No. _____

IN THE

Supreme Court of the United States

CATHOLIC HEALTH CARE SYSTEM, CATHOLIC HEALTH SERVICES OF LONG ISLAND, CARDINAL SPELLMAN HIGH SCHOOL, MONSIGNOR FARRELL HIGH SCHOOL,

Petitioners,

v.

SYLVIA MATHEWS BURWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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February 29, 2016

QUESTION PRESENTED

This case presents the same question on which this Court has granted certiorari in *Zubik v. Burwell,* No. 14-1418; *Priests for Life v. U.S. Department of Health & Human Services*, No. 14-1453; *Roman Catholic Archbishop of Washington v. Burwell*, No. 14-1505; *East Texas Baptist University v. Burwell*, No. 15-35; *Little Sisters of the Poor v. Burwell*, No. 15-105; *Southern Nazarene University v. Burwell*, No. 15-119; and *Geneva College v. Burwell*, No. 15-191. The question presented is:

Whether the Religious Freedom Restoration Act (RFRA) allows the Government to force objecting religious nonprofit organizations to violate their beliefs by offering health plans with "seamless" access to coverage for contraceptives, abortifacients, and sterilization.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were the Plaintiffs below, are Catholic Health Care System, Catholic Health Services of Long Island, Cardinal Spellman High School, and Monsignor Farrell High School. Petitioners do not have any parent corporations. No publicly held corporation owns any portion of Petitioners, and the Petitioners are not subsidiaries or affiliates of any publicly owned corporation.

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.

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PETITION FOR WRIT OF CERTIORARI

This case involves a challenge under the Religious Freedom Restoration Act ("RFRA") to regulations that force Petitioners to violate their religious beliefs by offering health insurance to their employees through a company that will provide or procure coverage for abortifacients, contraceptives, and sterilization services. In August 2015, a panel of the Second Circuit directly contradicted decisions from this Court when it held that the regulations do not "substantially burden" petitioners' religious exercise under the RFRA. The Government "substantially burdens" the "exercise of religion" whenever it forces plaintiffs to "engage in conduct that seriously violates their religious beliefs" on pain of "substantial" penalties. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775-76 (2014). The regulations at issue here do just that: they threaten massive penalties unless Petitioners violate their religion by (1) submitting a "self-certification" or "notification" and (2) offering health plans through companies that will provide the objectionable coverage.

This Court has now granted certiorari in *Zubik v. Burwell* and six related cases to resolve the exact question presented by this case: whether the regulatory scheme at issue in this litigation can survive scrutiny under RFRA. Accordingly, consistent with its usual practice, this Court should hold this petition pending resolution of *Zubik* and the six other cases that will be reviewed. If this Court determines, correctly in petitioners' view, that the regulations at issue violate RFRA, it should grant this petition, vacate the judgment below, and remand for further proceedings consistent with its opinion.

OPINIONS BELOW

The district court's opinion granting petitioners' motion for summary judgment (Pet. App. 40a) is reported at 987 F. Supp. 2d 232. The district court's subsequent final judgment and injunction (Pet. App. 92a) are reported at 2013 WL 6919134. The Second Circuit's opinion reversing the district court (Pet. App. 1a) is reported at 796 F.3d 207. The Second Circuit's order denying Petitioners' petition for rehearing en banc (Pet. App. 96a) is unreported. The Second Circuit's order granting Petitioners' motion to stay the mandate (Pet. App. 94a) is unreported.

JURISDICTION

The judgment of the Second Circuit was entered on August 7, 2015. Pet. App. 1a. That court denied rehearing en banc on December 1, 2015. Pet. App. 96a. Jurisdiction is proper under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following provisions are reproduced in Appendix F (Pet. App. 98a): 42 U.S.C. §§ 2000bb-1, 2000bb-2, 2000cc-5, 300gg-13; 26 U.S.C. §§ 4980D, 4980H; 26 C.F.R. §§ 54.9815-2713, 54.9815-2713A, 54.9815-2713AT; 29 C.F.R. §§ 2510.3-16, 2590.715-2713, 2590.715-2713A; 45 C.F.R. §§ 147.130, 147.131.

STATEMENT OF THE CASE

A. The Mandate

The Patient Protection and Affordable Care Act ("ACA") requires "group health plan[s]" and "health insurance issuer[s]" to cover women's "preventive care." 42 U.S.C. § 300gg-13(a)(4) (the "Mandate"). Employers that fail to include the required coverage are subject to penalties of $100 per day, per affected

beneficiary. 26 U.S.C. § 4980D(b). Dropping health coverage likewise subjects employers with more than fifty employees to penalties of $2,000 per year per employee after the first thirty employees. *Id.* § 4980H(a), (c)(1).

Congress did not define women's "preventive care." The Department of Health and Human Services ("HHS") also declined to define the term and instead outsourced the definition to a private entity, the Institute of Medicine ("IOM"). 75 Fed. Reg. 41,726, 41,731 (July 19, 2010). The IOM then determined that "preventive care" should include "all [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," HRSA, Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines (last visited June 18, 2015), and HHS subsequently adopted that definition, 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv). Some FDA-approved contraceptive methods (such as "Plan B" and "ella") can induce an abortion. *See Hobby Lobby*, 134 S. Ct. at 2762-63 & n.7.

1. Full Exemptions from the Mandate

From its inception, the Mandate exempted many health plans, including millions of people. For example, certain plans that were in existence when the ACA was enacted are "grandfathered" and therefore are exempt from the Mandate for as long as they do not make certain changes. 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g). As of May 2015, over 46 million individuals participate in grandfathered

plans. HHS, ASPE Data Point, *The Affordable Care Act Is Improving Access to Preventive Services for Millions of Americans* 3 (May 14, 2015), http:// http://aspe.hhs.gov/health/reports/2015/Prevention/ib_Prevention.pdf.

Additionally, acknowledging the burden the Mandate places on religious exercise, the Government has created a full exemption for plans sponsored by entities it deems "religious employers." 45 C.F.R. § 147.131(a). That category, however, includes only religious orders, "churches, their integrated auxiliaries, and conventions or associations of churches." *Id.* (citing 26 U.S.C. § 6033(a)(3)(A)(i) & (iii)). These entities are allowed to offer conscience-compliant health coverage through an insurance company or third-party administrator ("TPA") that will not provide or procure contraceptive coverage. 78 Fed. Reg. 39,870, 39,873 (July 2, 2013). Notably, this exemption is available for qualifying "religious employers" regardless of whether they object to providing contraceptive coverage. 45 C.F.R. § 147.131(a).

At the same time, the "religious employer" exemption does *not* apply to many devoutly religious nonprofit groups that *do* object to contraceptive coverage, including all of the petitioners here. According to the Government, these nonprofit religious groups do not merit an exemption because they are not as "likely" as "[h]ouses of worship and their integrated auxiliaries" "to employ people of the same faith who share the same objection" to "contraceptive services." 78 Fed. Reg. at 39,874. The administrative record contains no evidence in support of this assertion.

2. The Nonprofit Mandate

Instead of expanding the "religious employer" exemption to include religious organizations such as petitioners, the Government announced that non-exempt religious nonprofits would be "eligible" for an inaptly named "accommodation." 78 Fed. Reg. at 39,871 (the "Nonprofit Mandate"). In reality, this "accommodation" gives rise to a new mandate that also forces religious objectors to violate their beliefs.

Under the Nonprofit Mandate, an objecting religious organization must either provide a "self-certification" directly to its insurance company or TPA, or submit a "notice" to the Government providing detailed information on the organization's plan name and type, along with "the name and contact information for any of the plan's [TPAs] and health insurance issuers." 26 C.F.R. § 54.9815-2713A(a); *id.* § 54.9815-2713AT(b)(1)(ii)(B), (c)(1)(ii). The effect of either submission is the same: by submitting the documentation, the eligible organization authorizes, obligates, or incentivizes its insurance company or TPA to arrange "payments for contraceptive services" for beneficiaries enrolled in the organization's health plan. *Id.* §§ 54.9815-2713A(a), 54.9815-2713AT(b)-(c). "If" the organization submits the self-certification, then it creates the obligation for its own TPA or insurance company to provide the objectionable coverage. *Id.* §§ 54.9815-2713A(a), 54.9815-2713AT(b)-(c). And "if" the organization instead submits the notice to the Government, the Government "send[s] a separate notification" to the organization's insurance company or TPA "describing the[ir] obligations" to provide the objectionable coverage. *Id.* § 54.9815-

2713AT(b)(1)(ii)(B), (c)(1)(ii). In either scenario, payments for contraceptive coverage are available to beneficiaries only "so long as [they] are enrolled in [the religious organization's] health plan." 29 C.F.R. § 2590.715-2713A(d).

The Nonprofit Mandate has additional implications for organizations that offer self-insured health plans. The Government concedes that in the self-insured context, "'the contraceptive coverage is part of the [self-insured organization's health] plan.'" *Roman Catholic Archbishop of Wash. v. Sebelius* ("RCAW"), No. 13-1441, 2013 WL 6729515, at *22 (D.D.C. Dec. 20, 2013) (citation and alteration omitted); *see also* Br. of Respondents at 19, *Houston Baptist Univ. v. Burwell*, No. 15-35 (U.S. Sept. 8, 2015) (conceding that in the self-insured context, "the contraceptive coverage provided by [the] TPA is . . . part of the same ERISA plan as the coverage provided by the employer"). Both the self-certification and the notification provided by the Government upon receipt of the eligible organization's submission are deemed to be "instrument[s] under which the plan is operated," 29 C.F.R. § 2510.3-16(b), and serve as the "designation of the [organization's TPA] as plan administrator and claims administrator for contraceptive benefits," 78 Fed. Reg. at 39,879. Consequently, the TPA of a self-insured health plan is *barred* from providing contraceptive benefits to the plan beneficiaries *unless* the sponsoring organization provides the self-certification or notification.[1]

[1] *See* 29 U.S.C. § 1002(16)(A) (limiting the definition of a plan administrator to "the person specifically so designated by the terms of the instrument under which the plan is operated");

In addition, the Nonprofit Mandate provides a unique incentive for objecting organizations' TPAs to provide the objectionable coverage. If an eligible organization complies with the Nonprofit Mandate, its TPA becomes eligible to be reimbursed for the full cost of providing the objectionable coverage, plus 15 percent. 26 C.F.R. § 54.9815-2713AT(b)(3); 79 Fed. Reg. 13,744, 13,809 (Mar. 11, 2014). TPAs receive this incentive, however, only if the self-insured organization submits the required self-certification or notification.

