and Reply Br., 14. These circumstances sharply conflict with the court's conclusion that the accommodation does not use the nonprofits' health plans and "makes every effort to separate religious employers from the provision of any objectionable services." *Ante*, at 23. "[E]very effort" does not disguise the fact that the offensive provision is inseparably imbedded in the nonprofits' health plan. *Id*.

A further indication that the accommodation uses the nonprofits' health plans is the fact that the only way an employee receives coverage for contraceptive services under the accommodation is to enroll in the objecting nonprofit's health plan. An employee cannot reject coverage under the nonprofit's plan and still receive coverage under the

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[16] 78 Fed. Reg. 39877 ("[A]n issuer … *may require that contraceptive services be obtained in-network* (if an issuer has a network of providers) in order for plan participants and beneficiaries to obtain such services without cost sharing." (emphasis added)).

[17] 78 Fed. Reg. 39880 ("[T]he self-certification … identifies the limited set *of plan benefits* (that is, contraceptive coverage) that the employer refuses to provide and *that the third party administrator must therefore provide* or arrange for an issuer or another entity to provide." (emphasis added)).

accommodation. The coverage under the accommodation is not separate from the coverage under the nonprofit's health plan. It is the employee's status as a beneficiary of the nonprofit's health plan, not as an employee, that entitles the employee to coverage under the accommodation. Simply being hired as an employee is not enough to receive coverage; an employee must enroll in the nonprofit's health plan. *Cf. Notre Dame II*, 786 F.3d at 617.

C. The nonprofits are involved in the payment of contraceptive services.

Finally, there is the matter of payment. For TPAs, the self-certification and alternative notice act as authorizations for payment, without which the TPAs cannot receive reimbursement from the government for payments made under the accommodation.[18] The government assumed that the

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[18] Payments for contraceptive services provided by TPAs under the HHS accommodation are funded through an adjustment (i.e., discount) to the federally-facilitated exchange (FFE) user fee. *See* 78 Fed. Reg. 39882. The FFE user fee is paid by insurance issuers that participate in a federal health care exchange to support the operations of the exchange. *See* 78 Fed. Reg. 15412; 45 C.F.R. § 156.50(c). The amount of the adjustment is equal to the total amount of the payments made for contraceptive services provided by the TPA plus an allowance of *at least* 10 percent for administrative costs. 45 C.F.R. § 156.50(d)(3). To receive the FFE user fee adjustment, a TPA must submit to HHS "[a]n attestation that the payments for contraceptive services were made in compliance with 26 CFR 54.9815-2713A(b)(2) or 29 CFR 2590.715-2713A(b)(2)." 45 CFR § 156.50(d)(2)(iii)(E). Both the provisions cited by § 156.50 provide that the TPA will provide the separate payments for contraceptive services "[i]f a third party administrator receives

reimbursements for TPAs would not be passed on to the non-profits but, as more nonprofits are forced to use the accommodation and more contraceptive services are provided under the accommodation, that assumption is unlikely to prove true.[19] For insurers there is ostensibly no reimbursement because the government claims the cost of contraceptive services will be offset by the reduction in unintended pregnancies.[20] Whether this claim is true will be hard to determine because the regulations allow insurers to recapture costs for contraceptive services

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a copy of the self-certification from an eligible organization or a notification." 26 CFR § 54.9815-2713AT(b)(2) *and* 29 CFR § 2590.715-2713A(b)(2). Moreover, § 156.50 requires a TPA which receives an adjustment to maintain for 10 years and make available upon request "[a] copy of the self-certification referenced in 26 CFR 54.9815-2713A(a)(4) or 29 CFR 2590.715-2713A(a)(4) for each self-insured plan with respect to which an adjustment is received." 45 CFR § 156.50(d)(7)(i).

[19] The government assumed that the adjustments granted under the accommodation for 2014 would be small enough to have no impact on the fee. 78 Fed. Reg. 39882. However, the FFE user fee will have to be increased to cover 1) more adjustments as more nonprofits are forced to take advantage of this accommodation, and 2) greater adjustments because the HHS mandate incentivizes more expensive forms of contraception. An increase in the FFE user fee will eventually be recouped through an increase in premiums, albeit an increase across the insurance issuer's entire portfolio, but the nonprofits may be in that same portfolio.

[20] 78 Fed. Reg. 39877 ("The Departments continue to believe, and have evidence to support, that, with respect to the accommodation for insured coverage established under these final regulations, providing payments for contraceptive services is cost neutral for issuers.").

provided under the accommodation through what is called the "risk corridor program."[21] The program is

[21] 78 Fed. Reg. 39878 ("[A]n issuer of group health insurance coverage that makes payments for contraceptive services under these final regulations may treat those payments as an adjustment to claims costs for purposes of medical loss ratio and risk corridor program calculations. This adjustment compensates for any increase in incurred claims associated with making payments for contraceptive services."). The "risk corridor program" is a complex cost-sharing program in which insurers with healthier beneficiaries cover the costs of insurers which either failed to raise premiums or could not raise premiums enough to cover more costly beneficiaries, including those that received separate payments for contraceptive services. *See* 45 C.F.R. § 153.500 *et seq*.; 78 Fed. Reg. 7235 ("Section 1342 of the Affordable Care Act directs the Secretary to establish a temporary risk corridors program that provides for the sharing in gains or losses resulting from inaccurate rate setting from 2014 through 2016 between the Federal government and certain participating plans."); *see also* 78 Fed. Reg. 72323 ("In 2014, HHS will also operationalize the premium stabilization programs established by the Affordable Care Act—the risk adjustment, reinsurance, and risk corridors programs—which are intended to mitigate the impact of possible adverse selection and stabilize the price of health insurance in the individual and small group markets."). The program is supposed to pay for itself, but the regulations allow the government to use appropriated funds to cover insurer loses. *See* 79 Fed. Reg. 30260 ("In the unlikely event of a shortfall for the 2015 program year, HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers. In that event, HHS will use other sources of funding for the risk corridors payments, subject to the availability of appropriations."). Perhaps this is why insurers do not object to the HHS accommodation. Insurers know that the federal government will ultimately bear the burden of covering the costs for contraceptive services they are unable to recoup. The risk corridor program has been criticized as a health insurer bailout program. *See* Noam N. Levey, *Critics call Obama funding plan for health insurer losses a 'bailout'*, L.A.

temporary, but since the HHS accommodation was enacted during the program's implementation, it will be difficult to determine how the accommodation's separate payments affect premiums. Nevertheless, if it were true that payments for contraceptive services are cost-neutral, then the premiums that would otherwise go toward childbirths are instead used for contraceptive services in order to reduce childbirths because the nonprofits' premiums are the only source of funding. This is also an objectionable outcome.

D. The proper substantial burden analysis: the court must accept the nonprofits' sincere belief that the accommodation violates their religion because the nonprofits understand its operation.

The HHS accommodation is a purposely complicated act of bureaucratic legalese and accounting tricks that enables the government to claim that the objecting nonprofits have nothing to do with the provision of contraceptive services. Yet, as shown in much detail above, the accommodation infects the nonprofits' health plans with an offensive provision that eradicates their purpose, which is the exercise of the nonprofits' religion. It is the nonprofits which understand the operation of the HHS accommodation, not the court, and we must accept their sincere belief that it violates their religion. The accommodation imposes a substantial

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TIMES, May 21, 2014, http://www.latimes.com/nation/lana-insurance-bailout-2014052 1-story.html (last visited Sept. 3, 2015).

burden because the nonprofits have a sincere belief that compliance with the law violates their religion and the penalties applied by the government to coerce compliance are enormous.

III. The accommodation does not further a compelling government interest.

The government must grant the nonprofits an exemption from the accommodation unless "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." 42 U.S.C. § 2000bb-1 (emphasis added). "This requires us to look beyond broadly formulated interests and to scrutinize the asserted harm of granting specific exemptions to particular religious claimants—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases." *Hobby Lobby*, 134 S. Ct. at 2779 (internal quotation and alteration marks omitted). "RFRA creates a broad statutory right to case-specific exemptions from laws that substantially burden religious exercise even if the law is neutral and generally applicable, unless the government can satisfy the compelling-interest test." *Korte*, 735 F.3d at 671. "In short, RFRA operates as a kind of utility remedy for the inevitable clashes between religious freedom and the realities of the modern welfare state, which regulates pervasively and touches nearly every aspect of social and economic life." *Id*. at 673.

"Congress's express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test … ." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006). Thus, the government "must specifically identify an 'actual problem' in need of solving, and the curtailment of [the right] must be actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (citation omitted). This requires a "high degree of necessity." *Id.* at 2741. The government must show a "direct causal link." *Id.* at 2738. The government's "predictive judgment" is insufficient, "and because it bears the burden of uncertainty, ambiguous proof will not suffice." *Id.* at 2738–39. (citation omitted). The government must prove that what it seeks to regulate actually *causes* the harm it wishes to prevent; evidence of a *correlation* is insufficient. *Id.* at 2739. "[S]tudies [that] suffer from significant, admitted flaws in methodology" fail to provide this proof. *Id.* If the regulation is underinclusive it is a sign that the governmental interest is not compelling. *Id.* at 2740. Put another way, "only those interests of the highest order and those not otherwise served" can be considered compelling. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). But, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal quotation and alteration marks omitted). Finally, the government

does not have a compelling interest in "[f]illing the remaining modest gap" or in "each marginal percentage point by which its goals are advanced." *Brown*, 131 S. Ct. at 2741, n.9.

The government asserts the same interest in furtherance of the HHS accommodation that it asserts in furtherance of the HHS contraceptive mandate, namely, the increased availability of contraceptive services to improve the health of women. The government also says that it wishes to increase the availability of contraceptive services to equalize the provision of preventive care for women and men so that women can participate in the workforce and society on an "equal playing field with men." The latter interest boils down to a concern for women's health. The government claims that the inequality stems from the additional cost of contraception and that the additional cost can deter women from using contraceptives, thus allowing the negative health outcomes that prevent women from achieving equal economic status. 77 Fed. Reg. 8728.

To justify increasing the availability of contraception to improve the health of women, the government relies exclusively on the Institute of Medicine's 2011 study, *Clinical Preventive Services for Women: Closing the Gaps* (IOM Study). The IOM Study is a 235-page study of the current preventative services available for women. Only eight pages of the study deal with the issue of contraceptive services. IOM Study, 102–09. The study does not claim that contraceptives improve women's health generally, but that they prevent certain negative health outcomes associated with

unintended pregnancies. *See Priests for Life*, 772 F.3d at 261 ("A core reason the government sought under the ACA to expand access to contraception is that use of contraceptives reduces unintended pregnancies."). The government's interest advanced by the accommodation, then, is best identified as increasing the availability of contraceptive services in order to prevent the negative health outcomes caused with unintended pregnancies. When put to the test, the government's interest fails to prove compelling.[22]

A. A lack of available contraception and unintended pregnancies are not actual problems in need of solving.

The HHS accommodation relies on a lengthy chain of causality: 1) the accommodation will make contraceptives more available by removing administrative and cost burdens; 2) if contraceptives are more available, then more women will use them; 3) if more women use contraceptives, then there will be fewer unintended pregnancies; and 4) if there are fewer unintended pregnancies, then there will be fewer of the negative health outcomes associated with them. The government, therefore, must prove more than the existence of negative health outcomes. It must prove *first*, that unintended pregnancies cause the negative outcomes; *second*, that contraceptive use will cause fewer unintended

[22] For a comprehensive explanation of how the government's interest thoroughly fails the compelling interest test, see generally Helen Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 VILL. L. REV. 379 (2013).

pregnancies; and *third* a higher availability of contraceptives will cause more women to use them. The IOM Study fails to prove these "direct casual links." *Brown*, 131 S. Ct. at 2738. Instead, the study shows merely a correlation.

First, the study admits that "for some outcomes [of unintended pregnancy], research is limited." *Id.* at 103. It then proceeds to describe the outcomes *correlated* with unintended pregnancies: outcomes that "may" or "may not" happen, are "more" or "less likely," have been "reported," and have "increased odds," or are "associated with." IOM Study 103.

Second, the study discusses "evidence of [contraceptive] method effectiveness," but does not prove that increasing the use of even an effective contraceptive causes fewer unintended pregnancies. This is because such a simple correlation does not take into account the factors that inhibit perfect use of contraception or the societal changes that result from increased reliance on contraception.[23] Rather than prove that greater contraceptive use causes fewer unintended pregnancies, the study only states that "evidence exists" that it does. *Id.* at 105. The

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[23] *See* Alvaré, *supra* note 22, at 408–411 for a discussion of the "growing body of scholarship … indicating that the persistence or worsening of high rates of unintended pregnancy, abortion, and sexually transmitted diseases, and also our nation's high rates of nonmarital births (the chief predictor of female poverty), are the 'logical' result—in economic and psychological terms—of the new marketplace for sex and marriage made possible by increasingly available contraception (in some cases, combined with available abortion)."

IOM study bases this statement on two other studies, but they are insufficient to provide the necessary evidence.[24] According to the study, "*[i]t is thought* that greater use of long-acting, reversible contraceptive methods—including intrauterine devices and contraceptive implants that require less action by the woman and therefore have lower use failure rates—*might help* further reduce unintended pregnancy rates." *Id.* at 108 (emphasis added; citation omitted).

Third, the study fails to prove that increasing the availability of contraceptives will cause an increase in their use, but concludes that "[t]he elimination of cost sharing for contraception therefore *could* greatly increase its use, including use of the more effective and longer-acting methods, especially among poor and low-income women most at risk for unintended pregnancy." IOM Study, 109 (emphasis added). However, the conclusion that eliminating cost sharing "could" increase its use is based on two studies, neither of which concerned contraceptive services specifically. The first concerned preventative and primary care services generally, and the second concerned mammograms. *Id.* The final claim the study makes is that "when out-of-pocket costs for contraceptives were eliminated or reduced, women were more likely to rely on more effective long-acting contraceptive methods." *Id.* But, a review of the study underlying that conclusion reveals that "[w]e cannot be certain that the changes in procurement were solely due to the removal of cost to the patient, but there was a

[24] Alvaré, *supra* note 22, at 399-405.

shift toward prescribing the most effective methods ([intrauterine contraceptives] and injectable contraceptives) and a substantial increase in prescribing of [emergency contraceptive pills]."[25] So, not only was the study inconclusive, it is ambiguous regarding the IOM Study's intended purpose because a substantial increase in emergency contraceptive pills would seem to follow from a decrease in regular contraceptive use. On the whole, the IOM study's lack of causality renders the government's claim that it must increase the availability of contraceptives nothing more than a "predictive judgment." *Brown*, 131 S. Ct. at 2738.

Another reason the IOM Study fails to prove "an 'actual problem' in need of solving" is because it is overbroad. *Brown*, 131 S. Ct. at 2738. The study starts with the estimation that "[i]n 2001, … 49 percent of all pregnancies in the United States were unintended," but the study defines an unintended pregnancy as one that is "unwanted or mistimed at the time of conception." IOM Study, 102. This definition includes pregnancies that were unwanted at the time of conception, but still wanted when the mother discovered she was pregnant, and mothers who intended to become pregnant, but did not intend to become pregnant by the specific conjugal act that resulted in conception. The government has zero interest in preventing these pregnancies. Under the study's overbroad definition, "all sexually active women with reproductive capacity are at risk for

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[25] Debbie Postlethwaite, et al., *A comparison of contraceptive procurement pre- and post-benefit change*, 76 CONTRACEPTION 360, 364 (2007).

unintended pregnancy." *Id.* at 103. Aside from the study's problems with its own definition, unintended pregnancies are an extremely difficult thing to quantify.[26]

Overall, the IOM Study lacks the necessary quality and rigor. It heavily relies on studies from biased organizations, such as the Guttmacher Institute and the journal CONTRACEPTION, and offers no consideration of competing studies. *Id.* at 102–109. The study's own dissenting opinion says it best:

> Readers of the Report should be clear on the fact that the recommendations were made without high quality, systematic evidence of the preventive nature of the services considered. Put differently, evidence that use of the services in question leads to lower rates of disability or disease and increased rates of wellbeing is generally absent.
>
> The view of this dissent is that the committee process for evaluation of the evidence lacked transparency and was largely subject to the preferences of the committee's composition. Troublingly, the process tended to result in a mix of objective and subjective determinations filtered through a lens of advocacy. An abiding principle in the evaluation of the evidence and the recommendations put forth as a consequence should be

[26] Alvaré, *supra* note 22, at 396–97.

> transparency and strict objectivity, but the committee failed to demonstrate these principles in the Report. This dissent views the evidence evaluation process as a fatal flaw of the Report particularly in light of the importance of the recommendations for public policy and the number of individuals, both men and women, that will be affected.

The itself shows that the lack of available contraceptive services is not a problem in need of solving. According to the IOM Study, "[c]ontraceptive coverage has become standard practice for most private insurance and federally funded insurance programs." *Id*. at 108. Further, "[s]ince 1972, Medicaid, the state-federal program for certain low-income individuals, has required coverage for family planning in all state programs and has exempted family planning services and supplies from cost-sharing requirements." *Id*. Finally,

> [C]omprehensive coverage of contraceptive services and supplies [is] "the current insurance industry standard," with more than 89 percent of insurance plans covering contraceptive methods in 2002. A more recent 2010 survey of employers found that 85 percent of large employers and 62 of small employers offered coverage of FDA-approved contraceptives.

Id. at 109 (citations omitted). Not only are contraceptive services already widely available, but they are also already widely used: "More than 99 percent of U.S. women aged 15 to 44 years who have ever had sexual intercourse with a male have used at least one contraceptive method." IOM Study, 103 (citation omitted). According to the Centers for Disease Control and Prevention, contraceptive use is "virtually universal among women of reproductive age."[27]

The study similarly fails to prove that there is a need to increase the availability of contraceptives to alleviate "the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced" or for "women with certain chronic medical conditions" who "may need to postpone pregnancy" and "women with serious medical conditions" for whom "pregnancy may be contraindicated." IOM Study, 103. Amazingly, the study does not even pretend to demonstrate a causal link in these circumstances, relying instead on the reader to make the inference mistakenly. The study hopes the reader ignores the common sense fact that women in these circumstances have a higher incentive to use contraceptives if that is their chosen method to prevent these outcomes.

The study offers no evidence regarding the effects that extra paperwork or other administrative

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[27] CDC, "Advance Data No. 350, Dec. 10, 2004: Use of Contraception and Use of Family Planning Services in the United States: 1982-2002", http://www.cdc.gov/nchs/data/ad/ad350.pdf (last visited Sept. 3, 2015).

and logistical obstacles would have on contraceptive availability or use. Such a finding is absolutely necessary for the government to assert that it has a compelling interest in using the nonprofits' health plans so that the coverage for contraceptive services will be "seamless." Instead, the IOM Study's conclusions are limited to the elimination of cost-sharing and provide no reason why a government-run option would not work equally as well as the HHS accommodation.

Finally, the IOM Study does not concern the employees of the nonprofits who are less likely to use contraception given their own religious beliefs. Instead, its conclusions mostly concern the "poor and low-income women most at risk for unintended pregnancy." *Id*. at 109. The study's hope is that the elimination of cost sharing for contraception will induce the poor to use more effective, long-acting methods, such as IUDs, implants, and sterilization. *Id*. at 108-109. However, "the government must establish a compelling and specific justification for burdening *these* claimants." *Korte*, 735 F.3d at 685; *see also Hobby Lobby*, 134 S. Ct. at 2761. The IOM Study fails to prove any connection whatsoever with the nonprofits' employees. In fact, there are already a high level of access to contraception, a higher rate of use, and an increased use of more effective methods among the women with more income and education.[28] Simply put, the IOM study fails to "specifically identify an 'actual problem' in need of solving," and, consequently, the government has

[28] Avaré, *supra* note 22, at 426.

failed to demonstrate a compelling interest. *Brown*, 131 S. Ct. at 2738.

B. The accommodation is underinclusive.

The HHS accommodation's underinclusiveness is another sign that the governmental interest is not compelling. *Id*. at 2740. The government "leaves appreciable damage to that supposedly vital interest unprohibited" by allowing religious employers, grandfathered plans, and employers with fewer than 50 employees to avoid providing contraceptive coverage. *Lukumi*, 508 U.S. at 547 (internal quotation marks omitted). Although more health plans will lose their grandfathered status the longer the ACA is in place, the number of persons employed by religious employers and organizations with fewer than 50 employees will remain considerable in light of the less than 2,000 covered employees concerned here.

The accommodation is also underinclusive because it does not account for the other causes of the negative health outcomes the IOM Study correlates with unintended pregnancies. According to the study, "women with unintended pregnancies are more likely than those with intended pregnancies to receive later or no prenatal care, to smoke and consume alcohol during pregnancy, to be depressed during pregnancy, and to experience domestic violence during pregnancy." IOM Study, 103. The study implies that unintended pregnancies cause these conditions, but there could just as well be another cause that causes not only these conditions, but the unintended pregnancy as well:

poverty, lack of education, abuse, or other causes of risk taking behaviors. The HHS accommodation addresses none of these alternative causes, focusing solely on unintended pregnancies. Most notably, the study does not acknowledge the fact that pregnancies resulting from failed contraceptives are also considered unintended.

Most damaging to the government's asserted interest in the contraceptive mandate is the fact that those women most at risk for an unintended pregnancy are "women who are aged 18 to 24 years and unmarried, who have a low income, who are not high school graduates, and who are members of a racial or ethnic minority group." IOM Study, 102 (citation omitted). These women—let alone the nonprofits' employees—are less likely to be served by the HHS accommodation, or the ACA's contraception mandate generally, because they are less likely to have the type of employment that qualifies them for the health insurance under the ACA. These women would not obtain contraceptive services through the HHS accommodation, but through a number of government programs such as Medicaid, 42 U.S.C. § 1396 et seq. (2010), and the Title X Family Planning Program, 42 U.S.C. § 300 (2006). "The consequence is that [the HHS accommodation] is wildly underinclusive when judged against its asserted justification, which … is alone enough to defeat it." *Brown*, 131 S. Ct. at 2740.

C. Forcing nonprofits to use the accommodation can only provide a marginal increase in contraception.

Contraceptive services are already widely available and their use is virtually universal. The HHS accommodation only fills the "remaining modest gap" by making already prevalent contraceptive services free for employees of religious nonprofits. *Id*. at 2741. This "can hardly be a compelling state interest." *Id*. Further, the "more focused inquiry" of RFRA requires the government to demonstrate that it has a compelling interest in filling the gap made by the less than 2,000 employees of the nonprofits here. *Hobby Lobby*, 131 S. Ct. at 2779. This is even less of a compelling interest. Further still, the accommodation fills in even less of the gap when viewed from the perspective of unintended pregnancies. This is because the accommodation seeks to treat unintended pregnancies through contraceptive services, but contraceptives are not always effective for a variety of reasons. Even if this gap could be decreased by improving the effectiveness of contraceptives, "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown*, 131 S. Ct. at 2741, n.9.

D. A primary concern underlying the accommodation is cost.

Cost appears to be a primary concern underlying the HHS accommodation. After all, babies are expensive. Of the IOM Study's eight-page discussion

of contraceptives, a significant portion is spent on the cost savings to be expected from their use despite the study's acknowledgement that cost considerations are out of scope:

> Although it is beyond the scope of the committee's consideration, it should be noted that contraception is highly cost-effective. The direct medical cost of unintended pregnancy in the United States was estimated to be nearly $5 billion in 2002, with the cost savings due to contraceptive use estimated to be $19.3 billion. … It is thought that greater use of long-acting, reversible contraceptive methods — including intrauterine devices and contraceptive implants that require less action by the woman and therefore have lower use failure rates—might help further reduce unintended pregnancy rates. Cost barriers to use of the most effective contraceptive methods are important because long-acting, reversible contraceptive methods and sterilization have high up-front costs.

IOM Study, 107–08 (citations omitted). The study's primary conclusion is that the use of contraceptive services—particularly longer-acting methods like IUDs—will greatly increase if they are free, "*especially among poor and low-income women.*" *Id.* at 109 (emphasis added). The appearance is that the government desires to use contraceptives that "require less action by the woman" to prevent poor, unmarried, minority women from having babies, as

if babies were a costly disease. IOM Study, 108. Of course, this appearance is lessened by the fact that the government is vigorously enforcing the HHS contraception mandate on even religious nonprofits through the accommodation.