Finally, the Nonprofit Mandate requires self-insured religious groups to "contract[] with one or more" TPAs, 26 C.F.R. § 54.9815-2713AT(b), but TPAs are under no obligation "to enter into or remain in a contract with the eligible organization," 78 Fed. Reg. at 39,880. Consequently, self-insured organizations must either maintain a contractual relationship with a TPA that will provide the objectionable coverage to their plan beneficiaries, or find and contract with a TPA that is willing to do so.

B. Petitioners

Petitioners are Catholic religious non-profit organizations who believe it would be immoral for them to provide, pay for, or facilitate access to abortifacients, contraception, or sterilization because

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id. § 1102(a)(1), (b)(3) (providing that self-insured plans must be "established and maintained pursuant to a written instrument," which must include "a procedure for amending [the] plan, and for identifying the persons who have authority to amend the plan"); 79 Fed. Reg. 51092, 51095 n.8 (August 27, 2014).

it violates the teachings of the Catholic Church. The Government has made it effectively impossible for Petitioners to offer health coverage in a manner consistent with these beliefs.

Currently, Petitioners offer employee health coverage in the following manner:

- Petitioners Cardinal Spellman High School and Monsignor Farrell High School are affiliated entities of the Roman Catholic Archdiocese of New York, and offer health insurance to their employees under the Archdiocese's self-insured health plan, which is administered by third parties United Healthcare and CVS Caremark.
- Petitioner Catholic Health Care System provides health coverage to its employees and their dependents under a self-insured plan administered by Emblem Health and CVS Caremark.
- Petitioner Catholic Health Services of Long Island provides health coverage to its employees and their dependents under three self-insured plans administered by Empire BlueCross BlueShield and Express Scripts.

Despite their sincere, unquestioned religious missions, none of Petitioners qualify as an exempt religious employer under the ACA.

C. Proceedings Below

Left with no alternative to avoid violating their beliefs, Petitioners[2] filed suit in the U.S. District

[2] The Roman Catholic Archdiocese of New York, the Roman Catholic Diocese of Rockville Centre, New York, and Catholic

Court for the Eastern District of New York on May 21, 2012. On December 16, 2013, the district court granted Petitioners' motion for summary judgment and separately entered final judgment and a permanent injunction against Respondents. In electing to apply the "substantial pressure" test used by the Seventh and Tenth Circuits, the district court focused on the "intensity of the coercion applied by the government" and ultimately held that the mandate substantially burdens Petitioners' religious exercise. The court went on to hold that the mandate does not serve a compelling government interest, and that it is not the least restrictive means by which the government can improve public health and equalize women's access to healthcare.

On February 11, 2014, the Government filed its notice of appeal, and on August 7, 2015 the U.S. Court of Appeals for the Second Circuit reversed, holding that the Nonprofit Mandate does not substantially burden Petitioners' religious exercise. Unlike the district court, the Second Circuit disregarded "the substantiality of the pressure the Government imposes on [Petitioners] to violate [their] beliefs," *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2775-76 (2014),[3] and focused instead on the

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Charities of the Diocese of Rockville Centre were also plaintiffs in the original action.

[3] The panel reasoned that completion of the opt-out forms here imposes a "de minimis" burden on Petitioners, and therefore secondary analysis of the alternatives (i.e., penalties for non-compliance) is irrelevant. *Catholic Healthcare System*, 796 F.3d at 221, 225.

nature of and burden associated with the action Petitioners are compelled to take (i.e., complete a self-certification form). After "assessing this obligation objectively," the court stated that the "simple act of completing the notification form" does not impose a "substantial burden." *Catholic Health Care System v. Burwell*, 796 F.3d 207, 219 (2d Cir 2015).

Petitioners sought rehearing en banc, but the Second Circuit denied that petition on December 1, 2015. The Second Circuit subsequently granted Petitioners' motion to stay the mandate pending the filing and disposition of this timely petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

This case presents the same question on which this Court has recently granted review: whether RFRA allows the Government to force objecting religious nonprofit organizations to violate their beliefs by offering health plans with "seamless" access to coverage for contraceptives, abortifacients, and sterilization. To ensure the similar treatment of similar cases, this Court routinely holds petitions that implicate the same issue as other cases pending before the Court, and, once the related case is decided, it resolves the held petitions in a consistent manner. Because this case raises the same question presented in *Zubik* and the six related petitions for certiorari granted by the Cout, Petitioners respectfully request that the Court follow that course here. If this Court determines after its review that the regulations at issue in this and other granted cases violate RFRA, it should then grant this

petition, vacate the judgment below, and remand for further proceedings consistent with its decision.

A. Like cases should receive like treatment. To implement that principle, this Court routinely holds petitions for certiorari presenting the same question at issue in other cases pending in this Court, and, once the related case is decided, it resolves the held petitions in a consistent manner. *See, e.g.*, *Burwell v. Korte*, 134 S. Ct. 2903, 2903 (2014) (held pending *Hobby Lobby*); *Gilardi v. Dep't of Health & Human Servs.*, 134 S. Ct. 2902, 2902 (2014) (held pending *Hobby Lobby*); *IMS Health, Inc. v. Schneider*, 131 S. Ct. 3091, 3091 (2011); *Am. Home Prods. Corp. v. Ferrari*, 131 S. Ct. 1567, 1567 (2011); *State Farm Mut. Auto. Ins. Co. v. Willes*, 551 U.S. 1111, 1111 (2007); *see also Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (noting that the Court has "GVR'd in light of a wide range of developments, including [its] own decisions"); *id.* at 181 (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided.").

As a leading treatise on Supreme Court practice explains, "a petition for certiorari may be held, without the Court's taking any action, until some event takes place that will aid or control the determination of the matter," such as "a decision . . . by the Court in a pending case raising identical or similar issues." Shapiro, *et al.*, *Supreme Court Practice* § 5.I.9, at 340 (10th ed. 2013) (emphasis added). When "an issue is pending before the Court in a case to be decided on the merits, the Court will

typically 'hold' petitions presenting questions that will be—or might be—affected by its ruling in that case, deferring further consideration of such petitions until the related issue is decided." *Id.* § 6.XIV.31(e), at 485-86 (stating that this Court may defer action on a petition "pending some anticipated legal event (such as further proceedings below or the rendition of an opinion in a related case) that may affect the appropriateness of certiorari").

Indeed, the Solicitor General has advocated that related petitions for certiorari to both the Fifth and Seventh Circuits should be held pending the outcome of *Zubik*. *See* Brief for Respondents at 11, *University of Dallas v. Burwell*, No. 15-834; Brief for the Federal Respondents in Opposition, *University of Notre Dame v. Burwell*, No. 14-392. This practice makes good sense, as it would offend basic "interests of justice" for similar cases to be treated differently, based on nothing more than the vagaries of "timing of litigation in different courts." *Supreme Court Practice* § 15.I.3(b), at 833.

B. This petition should be held under the Court's practice. It presents the same question presented in *Zubik v. Burwell,* No. 14-1418; *Priests for Life v. U.S. Department of Health & Human Services*, No. 14-1453; *Roman Catholic Archbishop of Washington v. Burwell*, No. 14-1505; *East Texas Baptist University v. Burwell*, No. 15-35; *Little Sisters of the Poor v. Burwell*, No. 15-105; *Southern Nazarene University v. Burwell*, No. 15-119; and *Geneva College v. Burwell*, No. 15-191. The question is whether RFRA allows the Government to force objecting religious nonprofit organizations to violate their beliefs by offering

health plans with "seamless" access to coverage for contraceptives, abortifacients, and sterilization.

RFRA prohibits the Government from imposing a "substantial burden" on religious exercise unless doing so "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1. The Second Circuit's conclusion that the Government's regulatory scheme is consistent with this statute cannot be reconciled with *Hobby Lobby* and related decisions by this Court.

This Court held in *Hobby Lobby* that the Government substantially burdens religious exercise whenever it forces plaintiffs to "engage in conduct that seriously violates their religious beliefs" on pain of "substantial" penalties. 134 S. Ct. at 2775-76. Under *Hobby Lobby*'s simple test, the regulations at issue here impose a substantial burden on Petitioners' religious exercise. Just as in *Hobby Lobby*, Petitioners believe that if they "comply with the [regulations]"—here, by signing a certification in violation of their religious beliefs and thereby procuring objectionable coverage through a TPA—they "will be facilitating" wrongdoing in violation of its Catholic religious beliefs. *Id.* at 2759. And just as in *Hobby Lobby*, if Petitioners "do not comply, they will pay a very heavy price." *Id.* Thus, because the regulations "force[] [Petitioners] to pay an enormous sum of money . . . if they insist on providing insurance coverage in accordance with their religious beliefs, the [Government has] clearly impose[d] a substantial burden" on Petitioners' religious exercise. *Id.* at 2779. Further, because the Government's regulatory regime is not the least restrictive means of

furthering a compelling interest, Petitioners are entitled to relief under RFRA.

Rather than apply this binding analysis, the panel majority did exactly what *Hobby Lobby* said courts may not do: it "dodge[d] the question that RFRA presents (whether the [regulations] impose[] a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs) and instead addresse[d] a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)." *Hobby Lobby*, 134 S. Ct. at 2778. Indeed, the panel majority's opinion here is rife with examples of questioning the reasonableness of Petitioners' religious objection, instead of assessing whether the Government has imposed substantial pressure on Petitioners to act in violation of their beliefs. This judicial second-guessing of private religious beliefs cannot be squared with the Court's decision *Hobby Lobby*.

These issues will be resolved by this Court's disposition of *Zubik* and the related petitions listed above. Just as in *Zubik* and the other cases in which the Court has granted certiorari petitions, this case turns on whether compliance with the Government's so-called "accommodation" imposes a substantial burden on religious exercise. And just as in *Zubik* and the other granted petitions, if the answer to that threshold question is yes, Petitioners will be entitled to relief if the government's regulatory scheme is not the least restrictive means of advancing a compelling government interest.

Petitioners therefore respectfully request that the Court hold this case pending the Court's decision in *Zubik* and the six other petitions the Court has granted, and then rule on the petition as appropriate in light of the Court's decision in those cases. If this Court determines in *Zubik* and the other granted cases that the regulations violate RFRA, it should grant this petition, vacate the judgment below, and remand for further proceedings consistent with its opinion.

CONCLUSION

The petition for certiorari should be held pending this Court's disposition of the petitions for certiorari that have been granted in *Zubik* and the six other related cases. Should this Court conclude that the ACA regulatory scheme at issue here and in these other cases violates RFRA, the Court should grant this petition, vacate the decision of the Second Circuit, and remand this case for further consideration in light of its decision.