Because the government has failed to prove that the HHS accommodation furthers a compelling governmental interest, it is not allowed to burden the nonprofits' religious exercise with the accommodation. 42 U.S.C. § 2000bb-1. Thus, the government must grant the nonprofits the same exemption that it grants to religious employers. 45 C.F.R. § 147.131(a).

IV. The accommodation is not the least restrictive means.

Even if the government had proved that the HHS accommodation was in furtherance of a compelling interest, it would still have to grant the nonprofits' an exemption from the accommodation because the accommodation is not the least restrictive means. 42 U.S.C. § 2000bb-1(b)(2). The Supreme Court in *Hobby Lobby* spoke of an obvious means that would be less restrictive than the HHS accommodation:

> The most straightforward way of doing this would be for the Government to assume the cost of providing the [objectionable] contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections.

> This would certainly be less restrictive of the plaintiffs' religious liberty, and HHS has not shown … that this is not a viable alternative.

131 S. Ct. at 2780. The government argues that RFRA does not require the government to create entirely new programs to accommodate religious objections, but the government provides no authority for its position. The Court did not hold that it was so in *Hobby Lobby*. *Id*. at 2786. Rather, the Court stated that Congress understood that by passing RFRA it might cost the government extra to avoid burdening religion. *Id*. at 2781. Besides, the government already maintains programs, such as Medicaid and the Title X Family Planning Program mentioned earlier, which could be opened up to the employees of the nonprofits.

The government also argues that a government-run program is not a valid means because it would create additional burdens for the nonprofits' employees and RFRA does not protect religious exercise that "unduly restrict[s] other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Id*. at 2786–87 (Kennedy, J., concurring). This requirement is not found in RFRA. What the government fails to acknowledge is that the purpose of an inquiry into the burdens on others is to determine whether a particular religious accommodation violates the Establishment Clause. *See Cutter v. Wilkinson*, 544 U.S. 709, 719–20 (2005) (Ginsburg, J.). To determine whether a religious accommodation under RFRA is compatible with the Establishment Clause "courts

must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries, and they must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths." *Id.* at 712 (citation omitted). A religious accommodation's effect on third parties must be examined because "[a]t some point, accommodation may devolve into 'an unlawful fostering of religion.'" *Id.* at 714 (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334-335 (1987)). The Supreme Court "has long recognized that the government may … accommodate religious practices … without violating the Establishment Clause." *Id.* at 713 (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-145 (1987)).

Administering a government-run program for contraceptive coverage in order to relieve the nonprofits of the burden on their religion imposed by the accommodation would not "devolve into 'an unlawful fostering of religion.'" *Id.* at 714. A government-run program would provide the contraception coverage on a cost-free basis. Any burden resulting from an employee's participation in the program would be *de minimis* because it truly would be nothing more than additional paperwork (unlike the self-certification and alternative notice). Furthermore, such a small burden would be no different than the burden experienced by the many who obtain dental and vision care benefits from different plans and fill their prescriptions at pharmacies unassociated with their health care providers. It would be absurd to say that such a *de*

minimis burden even came close to the establishment of religion. Finally, any burden would be within the employee's power to avoid by changing employment to an employer that provides the coverage. According to the government, when the contraceptive services mandate was enacted, 85% percent of large employers and 62% percent of small employers already covered contraceptives services under the health plans. Even more plans will cover contraceptives and that coverage will be copayment-free now that the mandate is in force.

V. Conclusion

This dissent explores the road less traveled by. As detailed above, the detour exposes two serious misrepresentations. First, the so-called accommodation is nothing but a mirage. The government strung together the complicated details to create a lengthy and twisted extension cord. The end result is the *de facto* imposition of a provision offering "free" birth control into the nonprofits' necessary health plans. The unwanted provision is very offensive and contrary to the nonprofits' sincerely held religious beliefs. The imposition does not occur if the nonprofits refuse to plug in the extension cord by refusing to self-certify or otherwise indicate consent through the alternative notice. But this refusal causes enormous, existential monetary penalties. So, there are substantial burdens at both ends of the accommodation.

Second, deep into the detour is the falsehood behind the government's claim that increasing the availability of contraceptive services furthers a

"compelling governmental interest." That label is needed to overcome the nonprofits' sincerely held religious beliefs that no one disputes. But, contraceptive services are already widely available from the great majority of employers. And, for the primarily targeted poor and/or unemployed women, whom the mandate does not affect, there are already programs like Medicaid and Title X that offer free contraceptive services. At its center, the IOM Study recognizes that babies are medically very expensive, so the government endeavors to reduce "unexpected" pregnancies to save money. In effect, the government considers pregnancy a preventable disease.

Aside from the fact that the government desires to substantially burden the nonprofits' religious exercise in furtherance of an exaggerated, misnamed, and misdirected interest, there are, no doubt, less restrictive means of furthering its interest. But why even go there? The government certainly has no compelling interest in forcing contraceptive coverage into the nonprofits' otherwise wanted and needed health plans when they unanimously assert they don't want the coverage and don't need it. The obvious solution for these plaintiffs (and likely for the plaintiffs involved in the similar—and similarly expensive—litigation in at least six other federal circuits, *see supra* p.42) is for the government to extend the religious employer exemption to all religious nonprofits that object to the coverage. 45 C.F.R. § 147.131(a).

The nonprofits have shown a likelihood of success on their claims that the HHS accommodation violates RFRA. 42 U.S.C. § 2000bb-1. The

preliminary injunction granted by the district court should be affirmed. *Korte*, 735 F.3d at 666 ("Although the claim is statutory, RFRA protects First Amendment free-exercise rights, and in First Amendment cases, the likelihood of success on the merits will often be the determinative factor." (internal quotation marks omitted)).

For all these reasons, I dissent.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GRACE SCHOOLS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 3:12-cv-459 JD
KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services, *et al.*,	)	
	)	
	)	
	)	
	)	
Defendants.	)	

Memorandum Opinion and Order

Plaintiffs Grace Schools (hereinafter, "Grace") and Biola University, Inc. (hereinafter, "Biola") have filed their first amended verified complaint [DE 54] seeking declaratory and injunctive relief claiming that the government defendants have violated their rights under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb *et seq*., the First Amendment of the Constitution of the United States, and the Administrative Procedure Act, 5 U.S.C. § 500 *et seq*., by enacting the "contraception mandate" which requires certain employers to provide coverage for contraception and sterilization

procedures in their employee health care plans on a no-cost-sharing basis, or face stiff financial penalties and the risk of enforcement actions for the failure to do so. Although the defendants have since moved to dismiss the amended complaint and the parties have sought summary judgment on the various claims presented [DE 60; DE 69], the Court focuses only on plaintiffs' request for injunctive relief and defendants' objection thereto,[1] in an effort to prevent the possibility of any unjust enforcement of the contraception mandate against plaintiffs come the first of the year.[2]

For the reasons that follow, plaintiffs have shown that their RFRA claim stands a reasonable likelihood of success on the merits, that irreparable harm will result without adequate remedy absent an injunction, and that the balance of harms favor protecting the religious-liberty rights of the plaintiffs. As such, the Court enters a preliminary injunction barring enforcement of the contraception mandate against Grace and Biola.

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[1] The Court previously advised the parties as to how this complex litigation would proceed [DE 57] and the parties have filed their briefs consistent with the Court's scheduling order [DE 52]. The Court has also carefully considered the supplemental notices of authority and responses filed by counsel, along with the amicus curiae briefs filed by counsel for the Liberty, Life and Law Foundation, the American Civil Liberties Union, the American Center for Law & Justice, and Regent University.

[2] Grace's employee health care plan begins on January 1, 2014, while Biola's employee health care plan begins shortly thereafter on April 1, 2014 [DE 54 at ¶ 179], and their student plans begin in the Summer of 2014. *Id*. at ¶ 181.

I. Background

The Contraception Mandate

Under the Patient Protection and Affordable Care Act (ACA), employment-based group health plans covered by the Employee Retirement Income Security Act must provide certain types of preventive health services. *See* 42 U.S.C. § 300gg–13; 29 U.S.C. § 1185d. One provision mandates coverage, without cost-sharing by plan participants or beneficiaries, of "preventive care and screenings" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA]." 42 U.S.C. § 300gg–13(a)(4). The HRSA, an agency of the U.S. Department of Health and Human Services (HHS), then delegated the task of developing appropriate preventive-services guidelines to the Institute of Medicine (IOM), an arm of the National Academy of Sciences funded by Congress to provide the government with independent expert advice on matters of public health. After reviewing the type of preventive services necessary for women's health and well-being, the IOM recommended that the following preventive services be required for coverage: annual well-woman visits; screening for gestational diabetes and breast-feeding support, supplies, and counseling; human papillomavirus screening; screening and counseling for sexually transmitted infections and human immune-deficiency virus; screening and counseling for interpersonal and domestic violence; and

contraceptive education, methods, and services so that women can better avoid unwanted pregnancies and space their pregnancies to promote optimal birth outcomes. *See* IOM, Clinical Preventive Services for Women: Closing the Gaps, http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx (last visited Dec. 9, 2013). Based on the IOM's recommendations, the HRSA issued comprehensive guidelines requiring coverage of (among other things) "[a]ll Food and Drug Administration [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling[3] for all women with reproductive capacity." HRSA, Women's Preventive Services Guidelines: Affordable Care Act Expands Prevention Coverage for Women's Health and Well–Being, http://www.hrsa.gov/womensguidelines/ (last visited Dec. 9, 2013). These include hormonal methods such as oral contraceptives (the pill), implants and injections, barrier methods, intrauterine devices, and emergency oral contraceptives (Plan B and Ella).[4] *See* FDA, Birth Control: Medicines To Help You, http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublicati

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[3] The defendants clarify that this requirement does not indicate that such education and counseling need necessarily be 'in support of' certain contraception services or contraception in general.

[4] As the government points out, the list of FDA approved contraceptive methods does not include abortion, however, the terms "abortifacients" or "abortion inducing drugs" as used throughout this opinion refers to plaintiffs' characterization of contraception that artificially interferes with life and conception in violation of their religious beliefs.

ons/ucm313215.htm (lasted visited Dec. 9, 2013). On February 15, 2012, HHS published final regulations incorporating the HRSA guidelines. 77 Fed. Reg. 8725 (Feb. 15, 2012). The agency made the mandate effective in the first plan year on or after August 1, 2012, *see* 45 C.F.R. § 147.130(b)(1), however, a temporary enforcement safe harbor for nonexempt nonprofit religious organizations that objected to covering contraceptive services was also created, making the mandate effective in the first plan year on or after August 1, 2013 for those qualifying organizations who did not meet the religious employer exemption. 77 Fed. Reg. 8728-29. The government then undertook new rulemaking during the safe harbor period to adopt new regulations applicable to non-grandfathered[5] nonprofit religious organizations with religious objections to covering contraceptive services. *Id*.

On March 21, 2012, the government issued an Advance Notice of Proposed Rulemaking that stated it was part of the government's effort "to develop alternative ways of providing contraceptive coverage without cost sharing in order to accommodate non-exempt, nonprofit religious organizations with

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[5] Grandfathered" plans are those health plans that do not need to comply with the ACA's coverage requirements because they were in existence when the ACA was adopted and did not make certain changes to the terms of the plan. 42 U.S.C. § 18011. The purpose of grandfathering plans was to allow individuals to maintain their current health insurance plan, to reduce short term disruptions in the market, and to ease the transition to market reforms that phase in over time. See 75 Fed. Reg.. 34,546 (June 17, 2010). The number of grandfathered plans is expected to decline over time.

religious objections to such coverage." 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012). On February 1, 2013, the government issued a Notice of Proposed Rulemaking (NPRM), setting forth a proposal that stated it was to "amend the criteria for the religious employer exemption to ensure that an otherwise exempt employer plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths," and to "establish accommodations for health coverage established or maintained by eligible organizations, or arranged by eligible organizations that are religious institutions of higher education, with religious objections to contraceptive coverage." *See* 78 Fed. Reg. 8456 (Feb. 6, 2013). On June 28, 2013, the government issued final rules adopting and/or modifying the proposals in the NPRM. *See* 78 Fed. Reg. 39,870. The regulations challenged here (the "final rules") include the new regulations issued by the government and applicable to non-grandfathered, nonprofit religious organizations with religious objections to covering contraceptive services. *See* 78 Fed. Reg. 39,870.