Respectfully submitted,

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February 29, 2016

APPENDIX

APPENDIX A

United States Court of Appeals, Second Circuit.

CATHOLIC HEALTH CARE SYSTEM, Catholic Health Services of Long Island, Cardinal Spellman High School, Monsignor Farrell High School, Plaintiffs–Appellees,

v.

Sylvia Mathews BURWELL, in her official capacity as Secretary of the United States of Health and Human Services, United States Department of Health and Human Services, Thomas Perez, in his official capacity as Secretary of the United States Department of Labor, United States Department of Labor, Jacob L. Lew, in his official capacity as Secretary of the United States Department of Treasury, United States Department of Treasury, Defendants–Appellants.[1]

Docket No. 14–427–cv. | Argued: Jan. 22, 2015. | Decided: Aug. 7, 2015.

* * *

Before: LEVAL, POOLER, and CHIN, Circuit Judges.

[1] The Clerk of the Court is directed to amend the caption as above. Sylvia Mathews Burwell is automatically substituted for Kathleen Sebelius pursuant to Fed. R. App. P. 43(c)(2).

Opinion

POOLER, Circuit Judge:

Defendants–Appellants, the Secretaries of Health and Human Services, Labor, and the Treasury, appeal from the December 16, 2013 order of the United States District Court for the Eastern District of New York (Cogan, *J.*) which, in relevant part, granted Plaintiffs–Appellees' motion for summary judgment and denied Defendants–Appellants' cross-motion for summary judgment. The district court concluded that regulations promulgated under the Patient Protection and Affordable Care Act that allow religious non-profit employers to opt out of providing contraceptive coverage themselves violate these religious employers' rights under the Religious Freedom Restoration Act. We reverse, concluding that the challenged accommodation for religious objectors relieves, rather than imposes, any substantial burden on Plaintiffs' religious exercise, and thus does not violate the Religious Freedom Restoration Act.

BACKGROUND

I. Statutory and Regulatory Background

This case concerns regulations promulgated under the Patient Protection and Affordable Care Act of 2010 (the "ACA"), Pub. L. No. 111–148, 124 Stat. 119. The ACA generally requires employers with fifty or more full-time employees to offer "a group health plan or group health insurance coverage" that provides "minimum essential coverage." 26 U.S.C. § 5000A(f)(2); *id.* § 4980H(a)(1), (c)(2). Unless an exception applies, as part of this minimal essential coverage, the ACA requires an employer's group

health plan or group health insurance coverage to furnish "preventive care and screenings" for female employees without "any cost sharing requirements." 42 U.S.C. § 300gg–13(a)(4). Without "cost sharing requirements" means without requiring plan participants and beneficiaries to make copayments or pay deductibles or coinsurance. *See* 45 C.F.R. § 147.131(c)(2)(ii). An employer whose health plan does not include the required coverage is subject to penalties of $100 per day, per affected beneficiary. 26 U.S.C. § 4980D(b). An employer who drops employee health care coverage altogether is generally subject to a penalty of $2000 per year, per employee, after the first thirty employees. *Id.* § 4980H(a), (c)(1), (c)(2)(D)(i).

The ACA does not specify what types of preventive care must be covered for female plan participants and beneficiaries. Instead, Congress left that issue to be determined via regulation by the Health Resources and Services Administration ("HRSA"), a division of the Department of Health and Human Services ("HHS"). 42 U.S.C. § 300gg–13(a)(4). In developing guidelines for preventative health services for women, HRSA requested the assistance of the Institute of Medicine ("IOM"), an arm of the National Academy of Sciences established in 1970 to inform health policy with available scientific information. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 238 (D.C. Cir. 2014).

In August 2011, consistent with IOM's recommendations, HRSA promulgated the Women's Preventive Services Guidelines, which generally require non-exempt employers to provide "coverage, without cost sharing, for all Food and Drug Administration (FDA) approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity, as prescribed by a [health care] provider." 77 Fed. Reg. at 8725 (internal quotation marks and alterations omitted). These contraceptive coverage requirements were subsequently enacted by the three agencies responsible for the ACA's implementation—the Department of the Treasury, the Department of Labor, and HHS. *See* 26 C.F.R. § 54.9815– 2713(a)(1)(iv); 29 C.F.R. § 2590.715–2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv). We refer to this required coverage as the "contraceptive coverage mandate." The ACA and its implementing regulations create an exemption from the contraceptive coverage mandate for "religious employer[s]," a category that encompasses "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A)(i), (iii); 45 C.F.R. § 147.131(a). The government created this exemption in response to concerns from religious groups objecting to the contraceptive coverage mandate.

In response to continued objections from religiously-affiliated organizations that did not qualify for the "religious employer" exemption, the government also crafted the so-called "accommodation," which applies more broadly to

religious non-profit organizations that object to providing contraceptive coverage. The accommodation was so named because it allows religious employers to opt out of paying for objectionable medical services without denying these services to employees who may or may not share the religious beliefs of their employer. Under the applicable regulations, an organization is eligible for this accommodation if it 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....

45 C.F.R. § 147.131(b); *see also* 26 C.F.R. § 54.9815–2713A(a); 29 C.F.R. § 2590.715–2713A(a). We refer

to organizations that meet these criteria as "eligible organizations."[2]

By way of background, eligible organizations generally provide their employees insurance in one of two ways. Employers are said to have an "insured" plan if they contract with an insurance company for insurance—the insurance company bears the financial risk of paying health insurance claims. Other employers, like the Plaintiffs here, who bear the financial risk of paying claims themselves, are said to have "self-insured" plans. Many self-insured employers use insurance companies or other third parties to administer their plans, performing functions such as developing networks of providers, negotiating payment rates, and processing claims. In this context, the insurance company or other third party is called a "third-party administrator" or "TPA." *See generally* Congressional Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 6 (2008).

Under the regulations, an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). To be relieved of these obligations, an eligible organization has two options. First, it can complete a notification form issued by

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[2] Revisions to these regulations extending the accommodation to closely held for-profit entities with similar religious objections are scheduled to take effect September 14, 2015. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,318, 41,323 (July 14, 2015).

the Department of Labor, indicating that it has a religious objection to providing coverage for the required contraceptive services, and send a copy to its insurance company or third-party administrator. *See id.* at 39,875; *see also* 29 C.F.R. § 2590.715–2713A(a)(4), (b)(1)(ii)(A), (c)(1)(i). This one-page self-certification form requires only the name of the organization, and the name, title, and contact information of the person signing it. See Department of Labor, EBSA Form 700, http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf.

Second, an alternative notification option stems from the Supreme Court's orders in *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, —— U.S. ——, 134 S. Ct. 1022, 187 L. Ed. 2d 867 (2014), and *Wheaton College v. Burwell*, —— U.S. ——, 134 S. Ct. 2806, 189 L. Ed. 2d 856 (2014). In both orders, the Supreme Court granted injunctions pending appeal to non-profits covered by the accommodation, providing that instead of self-certifying using the Department of Labor's one-page form, they could instead send a letter to HHS detailing their religious objections in their own words. HHS, in turn, would then be responsible for informing the non-profits' third-party administrators to begin providing separate contraceptive coverage to the non-profits' employees. In August 2014, long after the district court's judgment in this case, HHS issued new interim final rules for non-profits that essentially codified these orders. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 51,092 (Aug. 27, 2014). These rules were finalized in July 2015. *See*

Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,323 (July 14, 2015). Under the new rules, an eligible organization can choose to either fill out the Department of Labor's form and send it to its third-party administrator, or it can write to HHS directly using its own words or a sample letter provided by HHS. This notice to the government is not required to take a particular form, but must include information on the entity's plan name and type, along with "the name and contact information for any of the plan's third-party administrators and health insurance issuers." 29 C.F.R. § 2590.715–2713A(b)(1)(ii)(B), (c)(1)(ii).

Once an eligible organization chooses to take advantage of the accommodation and notifies its third-party administrator or HHS by using one of the methods specified by the regulations, the plan's participants and beneficiaries will generally still have access to contraceptive coverage without cost sharing through alternative mechanisms established by government regulations. When an eligible organization that chooses not to provide contraceptive coverage has a "self-insured" plan like the Plaintiffs' plans here, the regulations, depending on the type of plan, either require or incentivize[3] the

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[3] When employers with self-insured plans offer insurance through what is known as a "church plan," the government lacks authority under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*. ("ERISA"), to regulate the third-party administrators that administer the plans. 29 U.S.C. §§ 1002(33), 1003(b)(2). Thus, rather than requiring third- party administrators to offer contraceptive coverage once an eligible organization opts out, the regulations

third-party administrator to provide or arrange its own separate payments for contraceptive services for plan participants and beneficiaries. 29 C.F.R. § 2590.715–2713A(b)(2). Importantly, the regulations require the third-party administrator to fully divorce the eligible organization from payments for contraceptive coverage. *See id.* § 2590.715–2713A(b)(2)(i). The regulations bar the third-party administrator from imposing any premium, fee or other charge, directly or indirectly, on the eligible organization or the group health plan with respect to payments for contraceptive services. *See id.* Instead, the third-party administrator may seek reimbursement for payments for contraceptive services directly from the federal government. *See id.* § 2590.715–2713A(b)(3); *see also* 45 C.F.R. § 156.50(d). Third-party administrators are required to "segregate" accounting for contraceptive coverage from the eligible organization's plan excluding such coverage. 29 C.F.R. § 2590.715–2713A(c)(2)(ii).[4]

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incentivize such coverage by providing reimbursement in excess of costs for third-party administrators. *See* 29 C.F.R. § 2590.715–2713A(b)(3); 45 C.F.R. § 156.50(d). Here, all of the Plaintiffs offer health coverage through self-insured church plans.

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

In addition, an eligible organization that opts out of providing contraceptive coverage has no obligation to inform plan participants and beneficiaries of the availability of these separate payments made by third parties. Instead, the third-party administrator itself provides this notice, and does so "separate from" materials that are distributed in connection with the eligible organization's group health coverage. *Id.* § 2590.715–2713A(d). Third-party administrators bear the burden of contacting beneficiaries, and eligible organizations are not required to provide these entities the names of their beneficiaries or otherwise coordinate these notices. *See id.* § 2590.715–2713A(b)(4), (c)(1)(i); *Priests for Life*, 772 F.3d at 254 (noting that "[n]o regulation related to the accommodation imposes any such duty on Plaintiffs"). Furthermore, the third-party administrator's notice must make clear that the eligible organization is neither administering nor funding the contraceptive benefits, specifying 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." 29 C.F.R. § 2590.715–2713A(d).