The final rules state that they "simplify[ied] and clarify[ied]" the definition of "religious employer." 78 Fed. Reg. 39,871. Under the new definition, an exempt "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. 78 Fed. Reg. 39,874 (codified at 45 C.F.R. § 147.131(a)). The groups that are "refer[red] to in section

6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code," are "churches, their integrated auxiliaries, and conventions or associations of churches" and "the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A)(i), (iii). The new definition of "religious employer" does "not expand the universe of religious employers that qualify for the exemption beyond that which was intended in the 2012 final regulations." 78 Fed. Reg. 39,874 (citing 78 Fed. Reg. 8461). The 2013 final rules' amendments to the religious employer exemption apply to group health plans and group health insurance issuers for plan years beginning on or after August 1, 2013. *See id.* at 39,871.

The 2013 final rules also included an "accommodation" regarding the contraceptive coverage requirement for group health plans, as well as student health plans, established or maintained by "eligible organizations." 78 Fed. Reg. 39,874–80; 45 C.F.R. § 147.131(b)-(f). 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. 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.

45 C.F.R. § 147.131(b); *see also* 78 Fed. Reg. 39,874-75. The 2013 final rules state that an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. 39,874. To be relieved of the obligations that otherwise apply to non-grandfathered, nonexempt employers, the 2013 final rules require that an eligible organization complete a self certification form, certifying that it is an eligible organization, sign the form, and provide a copy of that self-certification to its issuer or third party administrator (TPA). *Id.* at 39,878–79. In the case of an organization with an insured group health insurance issuer, upon receipt of the self certification, the organization's health insurance issuer must provide separate payments to plan participants and beneficiaries for contraceptive

services without cost sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or it's plan. *Id*. at 39,875–77. The government expects that its insurers will have options to achieve cost neutrality, including by way of cost savings from improvements in women's health and fewer pregnancies, and by including the cost of contraceptive services as an administrative cost that is spread across the issuer's entire risk pool (excluding plans established or maintained by eligible organizations). *Id*. at 39,877-78. In the case of an organization with a self-insured group health plan, upon receipt of the self certification, the organization's TPA is designated as plan administrator and claims administrator for purposes of providing or arranging separate payments for contraceptive services without cost sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or it's plan. *Id*. at 39,879–80. Under the 2013 final rules, costs incurred by TPAs relating to the coverage of contraception services for employees and students of eligible organizations can be reimbursed through an adjustment to Federally-Facilitated Exchange user fees. *See* 78 Fed. Reg. 39,880. The contraceptive services provided are directly tied to the employer's insurance policy, and are available only so long as the employees/students are enrolled in the organization's health plan. 45 C.F.R. § 147.131(c). The 2013 final rules' "accommodation" applies to group health plans and health insurance issuers for plan years beginning on or after January 1, 2014. 78 Fed. Reg. 39,872.

Ultimately, several exemptions from the ACA's coverage requirements have survived the law's revisions, including exemptions for smaller employers—those with fewer than fifty full time employees, 26 U.S.C. § 4980H, and employer health plans that are grandfathered, 42 U.S.C. § 18011. In addition, religious employers meeting the narrow definition of religious employer are exempted from the contraceptive coverage requirement. 45 C.F.R. § 147.131(a). A noncomplying employer who does not meet an exemption will face large fines, specifically, $2,000 per year per full time employee (less 30 employees) for not providing insurance meeting the coverage requirements, 26 U.S.C. § 4980H(c), or $100 per day per employee for providing insurance that excludes the coverage required by the contraception mandate, 26 U.S.C. § 4980D, and will face the risk of other enforcement actions.

As detailed below, Grace and Biola do not meet any of these exemptions; rather, they meet the "accommodation" created for nonprofit religiously affiliated employers, which the Seventh Circuit has characterized as "an attempted workaround whereby the objecting employer gives notice to its insurance carrier and the insurer issues a separate policy with the mandated coverage." *Korte v. Sebelius*, 735 F.3d 654, 662 (7th Cir. 2013) (Rovner, J., dissenting). The plaintiffs argue that compliance with the contraception mandate, even via the accommodation, violates their religious exercise rights.

The Plaintiffs

The presidents of Grace Schools and Biola University, Inc. have verified the facts applicable to their claims and request for injunctive relief [DE 54][6]. Both Grace and Biola are not for profit Christ-centered institutions of higher learning. *Id.* at ¶¶ 2, 10-11. To fulfill their religious commitments and duties in a Christ-centered educational context, plaintiffs promote the spiritual and physical well-being and health of their employees and students, which includes the provision of health insurance to their employees and students. *Id.* at ¶¶ 43, 68.

Grace College and Seminary, located in Winona Lake, Indiana, was founded in 1937 and has a mission to be "an evangelical Christian community of higher education which applies biblical values in strengthening character, sharpening competence, and preparing for service" and pursues its mission through biblically-based programs and services founded in the historic Fellowship of Grace Brethren Churches [DE 54 at ¶¶ 21, 24, 26]. Grace embraces Christian core values, its students, administration, faculty, and staff aim together to make Christ preeminent in all things, *id.* at ¶¶ 22-23, and Grace has a "Covenant of Faith" that is consistent with the beliefs of the Fellowship of Grace Brethren Churches

[6] The verified complaint serves as the equivalent of an affidavit and, unless specifically noted herein, the defendants do not contest these facts, which are admitted for preliminary injunction purposes. *See IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 542 (7th Cir. 1998). In addition, no hearing was necessary given the controversy was controlled by the undisputed facts detailed in this order.

which affirms biblical truth and God's grace. *Id*. at ¶¶ 25, 27. Members of Grace's Board of Trustees, which governs the College, must subscribe annually to the Covenant of Faith, and Grace draws its faculty, staff, and administration from among those who profess the Covenant of Faith. *Id*. at ¶¶ 27-28. Although Grace does not require student membership in the Grace Brethren denomination, it does require a profession of faith as a prerequisite for student admission and students are expected to adhere to the standards set forth in the Grace community and lifestyle statement. *Id*. at ¶ 29. Through its Fall 2013 "Statement on Community Expectations for Faculty and Staff," members of the Grace community agree to uphold the standards of the community, which in pertinent part states:

> Grace Schools values the worth and dignity of human life as expressed through the fruit of the Spirit. Having been made in the image of God, those who live and work at the institution express like faith and are expected to respect and uphold life-affirming practices that distinguish our faith community from other institutions of higher education, particularly for those who are vulnerable members of society. Consistent with the views of the Fellowship of Grace Brethren Churches, Grace Schools believes that human life is worthy of respect and protection at all stages from the time of conception. The sanctity of human life is established by creation (Genesis 1:26-27),

> social protection (Genesis 9:6) and redemption (John 3:16).

[DE 54 at ¶¶ 36-37]. Further, the Fellowship of Grace Brethren Churches believes that human life is worthy of protection and respect at all stages from the time of conception (or fertilization), and Grace has the religious view that the procurement, participation in, facilitation of, or payment for abortion (including abortion-causing drugs) violates the Sixth Commandment and is inconsistent with the dignity conferred by God on creatures made in His image. *Id*. at ¶¶ 32-35.

Consistent with its religious commitments, Grace provides a self-insured group plan for its employees, acting as its own insurer but working with a third-party claims administrator [DE 54 at ¶ 44]. Under the terms of Grace's plan for its employees, coverage excludes abortifacient drugs, however, the employee plan does include a variety of contraceptive methods that Grace does not consider to be morally objectionable. *Id*. at ¶¶ 46-47. In addition, Grace requires all registered residential students to have health insurance, and if a student does not submit proof of coverage, Grace will enroll the student in a health insurance plan issued by Gallagher Koster and bill enrolled students for the cost of the coverage. *Id*. at ¶ 50. Grace's student plan does not include coverage for abortifacient drugs and related counseling to which it morally objects. *Id*.

Grace currently has approximately 457 employees and 3,100 students [DE 54 at ¶¶ 30-31]. Approximately 168 employees are enrolled in Grace's group health plan, along with approximately 307 dependents. *Id*. at ¶ 45. In the 2013-2014 school year, approximately 60 students enrolled in the student insurance plan facilitated by Grace. *Id*. at ¶ 50. Biola University, located in La Mirada, California, was founded in 1908 as the Bible Institute of Los Angeles and has a mission to provide biblically or Christ-centered education, scholarship and service—equipping men and women in mind and character to impact the world for the Lord Jesus Christ [DE 54 at ¶¶ 51-52, 55, 57-60]. Biola's vision is to be an exemplary Christian university and believes that all it does should be Christ-centered. *Id*. at ¶¶ 53, 55. Biola also believes that God uses its faculty, staff, students, and alumni to accomplish God's plans, and draws its faculty, staff, and students from among those who profess faith in Christ. *Id*. at ¶¶ 56, 61.

Biola's "Doctrinal Statement" declares that "[t]he Bible is clear in its teaching on the sanctity of life. Life begins at conception. We reject the destruction or termination of innocent human life through human intervention in any form after conception including, but not limited to, abortion, infanticide or euthanasia because it is unbiblical and contrary to God's will. Life is precious and in God's hands." [DE 54 at ¶ 65]. The Biola Employee Handbook, in a section entitled "Standard of Conduct," states in part as follows: "Consistent with the example and command of Jesus Christ, we

believe that life within a Christian community must be lived to the glory of God, with love for God and for our neighbors . . .[t]o this end, members of the Biola community are not to engage in activities that Scripture forbids. Such activities include . . . the destruction or termination of innocent human life through human intervention in any form after conception including, but not limited to, abortion, infanticide or euthanasia." *Id*. at ¶ 66. In addition, Biola's undergraduate Student Handbook provides in relevant part: "The University wants to assist those involved in unplanned pregnancy while at Biola to consider the options available to them within the Christian moral framework. These include marriage of the parents, single parenthood, or offering the child for adoption. Because the Bible is clear in its teaching on the sanctity of human life, life begins at conception; we abhor the destruction of innocent life through abortion on demand. Student Development stands ready to help those involved to cope effectively with the complexity of needs that a crisis pregnancy presents." *Id*. at ¶ 67.

Biola offers two medical insurance plans to regular employees who work at least 30 hours per week, for at least ten months of the year—one plan is through Kaiser, while the other is through Blue Shield [DE 54 at ¶¶ 69-70]. Biola has approximately 856 full time, benefit-eligible employees, and approximately 1,835 individuals are covered under its two employee health insurance plans. *Id*. at ¶ 71.

Prior to April 1, 2012, the former Anthem Blue Cross plan and the Kaiser plan did cover all FDA-

approved contraceptives, but the inclusion of abortion-inducing drugs was neither knowing nor intentional on Biola's part. *Id.* at ¶¶ 73, 75. Since April 1, 2012, the Blue Shield plan has not covered abortion-inducing drugs, but it does provide coverage of other drugs characterized by the FDA as "contraceptives." *Id.* at ¶ 74. Also since April 1, 2012, the Kaiser plan has not covered any contraceptives, but employees can receive coverage of non-abortifacient prescription contraceptive drugs through Script Care, a pharmacy benefits manager. *Id.* at ¶ 75.

Biola requires its students to have health insurance coverage and facilitates health insurance through United Health Care for its students who are not otherwise covered by health insurance [DE 54 at ¶ 76]. While Biola does not indicate the number of students enrolled in its health plan, it currently has approximately 6,323 students. Biola University, Five Year Enrollment Summary 2009-2013 Summary, http://www.biola.edu/registrar/research_reporting/5_year_enrollment/5_Year_Enrollment_Summary.pdf (last visited Dec. 15, 2013). Students who enroll in the plan pay the premium to Biola and then Biola remits payment to the carrier on behalf of the students [DE 54 at ¶ 76]. Ella and Plan B are excluded from this plan. *Id.*

Although Grace and Biola were protected by the safe harbor which was extended through the end of 2013, their employee and student health plans must comply with the contraception mandate thereafter, *id.* at ¶¶ 48, 116-18, 150, 179, 181, 275, because

plaintiffs do not meet the religious employer exemption and their health plans are not grandfathered. *Id*. at ¶¶ 3, 49, 72, 143-144. Specifically, Grace's employee and student health plans are subject to the contraception mandate on January 1, 2014 and July 25, 2014, respectively, and Biola's employee and student health plans are subject to the mandate on April 1, 2014 and August 1, 2014, respectively. *Id*. at ¶¶ 48, 179, 181. However, the plaintiffs are eligible for the accommodation. *Id*. at ¶ 148.

As plaintiffs profess their religious beliefs, compliance with the accommodation violates their free exercise rights because it forces the plaintiffs to obtain insurance and certify a form that specifically requires an issuer or TPA to provide coverage for the objectionable contraceptive services as a direct consequence of the health benefits provided by the plaintiffs [DE 54 at ¶¶ 5, 133] (claiming that the accommodation forces plaintiffs to deliberately provide health insurance that will trigger[7] access to abortion inducing drugs and related education and counseling). In other words, by invoking the accommodation and executing the self certification, plaintiffs would initiate the insurance coverage of morally objectionable contraceptive services [DE 54 at ¶¶ 152-55]. And by issuing the self certification,

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[7] Defendants dispute that the regulations require plaintiffs to "trigger" or "facilitate" the provision of contraceptive services to which plaintiffs object; however, defendants acknowledge that this is plaintiffs' characterization of what the mandate requires of them were the plaintiffs to complete the self-certification form and provide a copy of it to their issuer/TPA.

the plaintiffs would be identifying their participating employees and students to the TPA/issuer for the distinct purpose of enabling the government's scheme to facilitate free access to abortifacient services, to which plaintiffs would have to continue to play a central role in facilitating. *Id.* at ¶¶ 156-63. The government contends that even prior to the ACA's passage, Grace and Biola would have had to provide notice to their issuers/TPAs indicating that their insurance plans should exclude coverage for objectionable contraceptive services. However, the government makes the contention without providing any evidence of what type of notice was previously given by plaintiffs to their insurers/TPAs, if any, for the *exclusion* of particular services.

Plaintiffs contend that they strongly believe that God has condemned the intentional destruction of innocent human life and, as a matter of religious conviction, it would be sinful and immoral for them to intentionally participate in, pay for, facilitate, enable, or otherwise support access to abortion or the use of drugs that can (and do) destroy human life in the womb—which the accommodation permits. *Id.* at ¶¶ 2, 175-78. On the other hand, refusing to offer insurance (which plaintiffs allege transgresses their religious duty to provide for the well-being of their employees and students) or refusing to comply with the contraception mandate, would cause them to face enormous fines that would financially devastate their operations and undermine their mission. *Id.* at ¶¶ 7, 179-81.

Plaintiffs also represent that rather than imposing the burden of the accommodation upon them, there are alternative mechanisms through which the government could provide access to the objectionable contraceptive services [DE 54 at ¶¶ 189-92]. For instance, plaintiffs argue that the government could provide contraceptive services through direct government payments, or through tax deductions, refunds or credits. *Id*. at ¶¶ 191-93. Moreover, plaintiffs argue that the government's interests in pursuing the mandate can hardly be compelling or pursued by the least restrictive means where it has excluded millions of employers from the ACA's requirements, including those employers who are grandfathered, 42 U.S.C. § 18011, or have fewer than 50 employees, 26 U.S.C. § 4980H; and where the government has included an exemption from the contraception mandate for those deemed religious employers, 45 C.F.R. § 147.131(a). *Id*. at ¶¶ 194-202. Plaintiffs argue that these broad exemptions further demonstrate that they could also be exempted from the requirements of the contraception mandate without measurably undermining any sufficiently important governmental interest served by the mandate. *Id*. at ¶ 195.

II. Preliminary Injunction Standard

To obtain a preliminary injunction, the moving party must demonstrate that (1) it has no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied; and (2) there is some likelihood of success on the merits of the claim.

See Ezell v. City of Chicago, 651 F.3d 684, 694 (7th Cir. 2011). If the moving party meets this threshold burden, the court weighs the competing harms to the parties if an injunction is granted or denied and also considers the public interest. *See Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 972 (7th Cir. 2012); *Ezell*, 651 F.3d at 694. This equitable balancing proceeds on a sliding-scale analysis; the greater the likelihood of success on the merits, the less heavily the balance of harms must tip in the moving party's favor.[8] *See Planned Parenthood*, 699 F.3d at 972. The aim is to minimize the costs of a wrong decision. *See Stuller, Inc. v. Steak N Shake Enters., Inc.,* 695 F.3d 676, 678 (7th Cir. 2012).

The appropriateness of a preliminary injunction in this case rests on plaintiffs' RFRA claim and presents the following issues: does the contraception mandate and accommodation provided substantially burden the religious exercise rights of the plaintiffs, and if so, has the government discharged its burden of justifying its regulations under strict scrutiny.

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[8] As an aside, the government noted an objection to applying the sliding scale approach, arguing that the approach is inconsistent with the Supreme Court's holding in *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008) requiring a plaintiff to show all of the preliminary injunction factors. But the government also recognized that the undersigned is nonetheless bound to apply the Seventh Circuit's sliding scale approach to an injunction. In fact, the Seventh Circuit has recently determined that its sliding scale approach is "a variant of, though consistent with, the Supreme Court's recent formulations of the standard . . ." *Planned Parenthood of Wisc., Inc. v. Van Hollen*, No. 13-2726, 2013 WL 6698596 (7th Cir. Dec. 20, 2013) (citing *Winter*, 555 U.S. at 20).

Here, plaintiffs have shown some likelihood of success on the merits of their RFRA claim, that no adequate remedy at law exists, and that they will suffer irreparable harm without an injunction. And, a weighing of the injunction equities and consideration of the public interest also strongly supports issuance of an injunction at this stage of the litigation.

III. Analysis

To begin, for purposes of determining whether a preliminary injunction is appropriate in the instant case, no one questions that the issues presented based on the 2013 final rules are ripe for ruling, that the threat of financial penalty and other enforcement action is sufficient to establish the plaintiffs' standing to challenge the accommodation, and that plaintiffs—nonprofit religious organizations—exercise religion in the sense that their activities are religiously motivated. The Court will thus consider the appropriateness of injunctive relief in the instant case.

Success on the Merits of the RFRA Claim

The RFRA prohibits the federal government from placing substantial burdens on "a person's exercise of religion," 42 U.S.C. § 2000bb–1(a), unless it can demonstrate that applying the burden is "in furtherance of a compelling government interest" and is the "least restrictive means of furthering that compelling governmental interest," id. § 2000bb–1(b). RFRA creates a broad statutory right to case-

specific exemptions from laws that substantially burden religious exercise even if the law is neutral and generally applicable, unless the government can satisfy the compelling-interest test. *Korte*, 735 F.3d at 671-72 (reasoning that with RFRA, Congress expressly required accommodation rather than neutrality) (citation and quotation marks omitted). RFRA is structured as a "sweeping 'super-statute,' cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach." Id. at 673 (quoting Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253 (1995)).

Once a RFRA claimant makes a prima facie case that the application of a law or regulation substantially burdens his religious practice, the burden shifts to the government to justify the burden under strict scrutiny. Id. (citing *Gonzales v. O Centro Espirita*, 546 U.S. 418, 428 (2006)). "Congress's express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test . . .". Id. (*citing O Centro Espirita*, 546 U.S. at 430). Thus, in RFRA litigation, as in First Amendment litigation, "the burdens at the preliminary injunction stage track the burdens at trial." Id. (citing *O Centro Espirita*, 546 U.S. at 429).

1. Substantial Burden

While neither the United States Supreme Court nor any Circuit Courts have had the opportunity to consider whether the contraception mandate creates a substantial burden on a non-secular, nonprofit organization's religious exercise rights given the "accommodation" created for eligible organizations,[9] the Seventh Circuit recently discussed in *Korte* the substantial burden analysis in the context of RFRA:

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[9] In fact, not many district courts have had the opportunity to consider this question relative to nonprofit religious organizations, and their conclusions vary. Three courts have upheld the accommodation. *See Catholic Diocese of Nashville v. Sebelius,* No. 3:13-01303 (M.D. Tenn. Dec. 26, 2013); *University of Notre Dame v. Sebelius*, No. 3:13-cv-1276-PPS-CAN (N.D. Ind. Dec. 20, 2013) (Simon, C.J.); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-01261-EGS (D.D.C. Dec. 19, 2013). While the other courts have found the accommodation to pose a substantial burden. *See Geneva College v. Sebelius,* No. 12-020 (W.D. Pa. Dec. 23, 2013); *Southern Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F (W.D. Okla. Dec. 23, 2013); *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of New York v. Sebelius,* No. 1:12-cv-02542-BMC, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Zubik (and Persico) v. Sebelius*, Nos. 13cv1459 and 13-cv-0303, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481 (W.D. Pa. June 18, 2013); *see also Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-1441 (ABJ), 2013 WL 6729515 (D.D.C. Dec. 20, 2013) (drawing a distinction between self insured and group insured plans and granting a preliminary injunction only with respect to a self insured plaintiff despite the fact that all eligible organizations are confronted with the self certification process created by the accommodation).

Recall that "exercise of religion" means "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc–5(7)(A) (emphases added). At a minimum, a substantial burden exists when the government compels a religious person to "perform acts undeniably at odds with fundamental tenets of [his] religious beliefs." *Wisc. v. Yoder*, 406 U.S. 205, 218, 92 S.Ct. 1526 (1972). But a burden on religious exercise also arises when the government "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718, 101 S.Ct. 1425 (1981); *see also Nelson v. Miller*, 570 F.3d 868, 878 (7th Cir. 2009); *Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008). Construing the parallel provision in RLUIPA, we have held that a law, regulation, or other governmental command substantially burdens religious exercise if it "bears direct, primary, and fundamental responsibility for rendering [a] religious exercise . . . effectively impracticable." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003). The same understanding applies to RFRA claims.

Importantly, the substantial-burden inquiry does not invite the court to

determine the centrality of the religious practice to the adherent's faith; RFRA is explicit about that. And free-exercise doctrine makes it clear that the test for substantial burden does not ask whether the claimant has correctly interpreted his religious obligations. *See United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051 (1982); *Thomas*, 450 U.S. at 715–16, 101 S.Ct. 1425. Indeed, that inquiry is prohibited. "[I]n this sensitive area, it is not within the judicial function and judicial competence to inquire whether the [adherent has] correctly perceived the commands of [his] . . . faith. Courts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716, 101 S.Ct. 1425. It is enough that the claimant has an "honest conviction" that what the government is requiring, prohibiting, or pressuring him to do conflicts with his religion. *Id.*; *see also id.* at 715, 101 S.Ct. 1425 ("Thomas drew a [religious] line, and it is not for us to say that the line he drew was an unreasonable one.").

Checking for sincerity and religiosity is important to weed out sham claims. The religious objection must be both sincere and religious in nature. *Cf. United States v. Seeger*, 380 U.S. 163, 184–86, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965) (military-conscription exemption applies only to objections based on sincerely held religious

> beliefs as opposed to philosophical views or a personal moral code). These are factual inquiries within the court's authority and competence.
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> But we agree with our colleagues in the Tenth Circuit that the substantial-burden test under RFRA focuses primarily on the "intensity of the coercion applied by the government to act contrary to [religious] beliefs." *Hobby Lobby Stores, Inc., v. Sebelius*, 723 F.3d 114, 1137 (10th Cir. 2013). Put another way, the substantial-burden inquiry evaluates the coercive effect of the governmental pressure on the adherent's religious practice and steers well clear of deciding religious questions.

Korte, 735 F.3d at 682-83. With these principles in mind, the Seventh Circuit determined, in relevant part, that it was a substantial burden on the for profit company plaintiffs and their owners to require them to *purchase or provide* the required contraception coverage (or self-insure for these services). *Korte*, 735 F.3d at 668.

In the instant case, the government defendants posit that *Korte* and other similar for profit plaintiff cases, *see, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013); *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), are distinguishable because the burden on Grace and Biola to comply with the accommodation is merely de minimus where plaintiffs would barely

have to modify their behavior by complying with the purely administrative self certification requirement which should take a matter of minutes. Moreover, the government believes that any burden cast upon Grace and Biola is too attenuated to constitute a substantial burden.

The Court acknowledges that the burden on Grace and Biola to complete and submit a self certification is different than the burden imposed on the *Korte* plaintiffs. Simply put, Grace and Biola are not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections, 78 Fed. Reg. 39,874. Rather the plaintiffs must complete a self certification form stating that each is an eligible organization which objects to providing the contraceptive coverage on religious grounds and provide a copy of that self certification to its issuer or TPA, so that the payment for the services can then be provided or arranged for by the issuer or TPA at no cost to Grace or Biola. 45 C.F.R. § 147.131(b); 78 Fed. Reg. 39,874-75. But even so, the Court cannot agree with the government that Biola and Grace have not shown at least some reasonable likelihood of success on the merits relative to the showing of a substantial burden as defined in *Korte*.