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contraceptive coverage from the group health insurance coverage provided in connection with the ... plan," *id.* § 147.131(c)(2)(i)(A), and "segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services," *id.* § 147.131(c)(2)(ii).

II. Factual Background and Procedural History

The relevant plaintiffs on appeal are a group of religious non-profit organizations affiliated with the Roman Catholic Church. [5] Plaintiffs Cardinal Spellman High School and Monsignor Farrell High School are non-profit Catholic high schools located in the Bronx and Staten Island, respectively. As affiliated entities of the Roman Catholic Archdiocese of New York, Cardinal Spellman and Monsignor Farrell offer health insurance to their employees under the Archdiocese's self-insured health plan, which is administered by United Healthcare and CVS Caremark as third-party administrators. Plaintiff Catholic Health Care System (also known as ArchCare) is a non-profit organization that provides health coverage to more than 1000 employees and their dependents under a self-insured plan administered by Emblem Health and CVS Caremark. Plaintiff Catholic Health Services of Long Island is a non-profit organization that provides health coverage to approximately 11,000 employees and their dependents under three self-insured plans administered by Empire BlueCross BlueShield and Express Scripts.

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[5] The plaintiffs below also included the Roman Catholic Archdiocese of New York and the Roman Catholic Diocese of Rockville Centre, New York—both of whom are exempt from the contraceptive coverage mandate as religious employers—as well as Catholic Charities of the Diocese of Rockville Centre. The district court dismissed the claims of these plaintiffs and these decisions are not challenged on appeal.

While none of these entities qualify as "religious employers" under the exemption to the contraceptive coverage mandate, all of them are eligible for the accommodation to the mandate. Nevertheless, Plaintiffs contend that the contraceptive coverage mandate, including the accommodation, violates their rights under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb et seq. RFRA provides that the government "shall not substantially burden a person's exercise of religion" unless the application of that burden is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000bb–1. As affiliates of the Catholic Church, Plaintiffs adhere to the Church's teachings that life begins at the moment of conception, and that "abortion-inducing" products, contraception, and sterilization are immoral.[6] Plaintiffs' beliefs forbid them from taking actions that would make them complicit in the delivery of these services, and thus they believe that they are prohibited from paying for,

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[6] Plaintiffs contend that some forms of contraception can induce an abortion. While we do not doubt the sincerity of their beliefs, we note that the contraceptive coverage mandate deals only with drugs that fall within the FDA's definition of "contraception," not drugs which the FDA qualifies as "abortion-inducing." *See* 77 Fed. Reg. at 8725 (requiring coverage only for all "[FDA] approved contraceptive methods" and "sterilization procedures" (alterations and internal quotation marks omitted)). We recognize that Plaintiffs do not accept the FDA's proposition and argue that some of the covered methods are abortion-inducing. *See Burwell v. Hobby Lobby Stores, Inc.*, —— U.S. —— –, 134 S. Ct. 2751, 2759, 189 L. Ed. 2d 675 (2014) ("The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients.").

providing, or facilitating access to contraception. Plaintiffs argue that opting out of the coverage requirement substantially burdens their religious exercise because they believe that by doing so, they facilitate access to products and services they find objectionable. Thus, Plaintiffs contend that the ACA leaves them with the choice of: (1) providing contraceptive coverage in violation of their religious beliefs, (2) paying significant penalties for failing to provide the required health coverage, or (3) utilizing an accommodation which also forces them to violate their religious beliefs.

Plaintiffs brought suit in district court challenging the contraceptive coverage mandate under RFRA and seeking an injunction barring its enforcement.[7] On December 16, 2013, the district court granted Plaintiffs summary judgment on their RFRA claim and denied the government's cross-motion for summary judgment as to this claim. The district court concluded that the accommodation placed a substantial burden on Plaintiffs' exercise of religion, and that the government failed to show that the accommodation was the least restrictive means to advance a compelling governmental interest. The district court enjoined enforcement of the contraceptive coverage mandate against Plaintiffs and entered final judgment.

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[7] Plaintiffs, along with the Roman Catholic Archdiocese of New York, the Roman Catholic Diocese of Rockville Centre, New York, and Catholic Charities of the Diocese of Rockville Centre, also pressed other statutory and constitutional claims not relevant here.

III. Parallel Proceedings

Plaintiffs' challenge to the contraceptive coverage mandate is not unique. Religious non-profit organizations throughout the country have brought similar RFRA challenges. In the time since the district court issued its opinion, six circuits have rejected these claims, either on the merits or by denial of a preliminary injunction. *See Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151, 1158– 60, 2015 WL 4232096, at *3 (10th Cir. July 14, 2015); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 452–53, 2015 WL 3852811, at *1 (5th Cir. June 22, 2015); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 619 (7th Cir. 2015); *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 442 (3d Cir. 2015); *Priests for Life*, 772 F.3d at 237; *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 390 (6th Cir. 2014), *vacated and remanded*, —— U.S. ——, 135 S. Ct. 1914, 191 L. Ed. 2d 760 (2015); *see also Wheaton Coll. v. Burwell*, 791 F.3d 792, 796 (7th Cir. 2015).

These cases are still actively moving through the courts. Similar cases are pending in the Eighth and Eleventh Circuits. *See Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 14–1507 (8th Cir. argued Dec. 10, 2014); *Eternal Word Television Network, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 14–12696 (11th Cir. argued Feb. 4, 2015).

In addition, in light of the Supreme Court's opinion in *Burwell v. Hobby Lobby Stores, Inc.*, ——U.S. ——, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014), the Eleventh Circuit granted an injunction prohibiting enforcement of the accommodation against the

plaintiffs pending appeal. *Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1340 (11th Cir. 2014). Earlier this year, the Supreme Court also vacated and remanded both the original Seventh Circuit opinion in *University of Notre Dame* and the Sixth Circuit opinion, which were decided prior to *Hobby Lobby*, for further consideration in light of that decision. *See Mich. Catholic Conference v. Burwell*, —— U.S. ——, 135 S. Ct. 1914, 191 L. Ed. 2d 760 (2015); *Univ. of Notre Dame v. Burwell*, —— U.S. ——, 135 S. Ct. 1528, 191 L. Ed. 2d 557 (2015). Although the Seventh Circuit reaffirmed its original conclusion on remand, *see Univ. of Notre Dame*, 786 F.3d at 619, the Sixth Circuit case remains pending. We note also that petitions for certiorari are pending for the decisions of the Third, Fifth, Tenth, and D.C. Circuits. With respect to the Third Circuit's decision, the Supreme Court declined to recall and stay issuance of the mandate, but enjoined enforcement of the accommodation against the plaintiffs pending disposition of the petition for certiorari. *Zubik v. Burwell*, ——U.S. ——, 135 S. Ct. 2924, —— L. Ed. 2d —— (2015).

DISCUSSION

"We review *de novo* a district court's grant of summary judgment." *Byrne v. Rutledge*, 623 F.3d 46, 52 (2d Cir. 2010). We "will affirm only if, construing the evidence in the light most favorable to the nonmoving party, 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *State Emp. Bargaining Agent Coal. v. Rowland*, 718 F.3d 126, 131–32 (2d Cir. 2013) (quoting Fed. R. Civ. P. 56(a)). When, as here,

we review a district court's treatment of cross-motions for summary judgment we "evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Byrne*, 623 F.3d at 53 (internal quotation marks omitted).

I. The Religious Freedom Restoration Act

Under the Free Exercise Clause of the First Amendment, the government may not "prohibit[ ] the free exercise" of religion. U.S. Const. amend. I. In 1990, the Supreme Court clarified its Free Exercise Clause jurisprudence by holding that the government need not have a compelling governmental interest in order to enact neutral, generally applicable laws that happen to burden religious practice. *See Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 882–90, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). While consistent with much of the Supreme Court's prior free exercise precedent, *Smith* was arguably in tension with two prior Supreme Court cases, both of which the Smith Court declined to overrule. *Id.* at 881–85, 110 S. Ct. 1595. In these cases, the Court used strict-scrutiny like analysis and asked whether the challenged law substantially burdened a religious practice and, if it did, whether that burden was justified by a compelling governmental interest. *See Wisconsin v. Yoder*, 406 U.S. 205, 220–21, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972); *Sherbert v. Verner*, 374 U.S. 398, 405–06, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963).

In response to *Smith*, Congress enacted RFRA, which provides in relevant part that the

"[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person ... is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb–1(b); *see also Sossamon v. Texas*, 563 U.S. 277, 131 S. Ct. 1651, 1656, 179 L. Ed. 2d 700 (2011) (noting that by enacting RFRA, Congress "intended to 'restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* ... in all cases where free exercise of religion is substantially burdened.'" (quoting 42 U.S.C. § 2000bb(b)(1)) (citation omitted)). While RFRA's "compelling interest" prong stems from *Sherbert* and *Yoder*, the "least restrictive means" prong was not used pre-*Smith*. *See City of Boerne v. Flores*, 521 U.S. 507, 509, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). RFRA accordingly employs a strict scrutiny standard that provides "even broader protection for religious liberty" than existed previously. *Hobby Lobby*, 134 S. Ct. at 2761 n. 3. In sum, while "the Free Exercise Clause does not normally 'inhibit enforcement of otherwise valid laws of general application that incidentally burden religious conduct,'.... RFRA, in contrast, requires strict scrutiny of such laws where the incidental burden on religion is substantial." *Hankins v. Lyght*, 441 F.3d 96, 111–12 (2d Cir. 2006) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 714, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005)).

II. Substantial Burden

At the threshold, RFRA requires us to assess whether Plaintiffs have shown a substantial burden on their exercise of religion. *See City of Boerne*, 521

U.S. at 533, 117 S. Ct. 2157 (noting that the burden on this issue lies with the religious objector). "[I]f the law's requirements do not amount to a substantial burden under RFRA, that is the end of the matter." *Priests for Life*, 772 F.3d at 244.

Here, Plaintiffs argue that the ACA's contraceptive mandate, including the accommodation, constitutes a substantial burden on their religious exercise by forcing them to choose among three unacceptable options: (1) provide contraceptive coverage, (2) pay the fines and penalties associated with failure to provide contraceptive coverage, or (3) opt out of the contraceptive coverage mandate via the accommodation, using either method of self-certification.

On its face, the final option, designed by the government to (a) extricate employers with religious objections from the provision of contraceptive coverage, and (b) place the burden for such coverage on third-party administrators, would appear to eliminate any substantial burden on Plaintiffs' religious exercise. Indeed, in *Hobby Lobby*, the Supreme Court identified this accommodation as a way to alleviate a substantial burden on the religious exercise of for-profit corporations who enjoyed only the first two options. 134 S. Ct. at 2782. Yet Plaintiffs contend that the opposite is true. Plaintiffs believe that by submitting the opt-out notification to the government or their third-party administrators, they are indirectly facilitating the provision to their employees of products and services that have contraceptive and "abortion-inducing" effects, an act which violates their religious beliefs. Thus, although the accommodation shifts the burden of providing

contraceptive coverage to others once Plaintiffs avail themselves of the opt-out mechanism, Plaintiffs nevertheless contend that the regulatory scheme imposes a substantial burden on their exercise of religion.

A. Substantiality Is an Objective Inquiry

In analyzing the substantiality of a burden under RFRA, we employ an objective test. RFRA plaintiffs must show that the government has imposed a burden that is substantial, not simply one that they believe is substantial.

To be sure, the government concedes, and we do not doubt, the sincerity of Plaintiffs' belief that providing, paying for, or facilitating access to contraceptive services is contrary to their faith. Nor do we doubt that, in Plaintiffs' religious judgment, participation in the accommodation violates this belief. *See Priests for Life*, 772 F.3d at 247 ("Plaintiffs are correct that they—and not this Court—determine what religious observance their faith commands."). However, "[a]ccepting the sincerity of Plaintiffs' beliefs ... does not relieve this Court of its responsibility to evaluate the substantiality of any burden on Plaintiffs' religious exercise." *Id.* Although a court accepts a litigant's sincerely held religious beliefs, it must assess the nature of a claimed burden on religious exercise to determine whether, as an objective legal matter, that burden is "substantial" under RFRA. As other circuits have recognized, "[w]hether a law substantially burdens religious exercise under RFRA is a question of law for courts to decide, not a question of fact." *Id.; see also Little Sisters of the Poor*,

794 F.3d at 1175–78, 2015 WL 4232096, at *18–19; *E. Tex. Baptist Univ.*, 793 F.3d at 458– 59, 2015 WL 3852811, at *5; *Geneva Coll.*, 778 F.3d at 442; *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) ("[a]ccepting as true the factual allegations that [plaintiff's] beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened").

Plaintiffs urge a contrary position, contending that when accepting a RFRA plaintiff's religious beliefs, a court must *also* accept the plaintiff's assessment of the magnitude of any burden on their religious exercise. Yet this conclusion would "read out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement." *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001); *see also Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)). If RFRA plaintiffs needed only to assert that their religious beliefs were substantially burdened, federal courts would be reduced to rubber stamps, and the government would have to defend innumerable actions under demanding strict scrutiny analysis. *See Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011) (concluding that judicial inquiry into the substantiality of the burden "prevent[s] RFRA claims from being reduced into questions of fact, proven by the credibility of the claimant"). As the D.C. Circuit has recognized, this position would require us to "accept a RFRA claimant's understanding of what the challenged law requires

her to do (or to refrain from doing), even if that subjective understanding is at odds with what the law actually requires." *Priests for Life*, 772 F.3d at 249; *see also Univ. of Notre Dame*, 786 F.3d at 621 (Hamilton, *J.*, concurring) ("Notre Dame ... contends, in effect, that its religious belief can substitute for legal analysis regarding the operation of federal law."). Rejecting this possibility, we conclude that the fact that a RFRA plaintiff *considers* a regulatory burden substantial does not make it a substantial burden. Were it otherwise, no burden would be insubstantial.

Contrary to Plaintiffs' suggestions, *Hobby Lobby* did not collapse the distinction between beliefs and substantial burden, such that the latter could be established simply through the sincerity of the former. It is true that the Supreme Court noted in *Hobby Lobby* that "it is not for us to say that [plaintiffs'] religious beliefs are mistaken or insubstantial." 134 S. Ct. at 2779. But that observation related to the significance of the particular belief for the religion—not to the burden imposed by the governmental requirement. Consistent with a long judicial tradition, *Hobby Lobby* declined to second-guess the rationality, or demean the significance, of the plaintiffs' religious beliefs. *See id.* at 2778 (citing cases). Whether the regulation objected to imposes a substantial burden is an altogether different inquiry. Indeed, subsequent to *Hobby Lobby*, the Supreme Court has reaffirmed the independence of the belief and burden inquiries. In *Holt v. Hobbs*, the Court made clear that "[i]n addition to showing that the relevant exercise of religion is grounded in a sincerely held

religious belief, petitioner also bore the burden of proving that the Department's grooming policy substantially burdened that exercise of religion." —— U.S. ——, 135 S. Ct. 853, 862, 190 L. Ed. 2d 747 (2015) (emphasis added).[8] Consequently, we cannot agree with Plaintiffs that *Hobby Lobby* erased RFRA's substantial burden requirement by leaving the issue to be proven solely through a plaintiff's affirmation of belief. RFRA does not speak of a burden which the affected person considers substantial. It requires a substantial burden, and assessing substantiality is a matter for a court.

B. The Accommodation Imposes No Substantial Burden

Applying this objective analysis to the accommodation, we conclude that Plaintiffs have failed to show a substantial burden. The regulatory accommodation here operates in a straightforward fashion. In order to be excused from the contraceptive coverage mandate, an eligible organization must send a single sheet of paper communicating its eligibility and religious objection. 29 C.F.R. § 2590.715–2713A(b)(1)(ii). Once an eligible organization expresses its desire to have no involvement in the provision of contraceptive coverage, the government requires no further action of the organization. Instead, the regulations effectuate this separation by enlisting other entities to fill the gap. The regulations require or incentivize insurers and third-party administrators to directly

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[8] *Holt* was decided under RFRA's companion statute, the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq*.

offer separate coverage for contraceptive services to insured employees who want it, and to inform beneficiaries that their objecting employer has no role in facilitating this coverage. *Id.* § 2590.715–2713A(b)(2), (d). In the process, eligible organizations are provided the opportunity to freely express their religious objection to such coverage as well as to extricate themselves from its provision. At the same time, insured individuals are not deprived of the benefits of contraceptive coverage.

Thus, under the challenged regulatory scheme, the only obligation actually imposed on Plaintiffs is identifying themselves as religious objectors. Through a modicum of paperwork, an eligible organization throws the entire administrative and financial burden of providing contraceptive coverage on its insurer or third-party administrator, generally organizations with no objection to providing contraceptive coverage. Indeed, in discussing the opt-out mechanism in *Hobby Lobby*, the Supreme Court explained that the accommodation "effectively exempt[s]" eligible organizations from the contraceptive coverage mandate. 134 S. Ct. at 2763.

Assessing this obligation objectively, we cannot conclude that the simple act of completing the notification form imposes a substantial burden on Plaintiffs' religious exercise. Indeed, in past decisions favoring religious objectors, the burden imposed was considerably more substantial than the burden of notification at issue here. Pre-*Smith* First Amendment Free Exercise cases, which remain instructive in interpreting RFRA, *see Priests for Life*, 772 F.3d at 244, involved much more significant effects on the lives of religious objectors. For example,

in *Sherbert*, the plaintiff, a Seventh-day Adventist, was denied unemployment compensation after her employer discharged her because she refused to work on Saturday, her religion's day of rest. 374 U.S. at 399–401, 83 S. Ct. 1790. Similarly, in *Yoder*, the statute at issue required the Old Order Amish plaintiffs to send their children to school until the age of sixteen, in violation of their religion. 406 U.S. at 207–08, 92 S. Ct. 1526. In *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 709, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981), a religious pacifist was denied unemployment benefits after he quit his job following a transfer to a department where he was required to work in the production of armaments. Here, by contrast, Plaintiffs are not denied any similar government benefits, nor are they required to do anything besides identify themselves as religious objectors via a one-page form.

Cases finding a substantial burden under RFRA have similarly involved much more significant burdens on religious objectors. In *Jolly v. Coughlin*, 76 F.3d 468, 476–77 (2d Cir. 1996), this Court found a substantial burden where the challenged regulations required the plaintiff, a Rastafarian prison inmate, to undergo a physically-invasive and religiously-objectionable medical screening—in essence, to suffer an invasion of his bodily integrity. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 425–26, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006), a substantial burden existed where the Controlled Substances Act, 21 U.S.C. § 801 et seq., prevented the religious objector plaintiffs from ever again engaging in a sacramental

ritual. More recently, in *Hobby Lobby*, the Supreme Court found a substantial burden where the contraceptive coverage mandate, in the absence of *any accommodation*, required for-profit corporations to pay out of pocket for the use of religiously-objectionable contraceptives by thousands of employees or pay significant fines. 134 S. Ct. at 2775–79. And most recently, in *Holt*, a prison policy requiring a Muslim prisoner to cut his beard throughout his period of incarceration was found to substantially burden his religious beliefs. 135 S. Ct. at 862.

The burden imposed on Plaintiffs here stands in contrast to these previous cases. "Accurately understood, the opt-out mechanism imposes on Plaintiffs only the *de minimis* administrative burden associated with completing the self-certification form or the alternative notice." *Priests for Life*, 772 F.3d at 253. Viewed objectively, completing a form stating that one has a religious objection is not a substantial burden. To be sure, the notification required of Plaintiffs here certainly imposes *some* burden. But any imposition from completing the form falls well below the degree of substantial burdensomeness that has historically entitled a RFRA plaintiff (or pre-*Smith* free exercise plaintiff) to accommodation, or triggered strict scrutiny analysis. *See Kaemmerling*, 553 F.3d at 678 (noting that "[a]n inconsequential or *de minimis* burden on religious practice does not rise to [the] level" of a substantial burden).

Indeed, the accommodation here involves the same de minimis burden of notification historically required of religious objectors under statutory and regulatory schemes such as the military draft and

medical conscience clauses. *See Little Sisters of the Poor*, 794 F.3d at 1184 n. 31, 2015 WL 4232096, at *24 n. 31 ("Many religious objection schemes require an affirmative opt out before another person is required to step in and assume responsibility...."). As with other religious objectors, there must be some method by which the government can be notified of the objection. Otherwise there is no way that the government can know which organizations it needs to accommodate. Here, the government has provided flexible, largely effortless, and essentially cost-free options for notification. Plaintiffs have provided us with no case law concluding that a similarly minimal administrative notification of religious objection constitutes a substantial burden.