According to the Seventh Circuit, the pertinent inquiry for the substantial burden test under RFRA is whether the claimant has an honest conviction that what the government is requiring or pressuring him to do conflicts with his religious beliefs and whether the governmental pressure exerts a

sufficiently coercive influence on the plaintiffs' religious practice. *Korte,* 735 F.3d at 683; *see Hobby Lobby*, 723 F.3d at 1137 ("Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."); *Gilardi*, 733 F.3d at 1217-18 (" . . . the burden becomes substantial because the government commands compliance by giving the Gilardis a Hobson's choice. They can either abide by the sacred tenets of their faith, pay a penalty of over $14 million, and cripple the companies they have spent a lifetime building, or they become complicit in a grave moral wrong."). And in this case, the government defendants concede that plaintiffs' religious beliefs are sincerely held. In fact, the only evidence before the Court—plaintiffs' undisputed affirmations—indicate that their beliefs are indeed sincere and religious in nature. Therefore, the government rests its argument on its belief that plaintiffs cannot establish a substantial burden on plaintiffs' religious exercise rights where the regulations do not, according to the government, require the plaintiffs to modify their religious behavior.

Grace and Biola have established that the accommodation compels them to facilitate and serve as the conduit through which objectionable contraceptive products and services are ultimately provided to their employees and students, in violation of their unquestionably sincerely held religious beliefs. And prior to the ACA's enactment, no evidence establishes that Grace and Biola

previously discussed or provided a similar notice to their insurers/TPAs indicating that contraceptive services (specifically) were to be excluded from their health plans. In fact, given the religiously affiliated nature of the plaintiffs and their public stance on abortion and contraception, it is just as likely that those services would not have required any discussion, let alone a self certification, prior to their purchasing insurance coverage. *Cf. University of Notre Dame v. Sebelius*, No. 3:13-cv-1276-PPS-CAN (N.D. Ind. Dec. 20, 2013) ("In sum, the certification merely denotes Notre Dame's refusal to provide contraceptive care—a statement that is entirely consistent with what Notre Dame has told its TPA in the past . . . [and so, the holding] isn't that a compelled action is de minimis. It's that no action is being compelled at all because the action would be taken [by Notre Dame] even if no contraception requirement applied.").

But even if the plaintiffs previously informed their insurers/TPAs not to provide coverage for objectionable contraceptive services, the government's argument relative to the de minimus nature of any burden created by the accommodation is too narrow of a focus. The government's argument, that the completion of a simple self certification form that takes minutes doesn't create a substantial burden, misses the point. It is not the mere filling out and submitting the certification that creates a burden. Rather, if plaintiffs choose to provide health insurance coverage for employees and students (to comply with their own religious tenants and to avoid the ACA's fines for failing to

meet coverage requirements), then they must either directly provide contraceptive services themselves (which are clearly contrary to their religious beliefs) or they must invoke the accommodation and facilitate, indeed in their mind enable, the availability of contraceptive services (which is also contrary to their sincerely held religious beliefs). Thus, although plaintiffs avoid paying for the services, the compulsion to offer group health insurance results in their direct facilitation of insurance coverage and the potential use of contraceptive services by their employees and students, services which plaintiffs morally oppose. That the accommodation scheme allows the plaintiffs to avoid the costs of such services provides no comfort or relief. It's the facilitation of the objectionable services, not the related cost, that offends their religious beliefs. Ultimately, the plaintiffs would be forced to modify their behavior *and* violate their religious beliefs by either giving up their health insurance plans or by providing insurance but taking critical steps to facilitate another's extension of the objectionable coverage. *See Korte*, 735 F.3d at 682-83; *see also Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481 (W.D. Pa. June 18, 2013) (citing *Thomas*, 450 U.S. at 718). And, their failure to comply with insurance requirements or provide contraceptive services results in enormous penalties that would be financially detrimental to their operations. In short, the government's accommodation results in the plaintiffs violating their sincerely held religious beliefs, as well as the choice between conformity with the ACA's requirements or face substantial

fines. *See Korte*, 735 F.3d at 683; *see also Southern Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F (W.D. Okla. Dec. 23, 2013) (DE 45 at 16) ("The self certification is, in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects. If the institution does not sign the permission slip, it is subject to very substantial penalties or other serious consequences. If the institution does sign the permission slip, and only if the institution signs the permission slip, institution's insurer or third party administrator is obligated to provide the free products and services to the plan beneficiary."). Thus, given the nature of the analysis utilized, the undersigned believes that *Korte* may logically be extended to conclude that the completion and submission of the self certification is an alteration in plaintiffs' behavior such that it constitutes a substantial burden under RFRA. *See University of Notre Dame*, No. 3:13-cv-1276-PPS-CAN ("Perhaps upon review of this case, *Korte* will be extended by the Seventh Circuit to say that the filing of a certification is an alteration in Notre Dame's behavior such that it constitutes a substantial burden under RFRA"); *see also Zubik (and Persico) v. Sebelius*, Nos. 13cv1459 and 13cv0303, 2013 WL 6118696, at *23-25 (W.D. Pa. Nov. 21, 2013) ("although the 'accommodation' legally enables Plaintiffs to avoid directly paying for the portion of the health plan that provides contraceptive products, services, and counseling, the "accommodation" requires them to shift the

responsibility of purchasing insurance and providing contraceptive products, services, and counseling, onto a secular source. The Court concludes that Plaintiffs have a sincerely-held belief that "shifting responsibility" does not absolve or exonerate them from the moral turpitude created by the "accommodation"; to the contrary, it still substantially burdens their sincerely-held religious beliefs."). Given *Korte's* guidance, the lack of mandatory authority on the precise issue at hand, and the divergence of case holdings demonstrating the difficulty of the issue and the uncertainty of the ultimate decision on the merits, the Court believes that plaintiffs have shown at least some reasonable likelihood of success on the merits relative to the substantial burden analysis. And even if that likelihood was just more than slight, the balance of harms could support injunctive relief.[10]

Before concluding the substantial burden analysis, the undersigned would be remiss if it didn't acknowledge the government's alternative argument, that any burden on plaintiffs' religious exercise is too attenuated to render it substantial. In summary, the government believes that because plaintiffs are not required to actually contract or pay for contraceptive coverage any burden is too attenuated to be substantial because plaintiffs are

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[10] *See Storck USA, L.P. v. Farley Candy Co.*, 14 F.3d 311, 315 (7th Cir. 1994) ("Once the district court determined that [plaintiff's] likelihood of success on the merits of its claim was slight, it required [plaintiff] to make a proportionately stronger showing that the balance of harms was in its favor.") (citing *Accord Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992)).

separated by a series of events that must occur before the objectionable contraceptive services would be utilized. Specifically, after receiving the certification from plaintiffs, the TPA or issuer would actually pay for or arrange payment for the contraceptive services should employees and students independently decide to even use those services.

Similarly, in *Korte*, the government argued that the contraception mandate's burden was insubstantial because any use of contraceptive services could not be attributed to the corporate plaintiffs or their owners since the provision of the contraceptive coverage was several steps removed from an employee's independent determination to use contraception. *See Korte*, 735 F.3d at 684. However, the Seventh Circuit's majority opinion reasoned that the government's attenuation argument is equivalent to improperly asking whether "providing this coverage impermissibly assist[s] the commission of a wrongful act in violation of the moral doctrines of the [plaintiffs' religion]." *Id.* at 685.[11] But, "[n]o civil authority can decide that question". *Id.*; *see Roman Catholic Archdiocese of New York,* No. 1:12-cv-02542-BMC, 2013 WL 6579764, at *14 ("The Government feels that the accommodation sufficiently insulates the plaintiffs from the objectionable services, . . . [but] it is not the Court's role to say that plaintiffs are

[11] Judge Rovner understood the majority to be rejecting any assessment on how direct or attenuated the burden imposed on the plaintiff's religious practices may be. *Korte,* 735 F.3d at 705 (Rovner, J., dissenting).

wrong about their religious beliefs."); *see also Hobby Lobby,* 723 F.3d at 1142 (the question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity).

Here, no one questions that among the plaintiffs' religious tenets is that life begins at conception and that providing all FDA approved contraceptive service violates those tenets. And so it follows that plaintiffs object to deliberately providing health insurance that will trigger access to objectionable contraceptive services and related education and counseling. By completing the self certification, plaintiffs sincerely believe that they will be facilitating, and actually supporting, a step in the process by which their employees and students will eventually secure access to free contraceptive services. In their minds, this makes them complicit in the provision and use of such services. Again, the government does not contest the sincerity of these beliefs. Because Grace and Biola hold these honest religious convictions and because failing to comply with the law will result in heavy financial penalties and the risk of enforcement actions (which will significantly impact their ability to provide religious services), *id*. at 683, plaintiffs have shown that the contraception mandate and accommodation constitute a substantial burden on their religious exercise. As a result, the government must justify its regulations under the compelling interest test.

2. Least Restrictive Means and Compelling Government Interest

RFRA requires the government to demonstrate that applying the contraception mandate and its accommodation are "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb–1(b). Again, the Court follows the precedent set forth in *Korte*, in applying the appropriate test in this context. In fact, the government has since conceded that the recent decision in *Korte* forecloses its arguments that the regulations satisfy strict scrutiny, even in this context [DE 81 at 2, fn. 1]. Regardless, the Court will conduct an analysis for completeness of the record.

Consistent with *Korte*, the Supreme Court has instructed courts to look beyond "broadly formulated interests justifying the general applicability of government mandates" and "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Korte*, 735 F.3d at 685 (citing *O Centro Espirita*, 546 U.S. at 431). In other words, under RFRA's version of strict scrutiny, the government must establish a compelling and specific justification for burdening these claimants. *Id*.

The compelling-interest test generally requires a "high degree of necessity." *Id*. (citing *Brown v. Entm't Merchs. Ass'n*, — U.S. — , 131 S.Ct. 2729, 2741 (2011)). The government must "identify an 'actual problem' in need of solving, and the

curtailment of [the right] must be actually necessary to the solution." *Id*. (citing *Brown,* 131 S.Ct. at 2738). In the free-exercise context, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id*. (citing *Yoder*, 406 U.S. at 215). "[I]n this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation . . .". *Id.* (citing *Sherbert*, 374 U.S. at 406). The regulated conduct must "pose[ ] some substantial threat to public safety, peace[,] or order." *Korte*, 735 F.3d at 686 (citing *Sherbert*, 374 U.S. at 403). Finally, "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (7th Cir. 1993)).

Similar to the interests claimed by the government in *Korte*, the government identified two legitimate public interests in the instant case, improving the health of women and newborn children and equalizing the provision of preventive care for women and men so that women can participate in the workforce and society on an "equal playing field with men." The government (prior to the issuance of *Korte*) had argued that the contraception mandate and the accommodation furthers these interests in a narrowly tailored fashion by not requiring nonprofit religious organizations with religious objections to providing

contraceptive coverage to contract, pay, arrange, or refer for that coverage.

The Court agrees that the government's stated interests are indeed important, and for the sake of argument (and a thorough analysis) will assume they are even compelling. However, the government has not shown that the contraception mandate employs the least restrictive means of furthering the government's interests, because strict scrutiny requires a substantial congruity—a close "fit"—between the governmental interest and the means chosen to further that interest. *Korte*, 735 F.3d at 686.

As discussed, the regulatory scheme exempts or excludes certain employers from the contraception mandate and does not apply the ACA's requirements to employers with grandfathered plans or those with less than 50 employees. Since the government grants so many exceptions already, it cannot legitimately argue that its regulations are narrowly tailored, nor can they argue against exempting these plaintiffs, amounting to less than 2,000 covered people (or 1,500 eligible employees and a combined student population of less than 10,000). *See Korte*, 735 F.3d at 686; *Gilardi*, 733 F.3d at 1222 ("underinclusiveness can suggest an inability to meet the narrow-tailoring requirement, as it raises serious questions about the efficacy and asserted interests served by the regulation"). Also, there is nothing to suggest the ACA would become unworkable if employers objecting on religious grounds could opt out of one part of a comprehensive

coverage requirement. *See Gilardi*, 733 F.3d at 1223-24.