Nevertheless, urging the Court to look beyond the simplicity of the relevant notification forms, Plaintiffs raise two arguments. First, Plaintiffs contend that the burden of notification is substantial because the penalties for non-compliance with the notification requirement are significant. Second, Plaintiffs argue that the consequences of notification—the downstream actions of the government and third parties—transform completion of the relevant forms into a substantial burden. For the reasons discussed below, we do not find either argument persuasive.

1. Penalties for Non–Compliance

Plaintiffs first argue that the government imposes a substantial burden whenever it puts a RFRA plaintiff to a choice between (a) taking action she finds religiously objectionable, or (b) suffering substantial penalties. *See Jolly*, 76 F.3d at 477 ("[A] substantial burden exists where the state 'put[s]

substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" (quoting *Thomas*, 450 U.S. at 718, 101 S. Ct. 1425) (second alteration in original)). Thus, because Plaintiffs would pay serious fines or be forced to provide their employees contraceptive coverage if they failed to utilize the opt-out mechanism, they claim a substantial burden exists here.

Viewed in the context of our previous discussion, this argument is a non sequitur. An objectively insubstantial burden does not become substantial simply because a RFRA plaintiff faces substantial burdens in the alternative. Because Plaintiffs can comply with the notification requirement without suffering a substantial burden, it makes no difference that they would incur significant penalties for non-compliance.

For this reason, the cases cited by Plaintiffs are not applicable. As noted previously, in *Jolly* the challenged regulations required a prisoner to suffer a physical invasion of his bodily integrity. *Id.* at 476–77. In finding this invasion a substantial burden, we further observed that the penalty for non-compliance with this procedure was severe—"confinement to medical keeplock." *Id.* at 477. As we recognized, when the challenged action imposes a substantial burden, it is obviously pertinent whether available alternatives also impose a substantial burden. However, this secondary analysis matters only if the challenged conduct is itself a substantial burden. Indeed, we emphasized that the severity of the sanction for non-compliance was not the gravamen of the substantial burden analysis. *Id.* ("[T]he district court need not have emphasized the extraordinary

length of the plaintiff's confinement to medical keeplock as an indicator of a substantial burden.").

The same logic explains the Supreme Court's statement in *Hobby Lobby* that "[b]ecause the contraceptive mandate forces [plaintiffs] to pay an enormous sum of money—as much as $475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs." 134 S. Ct. at 2779. Unlike the regulatory scheme at issue here, the regulations challenged in *Hobby Lobby* imposed a substantial burden, requiring the for-profit corporation plaintiffs to pay out of pocket to insure thousands of individuals. *Id*. at 2775–78. Given that the burden of compliance was objectively substantial, the *Hobby Lobby* Court naturally also had to consider whether non-compliance with the challenged regulations might result in only an insubstantial penalty. Because these alternative penalties were *also* significant, the *Hobby Lobby* plaintiffs had no means of avoiding a substantial burden. By contrast, because completing the opt-out forms here imposes no substantial burden on Plaintiffs, the fact that they may arguably incur substantial burdens in the alternative is irrelevant.

Similar issues undermine Plaintiffs' citation to *Thomas*, 450 U.S. at 718, 101 S. Ct. 1425. There, as noted, the government denied a religious pacifist unemployment benefits after he quit his job producing armaments. *Id*. at 709, 101 S. Ct. 1425. Denial of these potentially life-saving unemployment benefits imposed an objectively substantial burden on the plaintiff's religious exercise. Furthermore,

Thomas lacked an alternative option for "not complying" with this loss of benefits. Although he could have continued to work in violation of his religious beliefs, this would not have avoided the loss of benefits, and, indeed, would have itself imposed a substantial burden. Crucially, the regulatory scheme at issue did not offer the objector an option that was free of a substantial burden.

In the context of the cases cited by Plaintiffs, it was thus pertinent that the cost of non-compliance with the challenged regulation was also significant. When doing what the governmental scheme requires is a substantial burden, then a court must also consider whether any alternatives available to the plaintiff also impose a substantial burden. Here, by contrast, what the governmental scheme actually requires of Plaintiffs—the filing of a form or letter of notification—is *not* a substantial burden. The fact that they may arguably incur substantial burdens if instead they unlawfully refuse to comply is therefore irrelevant.

2. Effects of Compliance

Plaintiffs further argue that the objectively insubstantial burden of filing either the opt-out form or the letter to HHS is substantial because it renders them complicit in bringing about consequences forbidden by their religion, namely the provision of contraceptive coverage by the government and third parties. Although third parties ultimately bear the burden of providing contraceptive coverage, Plaintiffs contend that their participation is essential to this coverage. Plaintiffs argue that a substantial burden exists because the submission of the self-certification

form or letter "triggers" or "facilitates" the provision of objectionable contraceptive services. Under this view, Plaintiffs' acts of self-certification as religious objectors ultimately result in their third-party administrators providing contraceptive coverage to their employees.

Like the other circuits to have addressed similar RFRA claims, we are not persuaded regarding the mechanics of Plaintiffs' "trigger" argument. As other courts have concluded, a religious objector's submission of the form or letter does not, as a legal matter, trigger or facilitate the provision of contraceptive coverage. *See, e.g., Geneva Coll.*, 778 F.3d at 437; *Priests for Life*, 772 F.3d at 252–53. Rather, contraceptive coverage occurs through operation of federal law. When third parties step in and provide contraceptive coverage after Plaintiffs opt out, they do so not because Plaintiffs have opted out, but rather because federal law requires or incentivizes them to provide such coverage. The accommodation functions not as a "trigger," but rather as a means of identifying and exempting those employers with religious objections. Once Plaintiffs indicate their desire to have no involvement in the provision of contraceptive coverage, the government steps in and acts to ensure contraceptive coverage without any participation by Plaintiffs. Thus, Plaintiffs' decision to opt out is not the cause of the ultimate contraceptive coverage; rather this coverage happens *in spite* of them.

Yet even accepting Plaintiffs' argument that their submission of the notification form or letter indirectly results in the provision of contraceptive coverage to their employees, there is still no substantial burden

here. The regulatory obligations imposed on third parties after Plaintiffs opt out do not transform the de minimis act of notification into a substantial burden. Courts have not found a substantial burden where a plaintiff argues that her religious exercise is violated by the government's internal operations or, by extension, its decision to burden third parties, even where the plaintiff plays a precipitating role. "An asserted burden is ... not an actionable substantial burden when it falls on a third party, not the religious adherent." *Priests for Life*, 772 F.3d at 246.

Most prominently, in *Bowen v. Roy*, 476 U.S. 693, 695–96, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986), a Native American plaintiff argued that a statute requiring the government to use his daughter's social security number to process his welfare benefit application violated the Free Exercise Clause. Plaintiff Roy believed that the government's assignment of a social security number to his daughter would "'rob the spirit' of his daughter and prevent her from attaining greater spiritual power." *Id.* at 696, 106 S. Ct. 2147. The Supreme Court rejected Roy's challenge to the government's internal use of his daughter's social security number, concluding that, rather than complaining about a government restriction on his own conduct, Roy sought to "dictate the conduct of the Government's internal procedures." *Id.* at 700, 106 S. Ct. 2147. Roy's claim failed in this respect because, even though assigning his daughter a social security number in processing the benefit application offended his religious sensibilities, it did not "itself in any degree impair Roy's freedom to believe, express, and

exercise his religion." *Id.* (internal quotation marks omitted). The Court concluded that although "[t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion[,] it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* The Court declined to "interpret[ ] the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development." *Id.* at 699, 106 S. Ct. 2147 (emphasis in original). Rather, it concluded that the "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.*; *see also Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439, 450–51, 452, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988) ("[G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires.").

Similarly, in *Kaemmerling*, the D.C. Circuit concluded that a federal prisoner could not establish a substantial burden under RFRA when he sought to enjoin application of the DNA Analysis Backlog Elimination Act on the basis that DNA sampling, storage, and collection without limitations violated his religious beliefs about the proper use of the "building blocks of life." 553 F.3d at 673–74, 680. The court found that the plaintiff's religious exercise was not substantially burdened, because "[t]he extraction and storage of DNA information are entirely activities of the FBI, in which Kaemmerling plays no role and which occur after the BOP has taken his fluid or tissue sample (to which he does not object)."

Id. at 679. The D.C. Circuit thus concluded that "[l]ike the parents in *Bowen*," Kaemmerling was attempting "to require the government itself to conduct its affairs in conformance with his religion." *Id*. at 680.

The same principles govern here. As with Roy's completion of the welfare application or Kaemmerling's provision of a tissue sample (to which he did not object), Plaintiffs' act of notification results in downstream conduct they find religiously objectionable. But like Roy and Kaemmerling, whose conduct also indirectly "triggered" government action they found religiously objectionable, Plaintiffs cannot claim a substantial burden on the basis of this subsequent conduct. "Religious objectors do not suffer substantial burdens under RFRA where the only harm to them is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out. They have no RFRA right to be free from the unease, or even anguish, of knowing that third parties are legally privileged or obligated to act in ways their religion abhors." *Priests for Life*, 772 F.3d at 246 (citation omitted). The objectively insubstantial burden of filing the notification form or letter does not become a substantial burden because of the subsequent burdens imposed on third parties by the government.

"Just as the Government may not insist that [Plaintiffs] engage in any set form of religious observance, so [Plaintiffs] may not demand that the Government join in their chosen religious practices by refraining from" working with third parties to

provide their employees contraceptive coverage. *Bowen*, 476 U.S. at 699–700, 106 S. Ct. 2147.

While we do not doubt the sincerity or rationality of Plaintiffs' beliefs, their legal argument would have the effect, if accepted, of enabling religious objectors to impose the constraints of their beliefs on the rest of the Nation. The Supreme Court made clear in *Bowen* that religious objectors do not have this right, because burdens falling on third parties, and not the religious objector, are not actionable.

Furthermore, the fact that the government imposes these separate legal responsibilities on contractual counterparties of eligible organizations does not create a substantial burden on Plaintiffs' religious exercise. *Cf. United States v. Lee*, 455 U.S. 252, 261, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."). Plaintiffs' relationships with their employees and third-party administrators do not provide them an avenue to dictate these entities' independent interactions with the government, even if Plaintiffs find these actions objectionable. *See Priests for Life*, 772 F.3d at 256 ("RFRA does not entitle Plaintiffs to control their employees' relationships with other entities willing to provide health insurance coverage to which the employees are legally entitled.").[9]

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[9] In a related vein, Plaintiffs contended at oral argument that the government's offer of reimbursement in excess of costs to

As other circuits have recognized, Plaintiffs' argument "is analogous to a religious conscientious objector to a military draft claiming that the act of identifying himself as such on his Selective Service card constitutes a substantial burden because that identification would then 'trigger' the draft of a fellow selective service registrant in his place and thereby implicate the objector in facilitating war." *Id.* at 246; *see also Little Sisters of the Poor*, 794 F.3d at 1184 n. 33, 2015 WL 4232096, at *24 n. 33; *Univ. of Notre Dame*, 786 F.3d at 623 (Hamilton, *J.*, concurring). The government's subsequent actions in drafting a replacement soldier surely do not transform the conscientious objector's completion of the opt-out form into a substantial burden, even if the conscientious objector finds these acts deplorable as a matter of faith. So too here, no substantial burden exists simply because the government ultimately works with third-party administrators to ensure the provision of contraceptive coverage once Plaintiffs opt-out. Were it otherwise, Plaintiffs and the conscientious objector would enjoy a blanket religious veto over the government's interactions with others. "Although [a] person may have a religious objection to what the government, or another third party, does with something that the law requires to be provided

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church plan third-party administrators could eventually result in the disappearance of third-party administrators who might refuse, at the request of eligible organizations, to provide contraceptive coverage. Yet, the fact that a federal policy incentivizes third parties to operate in a manner Plaintiffs find religiously objectionable is not a cognizable burden under RFRA. Plaintiffs do not enjoy a religious objector veto over the government's interactions with their third-party administrators.

(whether it be a Social Security number, DNA, or a form that states that the person religiously objects to providing contraceptive coverage), RFRA does not necessarily permit that person to impose a restraint on another's action based on the claim that the action is religiously abhorrent." *Geneva Coll.*, 778 F.3d at 441.

Indeed, accepting Plaintiffs' argument would cast doubt on the government's ability to accommodate religious objectors in other spheres. The simple, non-burdensome act of requesting a religious exemption from a regulatory burden would nevertheless create a substantial burden on a religious objector so long as any resulting independent action by the government is also religiously objectionable. *See Univ. of Notre Dame*, 786 F.3d at 621 (Hamilton, *J.*, concurring) ("From conscientious objector status in the military draft to federal and state tax codes, from compulsory school attendance laws to school lunch menus, from zoning law to employment law and even fish and wildlife rules, our governments at every level have long made room for religious faith by allowing exceptions from generally applicable laws."); *see also Geneva Coll.*, 778 F.3d at 439 n. 14 (analogizing to exemptions for religious objector employees). "The possibilities are endless, but we doubt Congress, in enacting RFRA, intended for them to be." *E. Tex. Baptist Univ.*, 793 F.3d at 461–62, 2015 WL 3852811, at *7.

Plaintiffs may certainly object to this subsequent action by the government and third parties based on their sincere religious beliefs, and we reiterate that we do not doubt the sincerity or rationality of Plaintiffs' beliefs. But just because Plaintiffs feel

complicit in these third party actions does not mean that the regulations impose a "burden" on their religious practice, much less a burden that is "substantial" under RFRA. While a plaintiff's "religious views may not accept [the] distinction between individual and governmental conduct," the law does. *Bowen*, 476 U.S. at 701 n. 6, 106 S. Ct. 2147; *see also Lyng*, 485 U.S. at 451, 108 S. Ct. 1319 ("Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."). "Accepting the sincerity of Plaintiffs' beliefs ... does not relieve this Court of its responsibility to evaluate the substantiality of any burden on Plaintiffs' religious exercise, and to distinguish Plaintiffs' duties from obligations imposed, not on them, but on insurers and TPAs." *Priests for Life*, 772 F.3d at 247.

Thus, consistent with Bowen and related cases, we must assess whether the claimed burden falls on a plaintiff or a third party with no religious objection. Here, the only burden that actually falls on Plaintiffs is the objectively insubstantial requirement of completing the opt-out form or letter. When all the government requires of a religious objector is the de minimis requirement of notification for an exemption such that the burden may be shifted to another, there is no substantial burden, even if the religious objector sincerely finds the ultimate actions taken by the government and third parties offensive. Even though Plaintiffs believe their role in the causal chain makes them complicit in the provision of contraceptives, this

belief does not control the substantial burden inquiry. Just like the conscientious objector, whose decision to opt out indirectly facilitates the drafting of another, Plaintiffs are not substantially burdened by the ultimate actions of the government and third parties. If what Plaintiffs must do to exempt themselves from the contraceptive coverage mandate is not substantially burdensome, it makes no difference that Plaintiffs' act of claiming exemption plays a functional role in the government's achievement of the purposes to which Plaintiffs object, or that they believe themselves to be substantially burdened for that reason.

* * *

The burden that the accommodation places on Plaintiffs is merely one of notification, equivalent to the burden historically placed on draft registrants to indicate their conscientious objections to military service. Once Plaintiffs avail themselves of the simple, non-burdensome means of opting out, the regulations do not require them to play any role in the provision of contraceptive coverage or to suffer punishments for not doing so. To the contrary, the accommodation relieves them of providing contraceptive coverage, and instead enlists third-party administrators to provide such coverage. If a regulatory scheme that might otherwise violate an objecting individual's rights under RFRA allows the objector to exempt himself from compliance via a simple, non-burdensome act of notification, there is no substantial burden. Furthermore, subsequent regulation of non-objecting parties in a manner that an objecting party finds offensive does not transform the act of opting out into a cognizable substantial

burden. The rights conferred by the First Amendment and RFRA do not include a right to have the government or third parties behave in a manner that comports with an individual's religious beliefs.

CONCLUSION

For the foregoing reasons, we reject Plaintiffs' RFRA challenge to the contraceptive coverage mandate. The regulations at issue do not substantially burden Plaintiffs' religious exercise in violation of RFRA. Accordingly, the judgment of the district court is reversed in relevant part.

APPENDIX B

United States District Court,
E.D. New York.

The ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK, et al., Plaintiffs,

v.

Kathleen SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, et al., Defendants.

No. 12 Civ. 2542(BMC).

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Dec. 16, 2013.

* * *

MEMORANDUM DECISION AND ORDER

COGAN, District Judge.

The Patient Protection and Affordable Care Act (the "ACA"), Pub. L. No. 111–148, 124 Stat. 119 (2010), requires that group health insurance plans cover certain preventative medical services without cost-sharing, such as a copayment or a deductible. Pursuant to regulations subsequently issued, the preventative services that must be covered include contraception, sterilization, and related counseling (the "Coverage Mandate" or "Mandate"). Certain religious employers, primarily churches, are exempt from this requirement. Further, the Government has recently promulgated regulations that seek to

accommodate the religious objections of "eligible organizations," namely religious non-profits. Under this accommodation, "eligible organizations" do not have to pay for a health plan that covers contraceptive services; instead, an eligible organization must provide its issuer or third party administrator ("TPA") with a self-certification form stating its objection to the Mandate on religious grounds. The issuer or TPA is then required to provide contraceptive coverage without charging the eligible organization any fees or premiums, and without imposing any cost-sharing on the beneficiary.

Plaintiffs are six New York-area organizations affiliated with the Roman Catholic Church. Plaintiffs state that their Catholic beliefs prohibit them from providing, subsidizing, facilitating, or sponsoring the provision of contraception, sterilization, or abortion-inducing products and services. The Mandate, they argue, requires them to violate these core religious beliefs, regardless of the exemption for religious employers or the accommodation for eligible organizations. Plaintiffs bring claims under the Religious Freedom Restoration Act ("RFRA") and Administrative Procedures Act, as well as under the Establishment, Free Exercise, and Free Speech clauses of the First Amendment.

Plaintiffs have moved for summary judgment as to all of their claims, seeking a preliminary and permanent injunction against enforcement of the Mandate against them. Defendants have cross-moved for summary judgment. For the reasons set forth below, plaintiffs' motion for summary judgment on their RFRA claims is granted in part and denied

in part, and defendants' motion for summary judgment is granted in part and denied in part.

BACKGROUND

I. The Plaintiffs

The six plaintiffs are all entities affiliated with the Roman Catholic Church. In their complaint, they allege that the Coverage Mandate forces them to choose between violating the tenets of their religious faith or paying substantial penalties. In particular, if plaintiffs want to avoid the penalties for non-compliance with the Mandate, they must authorize a third party to engage in activity, namely the provision of contraceptives, in which they themselves are religiously forbidden from engaging.

A. *The Archdiocese of New York*

The Roman Catholic Archdiocese of New York (the "Archdiocese") is a non-profit organization that encompasses 370 parishes located in the New York area. It administers numerous charitable and educational programs, which, in line with Catholic teachings, are not aimed solely at Catholics, but are meant to benefit the broader community. The Archdiocese, its parishes, and its institutions employ nearly 10,000 people, almost 8,000 of whom are lay people. The Archdiocese does not know how many of its employees are Catholic.

The Archdiocese operates a self-insured health plan, underwriting its employees' medical costs. Its health plan and pharmaceutical coverage are administered by third parties. The plan year for the Archdiocese's plan begins on January 1. Consistent with Catholic teaching, the plan currently does not

cover abortifacients, sterilization, or contraception.[1] Including the Archdiocese's affiliated charitable and educational organizations, nearly 9,000 people, both Catholic and non-Catholic, are covered under the Archdiocese's health plan.

B. *Cardinal Spellman High School and Monsignor Farrell High Schoo*l

Cardinal Spellman High School ("Cardinal Spellman") and Monsignor Farrell High School ("Monsignor Farrell") are two Catholic high schools located in the Bronx and Staten Island, respectively. Monsignor Farrell has 74 employees, and Cardinal Spellman has over 100. These schools both employ and educate individuals of all faiths. Employees at both high schools are currently covered under the Archdiocese's health plan, which, as stated, does not currently provide contraceptive coverage.

C. *ArchCare*

Catholic Health Care System and its affiliates, the Continuing Care Community of the Archdiocese of New York (collectively, "ArchCare"), are non-profit organizations that provide faith-based health care to the poor and disadvantaged, including elderly and disabled individuals, consistent with Catholic values. ArchCare operates a self-insured health plan for its employees, underwriting the plan while contracting with a TPA for administration of the plan. The plan covers approximately 3,000 people and ArchCare does not know how many of those covered are

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[1] Although contraceptives generally are not covered under the Archdiocese's plan, the medication may be covered when provided for medically necessary, non-contraceptive purposes.

Catholic. Contraception, abortion, and sterilization are not covered.