Further, the government's reason for creating the religious employer exemption in particular was that houses of worship and their integrated auxiliaries are more likely than other employers to employ people of the same faith who share the same objection to contraceptive coverage, and who would be less likely than others to use contraceptive services even if such services were covered. *See* 78 Fed. Reg. 39,874. However, *these* plaintiffs have indicated that their employees and students are expected to uphold the universities' standards in treating human life as worthy of respect and protection at all stages from the time of conception and are expected to avoid a Sixth Commandment violation by procuring, participating in, facilitating, or paying for objectionable contraceptive services. Thus, *these* plaintiffs share the same legitimate claim to the free exercise of religion as those exempted as "religious employers." And yet, *these* plaintiffs have not received the same exemption as "religious employers" from having to facilitate or initiate the provision of objectionable contraceptive services, merely because they are not organized and operated as a nonprofit entity referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986—a basis which has nothing to do with the government's stated interests for imposing the requirements of the contraception mandate. *See Zubik*, 2013 WL 6118696 at *29 (noting that the religious employer exemption was not predicated on the government's stated interests). And so again,

even assuming the government's interests are compelling, there is no basis indicating the government would be unable to enforce its legislation simply because these plaintiffs could avoid compliance with the contraception mandate.

Finally, there are certainly other ways to promote public health and gender equality less burdensome on religious liberty, and the government has not carried its burden of demonstrating that it cannot achieve its policy goals in ways less damaging to religious-exercise rights. Pre-*Korte*, the government maintained that the accommodation provides the least restrictive means because the self certification requires the plaintiffs to act just as they would without the mandate—by informing their TPAs or insurers that coverage should not include certain contraceptive services. But the argument falls short. First, there is no evidence that plaintiffs so informed their TPA/insurers to exclude such services prior to the ACA. Second, the government has made exemptions from the coverage requirements for other employers without requiring the same form of self certification (and resulting consequences), despite the fact that plaintiffs share the same legitimate claim to the free exercise of religion as those exempted as religious employers. Third, the self certification process created in the accommodation essentially transforms a voluntary act that plaintiffs may have utilized to ensure that the objectionable services are not provided, consistent with their religious beliefs, into a compelled act that they sincerely believe provides and promotes conduct that is forbidden by

their religious beliefs. *See Roman Catholic Archdiocese of New York,* No. 1:12-cv-02542-BMC, 2013 WL 6579764, at *14. And so the nature of the act itself has changed, not merely the consequences of that act.

And as identified in *Korte* and as offered by plaintiffs in the instant action, there are many ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors. For instance, the government can provide a "public option" for contraception insurance; it can give tax incentives or grants to contraception suppliers to provide these medications and services at no cost to consumers; and it can give tax incentives to consumers of contraception and sterilization services—all without requiring plaintiffs to self certify their religious objections to the contraception mandate and thereby directly facilitate access to objectionable contraceptive services to be arranged or paid for by third parties. Simply because these options may make it more difficult for the government to administer the regulations in a manner that would achieve the government's stated interests, greater efficacy does not equate to the least restrictive means. *See Zubik*, 2013 WL 6118696 at *23. And as the government has conceded in the instant case, *Korte* has recently made clear that its regulations fail the strict scrutiny analysis.

Bearing in mind that at this stage the court need not be certain about the outcome of the case to grant a preliminary injunction, the Court concludes

the plaintiffs have shown some reasonable likelihood of success on the merits relative to their RFRA claim. *See S.E.C. v. Lauer*, 52 F.3d 667, 671 (7th Cir. 1995) ("The case is before us on an appeal from the grant of a preliminary injunction, and as is too familiar to require citation such a grant is proper even if the district judge is uncertain about the defendant's liability.").

Adequate Remedy at Law and Irreparable Harm

Although the claim is statutory, RFRA protects First Amendment free-exercise rights, and "in First Amendment cases, 'the likelihood of success on the merits will often be the determinative factor.'" *Korte*, 735 F.3d at 666 (citing *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) (quoting *Joelner v. Village of Washington Park, Ill.*, 378 F.3d 613, 620 (7th Cir. 2004))). "This is because the 'loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury . . .'. " *Korte*, 735 F.3d at 666 (citing *Alvarez*, 679 F.3d at 589 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion))). Furthermore, injunctions are especially appropriate in the context of first amendment violations because the "quantification of injury is difficult and damages are therefore not an adequate remedy." *Alvarez*, 679 F.3d at 589 (citing *Flower Cab Co. v. Petitte*, 685 F.2d 192, 195 (7th Cir. 1982)).

In the instant case, Grace must decide by December 31, 2013 whether or not to provide insurance coverage and sign the self certification

with respect to its employee health plan, and less than three months later Biola must also make the same decisions. Should plaintiffs fail to comply with the insurance coverage requirements of the ACA and its contraception mandate, the plaintiffs face financially devastating fines and enforcement actions. Thus, plaintiffs will be irreparably harmed if forced to forgo their religious beliefs by facilitating access to the objected to services in order to avoid detrimental fines, and there simply is insufficient time to litigate the merits of the plaintiffs' claims without the relief of a preliminary injunction. Given that plaintiffs' religious exercise rights are at stake in the immediate future, that a loss of these freedoms for even a minimal period of time unquestionably constitutes irreparable injury which cannot be prevented or fully rectified by waiting for a final judgment, *see Elrod*, 427 U.S. at 373; *Anderson v. U.S.F. Logistics (IMS), Inc.*, 274 F.3d 470, 478 (7th Cir. 2011), and that injunctions are designed to offer relief when legal remedies are inadequate to protect the parties' rights, *see Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 397 (7th Cir. 1984) (Swygert, J., dissenting), the Court concludes that these factors weigh strongly in favor of granting the requested relief.

Weighing the Equities and Public Interest

In weighing the equities, the court balances each party's likelihood of success against the potential harms. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008). To do so, the court compares

the potential irreparable harms faced by both parties to the suit—the irreparable harm risked by the moving party in the absence of a preliminary injunction against the irreparable harm risked by the nonmoving party if the preliminary injunction is granted. *Id.* (citing *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001)). We evaluate these harms using a sliding scale approach. *Id.* (citing *Ty, Inc.*, 237 F.3d at 895). The more likely it is that plaintiffs will win their case on the merits, the less the balance of harms need weigh in their favor. *Id.* (citations omitted). Conversely, if it is very unlikely that plaintiffs will win on the merits, the balance of harms need weigh much more in plaintiffs' favor. *Id.* (citations omitted). When conducting this balancing, it is also appropriate to take into account any public interest, which includes the ramifications of granting or denying the preliminary injunction on nonparties to the litigation. *Id.* (other citations omitted). This analysis is "'subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief.'" *Girl Scouts of Manitou Council, Inc.*, 549 F.3d at 1100 (citations omitted).

As the Court has previously detailed herein, the harm likely to be caused the plaintiffs without an injunction is imminent and irreparable, whereas the government likely faces no risk of harm, let alone irreparable harm, if the preliminary injunction is granted. The Court agrees with the district court's comments in *Zubik*, in that the combined nationwide total of the millions of Americans whose employers fall within some type of exclusion,

exemption, or plan grandfathered from the ACA and contraception mandate's requirements demonstrates that the government will not be harmed in any significant way by the exclusion of these few plaintiffs. *Zubik*, 2013 WL 6118696 at *34; *see also Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481, *10 (W.D. Pa. June 18, 2013) ("tens of millions of individuals . . . remain unaffected by the mandate's requirements"). Moreover, the government has itself delayed the enforcement of the contraception mandate by initially granting a safe harbor from its enforcement and agreeing to injunctions in other cases involving challenges to the mandate.

Additionally, granting the preliminary injunction furthers the public interest. While it is true that employees and students of the plaintiffs will face an economic burden not shared by employees and students of organizations that cover all of the contraceptive methods imposed by the mandate, plaintiffs have already established that their employees and students were not only informed of the universities' religious stance regarding contraception and abortion, but they were on notice of the universities' expectation that its employees and students would promote the universities' religious views and community standards by refraining from the procurement, participation in, facilitation of, or payment for objectionable contraceptive services.[12] With that

[12] The government contends that not every employee and student of the plaintiffs share the plaintiffs' religious objections to certain contraceptive services. And while this *may* very well

said, the plaintiffs' employees/students and the public is best served if the plaintiffs can continue to provide needed (and expected) educational services, and the needed (and expected) insurance coverage to its employees and students, without the threat of substantial fines for noncompliance with the contraception mandate and its accommodation. Moreover, injunctions protecting First Amendment freedoms are always in the public interest, *see Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006), and the Court sees no reason to make an exception here.

The Court would also note that Grace and Biola quickly filed an amended complaint and sought an injunction after the 2013 final rules were passed. Thus, there has been no delay in their pursuit of a preliminary injunction. *See Ty, Inc.*, 237 F.3d at 903 (a delay in pursuing a preliminary injunction may raise questions regarding irreparable harm.) Additionally, Grace and Biola have established that their employees and students were made aware of the universities' expectation that they were to promote the universities' religious views and community standards by refraining from the procurement of, participation in, facilitation of, or payment for objectionable contraceptive services. Thus, it cannot be said that there was any expectation that the universities would ever facilitate access to all FDA approved contraceptive services for its employees and students.

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be true, it does not negate the fact that said employees and students were aware of the universities' expectations with respect to their use of contraceptive services.

Undoubtedly, the balance of harms in this case weighs heavily in plaintiffs' favor, enough so that any weakness in the merits of their case is overcome, thereby making injunctive relief appropriate to maintain the status quo until a decision on the merits of the case is rendered. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *Michigan v. U.S. Army Corps of Engineers,* 667 F.3d 765, 783 (7th Cir. 2011) ("The preliminary injunction, after all, is often seen as a way to maintain the status quo until merits issues can be resolved at trial. By moving too quickly to the underlying merits, the district court required too much of the plaintiffs . . .").

IV. Conclusion

Accordingly, it is hereby ORDERED that plaintiffs Grace Schools and Biola University, Inc.'s motion for a preliminary injunction [DE 55] based upon the uncontested and verified allegations of their first amended complaint [DE 54] is GRANTED, and as a result, defendants, their agents, servants, officers, employees, representatives, and all persons in active concert or participation with them are hereby ENJOINED from:

> Applying or enforcing against Plaintiffs Grace Schools and Biola University, Inc. or their employee or student health insurance plans, including their plan brokers, plan insurers, or third party administrators, the requirements set out

> in 42 U.S.C. § 300gg-13(a)(4) and 45 C.F.R. § 147.130(a)(1)(iv), corresponding guidelines, and corresponding press releases to provide, pay for, or otherwise facilitate access to coverage for FDA approved contraceptive methods, abortion-inducing drugs, sterilization procedures, and related patient education and counseling.

It is further ORDERED that plaintiffs shall not be required to post bond; however, should circumstances change prior to the Court's making a determination on the merits of the case, including new developments in the law, which may make the preliminary injunction or its terms no longer appropriate, then counsel are free to file a motion seeking a modification or vacatur of the injunction.

SO ORDERED.

ENTERED: December 27, 2013

/s/ JON E. DEGUILIO
Judge
United States District Court

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 6, 2015

Before

DANIEL A. MANION, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

Nos. 14-1430 & 14-1431

GRACE SCHOOLS, et al., and DIOCESE OF FORT WAYNE-SOUTH BEND, INC., et al.,	Appeals from the United States District Court for the Northern District of Indiana.
Plaintiffs-Appellees,	Nos. 3:12-cv-00459-JD-CAN and 1:12-cv-00159-JD-RBC
v.	
SYLVIA MATHEWS BURWELL, *et. al.*,	Jon E. DeGuiliio, *Judge*
Defendants-Appellants.	

AMENDED ORDER

No judge of the court having called for a vote on the Petition For Rehearing En Banc filed by Plaintiffs-Appellees on October 19, 2015,* and a majority of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the Petition For Rehearing En Banc is DENIED.

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* Judge Ann Claire Williams took no part in the consideration of this petition for rehearing en banc.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FINAL JUDGMENT

September 4, 2015

Before: DANIEL A. MANION, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

Nos. 14-1430 & 14-1431	GRACE SCHOOLS et al., and DIOCESE OF FORT WAYNE-SOUTH BEND, INC., et al., Plaintiffs - Appellees v. SYLVIA MATHEWS BURWELL, et al., Defendants - Appellants

Originating Case Information

District Court Nos.: 3:12-cv-00459-JD-CAN and
1:12-cv-00159-JD-RBC
Northern District of Indiana
District Judge Jon E. DeGuilio

The judgment of the District Court is **REVERSED**, with costs, and the case is **REMANDED** in accordance with the decision of this court entered on this date.

26 U.S.C. § 4980D

(a) General rule.—There is hereby imposed a tax on any failure of a group health plan to meet the requirements of chapter 100 (relating to group health plan requirements).

(b) Amount of tax.—

(1) In general.—The amount of the tax imposed by subsection (a) on any failure shall be $100 for each day in the noncompliance period with respect to each individual to whom such failure relates.

2) Noncompliance period.—For purposes of this section, the term "noncompliance period" means, with respect to any failure, the period—

(A) beginning on the date such failure first occurs, and

(B) ending on the date such failure is corrected.

(3) Minimum tax for noncompliance period where failure discovered after notice of examination.— Notwithstanding paragraphs (1) and (2) of subsection (c)—

(A) In general.—In the case of 1 or more failures with respect to an individual—

(i) which are not corrected before the date a notice of examination of income tax liability is sent to the employer, and

(ii) which occurred or continued during the period under examination, the amount of tax imposed by subsection (a) by reason of such failures with respect to such individual shall not be less than the lesser of $2,500 or the amount of tax which would be imposed by subsection (a) without regard to such paragraphs.

(B) Higher minimum tax where violations are more than de minimis.—To the extent violations for which any person is liable under subsection (e) for any year are more than de minimis, subparagraph (A) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(C) Exception for church plans.—This paragraph shall not apply to any failure under a church plan (as defined in section 414(e)).

(c) Limitations on amount of tax.—

(1) Tax not to apply where failure not discovered exercising reasonable diligence.—No tax shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such tax did not know, and

exercising reasonable diligence would not have known, that such failure existed.

(2) Tax not to apply to failures corrected within certain periods.—No tax shall be imposed by subsection (a) on any failure if—

(A) such failure was due to reasonable cause and not to willful neglect, and

(B)(i) in the case of a plan other than a church plan (as defined in section 414(e)), such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such tax knew, or exercising reasonable diligence would have known, that such failure existed, and

(ii) in the case of a church plan (as so defined), such failure is corrected before the close of the correction period (determined under the rules of section 414(e)(4)(C)).

(3) Overall limitation for unintentional failures.— In the case of failures which are due to reasonable cause and not to willful neglect—

(A) Single employer plans.—

(i) In general.—In the case of failures with respect to plans other than specified multiple employer health plans, the tax imposed by subsection (a) for failures

during the taxable year of the employer shall not exceed the amount equal to the lesser of—

(I) 10 percent of the aggregate amount paid or incurred by the employer (or predecessor employer) during the preceding taxable year for group health plans, or

(II) $500,000.

(ii) Taxable years in the case of certain controlled groups.—For purposes of this subparagraph, if not all persons who are treated as a single employer for purposes of this section have the same taxable year, the taxable years taken into account shall be determined under principles similar to the principles of section 1561.

(B) Specified multiple employer health plans.—

(i) In general.—In the case of failures with respect to a specified multiple employer health plan, the tax imposed by subsection (a) for failures during the taxable year of the trust forming part of such plan shall not exceed the amount equal to the lesser of—

(I) 10 percent of the amount paid or incurred by such trust during such taxable year to provide medical care (as

defined in section 9832(d)(3)) directly or through insurance, reimbursement, or otherwise, or

(II) $500,000.

For purposes of the preceding sentence, all plans of which the same trust forms a part shall be treated as one plan.

(ii) Special rule for employers required to pay tax.—If an employer is assessed a tax imposed by subsection (a) by reason of a failure with respect to a specified multiple employer health plan, the limit shall be determined under subparagraph (A) (and not under this subparagraph) and as if such plan were not a specified multiple employer health plan.

(4) Waiver by Secretary.—In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the tax imposed by subsection (a) to the extent that the payment of such tax would be excessive relative to the failure involved.

(d) Tax not to apply to certain insured small employer plans.—

(1) In general.— In the case of a group health plan of a small employer which provides health insurance coverage solely through a contract with a health insurance issuer, no tax shall be

imposed by this section on the employer on any failure (other than a failure attributable to section 9811) which is solely because of the health insurance coverage offered by such issuer.

(2) Small employer.—

(A) In general.—For purposes of paragraph (1), the term "small employer" means, with respect to a calendar year and a plan year, an employer who employed an average of at least 2 but not more than 50 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year. For purposes of the preceding sentence, all persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 shall be treated as one employer.

(B) Employers not in existence in preceding year.— In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is a small employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(C) Predecessors.—Any reference in this paragraph to an employer shall include a reference to any predecessor of such employer.

(3) Health insurance coverage; health insurance issuer.—For purposes of paragraph (1), the terms "health insurance coverage" and "health insurance issuer" have the respective meanings given such terms by section 9832.

(e) Liability for tax.—The following shall be liable for the tax imposed by subsection (a) on a failure:

(1) Except as otherwise provided in this subsection, the employer.

(2) In the case of a multiemployer plan, the plan.

(3) In the case of a failure under section 9803 (relating to guaranteed renewability) with respect to a plan described in subsection (f)(2)(B), the plan.

(f) Definitions.—For purposes of this section—

(1) Group health plan.—The term "group health plan" has the meaning given such term by section 9832(a).

(2) Specified multiple employer health plan.—The term "specified multiple employer health plan" means a group health plan which is—

(A) any multiemployer plan, or

(B) any multiple employer welfare arrangement (as defined in section 3(40) of the Employee Retirement Income Security

Act of 1974, as in effect on the date of the enactment of this section).

(3) Correction.—A failure of a group health plan shall be treated as corrected if—

(A) such failure is retroactively undone to the extent possible, and

(B) the person to whom the failure relates is placed in a financial position which is as good as such person would have been in had such failure not occurred.

26 U.S.C. § 4980H

(a) Large employers not offering health coverage.—If—

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or costsharing reduction is allowed or paid with respect to the employee, then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.—

(1) In general. —If—

(A) an applicable large employer offers to its fulltime employees (and their dependents) the opportunity to enroll in minimum

essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or costsharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to 1/12 of $3,000.

(2) Overall limitation.—The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

[(3) Repealed. Pub.L. 112-10, Div. B, Title VIII, § 1858(b)(4), Apr. 15, 2011, 125 Stat. 169]

(c) Definitions and special rules.—

For purposes of this section—

(1) Applicable payment amount.—The term "applicable payment amount" means, with respect to any month, 1/12 of $2,000.

(2) Applicable large employer.—

(A) In general.— The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 fulltime employees on business days during the preceding calendar year.

(B) Exemption for certain employers.—

(i) In general.—An employer shall not be considered to employ more than 50 full-time employees if—

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) Definition of seasonal workers.—

(C) Rules for determining employer size.—For purposes of this paragraph—

(i) Application of aggregation rule for employers.— All persons treated as a single employer under subsection (b), (c), (m), or (o) of

section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

(ii) Employers not in existence in preceding year.— In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(iii) Predecessors.—Any reference in this subsection to an employer shall include a reference to any predecessor of such employer.

(D) Application of employer size to assessable penalties—

(i) In general.—The number of individuals employed by an applicable large employer as fulltime employees during any month shall be reduced by 30 solely for purposes of calculating—

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).

(ii) Aggregation—In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be allowed with respect to such persons and such reduction shall be allocated among such persons

ratably on the basis of the number of full-time employees employed by each such person.

(E) Full-time equivalents treated as full-time employees.—Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

(3) Applicable premium tax credit and cost-sharing reduction.—The term "applicable premium tax credit and cost-sharing reduction" means—

(A) any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

(4) Full-time employee—

(A) In general.—The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

(B) Hours of service.—The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) Inflation adjustment.—

(A) In general.—In the case of any calendar year after 2014, each of the dollar amounts in subsection (b) and paragraph (1) shall be increased by an amount equal to the product of

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

(B) Rounding.—If the amount of any increase under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the next lowest multiple of $10.

(6) Other definitions.—Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act.

(7) Tax nondeductible.—For denial of deduction for the tax imposed by this section, see section 275(a)(6).

(d) Administration and procedure.—

(1) In general.—Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Time for payment.—The Secretary may provide for the payment of any assessable payment provided by this section on an annual, monthly, or other periodic basis as the Secretary may prescribe.

(3) Coordination with credits, etc.— The Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or costsharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

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.

42 U.S.C. § 2000bb-2

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and (4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. § 2000cc-5

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause "means that portion of the First Amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government
The term "government"—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

42 U.S.C. § 300gg-13(a)

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

> (1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force;
>
> (2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and[1]
>
> (3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration.[2]
>
> (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.[2]

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[1] So in original. The word "and" probably should not appear.

[2] So in original. The period probably should be a semicolon.

> (5) for the purposes of this chapter, and for the purposes of any other provision of law, the current recommendations of the United States Preventive Service Task Force regarding breast cancer screening, mammography, and prevention shall be considered the most current other than those issued in or around November 2009

Nothing in this subsection shall be construed to prohibit a plan or issuer from providing coverage for services in addition to those recommended by United States Preventive Services Task Force or to deny coverage for services that are not recommended by such Task Force.

26 C.F.R. § 54.9815-2713AT

(a) [Reserved]. For further guidance, see § 54.9815-2713A(a).

(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) are satisfied:

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

(ii) The eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services. (3) The organization holds itself out as a religious organization.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self-certification must include notice that obligations of the third party administrator are set forth in 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must include

the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Labor (working with the Department of Health and Human Services), will send a separate notification to each of the plan's third party administrators informing the third party administrator that the Secretary of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or a notification from the Department of Labor, as described in paragraph (b)(1)(ii) 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 a copy of the self-certification from the eligible organization or

notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

(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 provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 54.9815-2713. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health

insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section and under § 54.9815-2713A.

(2) Payments for contraceptive services.

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (b)(1)(ii) 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--

(ii)[Reserved]. For further guidance, see § 54.9815-2713A(c)(2)(ii).

(d) [Reserved]. For further guidance, see § 54.9815-2713A(d).

(e) [Reserved]. For further guidance, see § 54.9815-2713A(e).

(f) Expiration date. This section expires on August 22, 2017 or on such earlier date as may be provided in final regulations or other action published in the Federal Register.

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 CFR156.50(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.

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.

EBSA FORM 700—CERTIFICATION
(revised August 2014)

This form may be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131. Alternatively, an eligible organization may also provide notice to the Secretary of Health and Human Services.

Please fill out this form completely. This form should be made available for examination upon request and maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	
I certify the organization is an eligible organization (as described in 26 CFR 54.9815-2713A(a), 29 CFR 2590.715-2713A(a); 45 CFR	

147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), is considered to meet the requirements of 26 CFR 54.9815-2713A(a)(3), 29 CFR 2590.715-2713A(a)(3), and 45 CFR 147.131(b)(3).

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

_____

Signature of the individual listed above

_____

Date

The organization or its plan using this form must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:

(1) 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

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

As an alternative to using this form, an eligible organization may provide notice to the Secretary of Health and Human Services that the eligible organization has a religious objection to providing coverage for all or a subset of contraceptive services, pursuant to 26 CFR 54.9815-2713A(b)(1)(ii)(B) and (c)(1)(ii), 29 CFR 2590.715-2713A(b)(1)(ii)(B) and (c)(1)(ii), and 45 CFR 147.131(c)(1)(ii). A model notice is available at: http://www.cms.gov/cciio/resources/Regulations-and-Guidance/index.html#Prevention.

This form or a notice to the Secretary is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1210-0150. An organization that seeks to be recognized as an eligible organization that qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing may complete this self-certification form, or provide notice to the Secretary of Health and Human Services, in order to obtain or retain the benefit of the exemption from covering certain contraceptive services. The self-certification form or notice to the Secretary of Health and Human Services must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974, which generally requires records to be retained for six years. The time required to complete this information collection is estimated to average 50 minutes per response, including the time to review instructions, gather the necessary data, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue, N.W., Room N-5718, Washington, DC 20210 or email ebsa.opr@dol.gov and reference the OMB Control Number 1210-0150.