D. *The Diocese of Rockville Centre*

The Roman Catholic Diocese of Rockville Centre, New York (the "Diocese") is a nonprofit organization that encompasses 134 parishes in Nassau and Suffolk counties. The Diocese is responsible for numerous charitable and educational programs for the benefit of Catholics and non-Catholics alike. Together with its hospitals, schools, parishes and other associated institutions, the Diocese employs nearly 20,000 people.

Employees of both the Diocese and its affiliated charitable and educational organizations receive health care coverage through the Diocese's health plan, which covers over 4,500 people. The Diocese operates a self-insured health plan, administered by a TPA, underwriting its employees' medical costs. The plan does not cover abortifacients, sterilization, or contraception.

E. *CHSLI*

Catholic Health Services of Long Island ("CHSLI") is a non-profit organization that oversees Catholic health care organizations within the Diocese, including six hospitals, three nursing homes, and a hospice service. Neither CHSLI nor its member institutions condition employment or receipt of medical services on being Catholic.

CHSLI operates a self-insured health plan for its employees and employees of its member institutions, underwriting the plan while contracting with third parties for administration of the plan. The plan covers approximately 25,000 people. Like the other

plaintiffs, consistent with Catholic teaching, CHSLI's plan does not cover abortifacients, sterilization, or contraception.

II. The Relevant Statutes and Regulations

The Coverage Mandate is the result of a complex history of Congressional legislation and agency rulemaking involving the Department of Labor ("DoL"), the Department of the Treasury ("DoT"), and the Department of Health and Human Services ("HHS") (collectively, the "Departments").

In March 2010, Congress enacted the ACA as well as the Health Care and Education Reconciliation Act. These acts established a number of requirements relating to "group health plans," a term which encompasses employer plans that provide health care coverage to employees, regardless of whether the plans are insured or self-insured. See 42 U.S.C. § 300gg–91(a)(1); Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726, 41,727 (July 19, 2010) ("Interim Final Rules"). As is relevant here, the ACA requires that group health plans provide coverage for a number of preventative medical services at no charge to the patient. § 300gg–13. Specially, the ACA provides that a group health plan must "at a minimum provide coverage for and shall not impose any cost sharing requirements for[,]" among other things, women's "preventative care and screenings ... as provided for in comprehensive guidelines supported

by the Health Resources and Services Administration[.]" § 300gg–13(a)(4).[2]

The ACA's preventative services coverage requirement does not apply, however, to group health plans that are "grandfathered." *See* 42 U.S.C. §18011(a)(2). A group health plan is grandfathered when at least one person was enrolled in the plan on March 23, 2010 and the plan has continually covered at least one individual since that date. *See* 26 C.F.R. § 54.9815–1251T(a)(1)(i)(DoT); 29 C.F.R. § 2590.715–1251(a)(1)(i)(DoL); 45 C.F.R. § 147.140(a)(1)(i) (HHS). A plan may lose its grandfathered status if, when compared to the terms of the plan as of March 23, 2010, it eliminates benefits, increases a percentage cost-sharing requirement, significantly increases a fixed-amount cost-sharing requirement, significantly decreases an employer's contribution rate, or imposes or lowers an annual limit on the dollar value of benefits. *See* 26 C.F.R. § 54.9815–1251T(g) (1)(DoT); 29 C.F.R. § 2590.715–1251(g)(1)(DoL); 45 C.F.R. §147.140(g)(1)(HHS). It is undisputed that none of plaintiffs' plans qualify as grandfathered due to changes made within the past two years.

The Departments began issuing regulations implementing the ACA in phases. On July 19, 2010, they announced that HHS was developing the HRSA guidelines and expected to issue them by August 1, 2011. *See* Interim Final Rules, 75 Fed. Reg. at 41,728. Because there were no existing HRSA guidelines concerning preventative care and screenings for women at the time of the Interim Final

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[2] The Health Resources and Services Administration ("HRSA") is an agency within HHS.

Rules, HHS commissioned the Institute of Medicine ("IOM"), a Congressionally-funded body, with "review[ing] what preventative services are necessary for women's health and well-being" and recommending comprehensive guidelines, as called for by the ACA. On July 19, 2011, IOM published a report recommending the inclusion of certain preventative medical services in HRSA's guidelines.

Among other things, IOM recommended that group health plans be required to cover "the full range of Food and Drug Administration ["FDA"]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." FDA-approved contraceptive methods encompass oral conceptive pills, diaphragms, intrauterine devices, and emergency contraceptives such as Plan B, which, according to plaintiffs, can cause abortions.

HRSA adopted IOM's recommendations on August 1, 2011. Two days later, the Interim Final Rules were amended to "provide HRSA additional discretion to exempt certain religious employers from the [HRSA] Guidelines where contraceptive services are concerned." 76 Fed. Reg. 46,623 (Aug. 3, 2011). *See also* 45 C.F.R. § 147.130(a)(1)(iv)(A). In order to qualify for the religious employer exemption under the Interim Final Rules, an organization was required to meet certain criteria.[3] HRSA exercised

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[3] These criteria were:

(1) The inculcation of religious values is the purpose of the organization.

(2) The organization primarily employs persons who share the religious tents of the organization.

its discretion under the amended Interim Final Rules and exempted the religious employers that satisfy these criteria from the requirement of covering contraceptive services. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725, 8,726 (Feb. 15, 2012).

The Departments received over 200,000 responses to their request for comments on the amended Interim Final Rules. Many of the comments were submitted by religiously-affiliated institutions and asserted that the religious employer exemption was too narrow and that the limited scope of the exemption raised religious liberty concerns. *Id.* at 8,727. On February 15, 2012, the Departments finalized the amended Interim Final Rules without making any changes to the criteria used to determine whether an organization qualified for the religious employer exemption. *Id.*

At the same time that they finalized the Interim Final Rules, however, the Departments announced a "temporary enforcement safe harbor" period during which they planned "to develop and propose changes to these final regulations that would meet two goals—providing contraceptive coverage without cost-sharing to individuals who want it and

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(3) The organization serves primarily persons who share the religious tenets of the organization.

(4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

45 C.F.R. § 147.130(a)(1)(iv)(B).

accommodating non-exempted, non-profit organizations' religious objections to covering contraceptive services [.]" *Id.* Consistent with their announced plan "to develop and propose changes" to the Interim Final Rules, on March 21, 2012, the Departments filed an advance notice of proposed rulemaking ("ANPRM") in the Federal Register concerning possible means of accommodating religious organizations' objections to the Coverage Mandate. *See* Certain Preventative Services under the Affordable Care Act, 77 Fed. Reg. 16,501 (Mar. 21, 2012). The stated purpose of the ANPRM 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." 78 Fed. Reg. 8459 (Feb. 6, 2013). Defendants received over 400,000 comments (many of them standardized form letters) in response to the proposals set forth in the ANPRM and, in July 2013, issued rules finalizing the Mandate. *See* 78 Fed. Reg. 39,870, 39,871 (July 2, 2013) (the "Final Rules").

The Final Rules purport to accommodate religious objections to the Mandate in two ways. First, the Final Rules revised the definition of "religious employers," who are entirely exempt from the Mandate. The Final Rules define "religious employer"

as a non-profit referred to in § 6033(a)(3)(A) (i) or (iii) of the Internal Revenue Code, which in turn refers to churches, their integrated auxiliaries, associations of churches, and the exclusively religious activities of religious orders. 78 Fed. Reg. at 39,874. The Archdiocese and Diocese (the "Diocesan plaintiffs" or "exempt plaintiffs") meet this definition and are thus exempt from the Mandate. The remaining plaintiffs (the "non-Diocesan plaintiffs" or "non-exempt plaintiffs") are not exempt. This includes the plaintiffs that participate in the Archdiocese's health plan, because non-exempt entities cannot avail themselves of the religious employer exemption unless they "independently meet the definition of religious employer." *Id.* at 39,886.

Second, the Final Rules provide for an accommodation for "eligible organizations" that do not meet the definition of "religious employer" (the "accommodation"). An "eligible organization" is one 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).

There is no dispute that all of the non-Diocesean plaintiffs in this action qualify for this accommodation. The Final Rules state that an eligible organization is not required to "contract, arrange, pay, or refer for contraceptive coverage" as to which it has religious objections. 78 Fed. Reg. at 39,874. Instead, the eligible organization must complete a self-certification form stating that it is an eligible organization, and provide a copy of that form to its issuer or, where an eligible organization self-insures, as do all plaintiffs here, to their TPA. The TPA is then required to provide or arrange for payments for contraceptive services, a requirement imposed through the Department of Labor's ERISA enforcement authority. *See Id.* at 39,879–39,880. 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." *Id.* at 39,879. The TPA is required to provide these services "without cost sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or its

plan." *Id.* at 39,879–80. The TPA may seek reimbursement for such payments through adjustments to its Federally–Facilitated Exchange ("FFE") user fees. *Id.* at 39,882.

III. Procedural History

In December 2012, this Court denied in large part defendants' motion to dismiss for lack of standing. *See Roman Catholic Archdiocese of New York v. Sebelius*, 907 F. Supp. 2d 310 (E.D.N.Y. 2012).[4] After discovery began, defendants requested a stay of all proceedings in light of their pending rulemaking proceedings described above, which would alter the requirements of the Mandate. The Court granted that request.

After the Final Rules were promulgated, the parties agreed to a complicated briefing schedule, which the Court approved. First, plaintiffs filed an Amended Complaint, at the same time moving for a preliminary injunction based on their RFRA claims. After that, the Government filed its opposition to a preliminary injunction and simultaneously moved for summary judgment on the administrative record[5] as

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[4] Specifically, defendants' motion was granted only as to plaintiffs the Diocese of Rockville Center and Catholic Charities of the Diocese of Rockville Center ("Catholic Charities"), because those two plaintiffs had failed to allege adequately that their health plans failed to qualify as grandfathered. *See Roman Catholic Archdiocese of New York*, 907 F. Supp. 2d at 323–24. The Amended Complaint no longer lists Catholic Charities as a plaintiff, and the Government no longer disputes that the Diocese's plan does not qualify as grandfathered.

[5] The parties dispute whether the Court may consider any materials beyond the administrative record in deciding these motions. Because plaintiffs bring constitutional challenges to

to all of plaintiffs' claims. Plaintiffs subsequently cross-moved for summary judgment; the Government then put in papers in opposition to that motion, and plaintiffs then submitted their Reply. The Government then requested and received permission to file a sur-reply addressing decisions by the Seventh and D.C. Circuits issued after defendants filed their last Opposition papers. In addition to the parties' papers on this motion, the Court has received and considered a brief filed by the American Civil Liberties Union ("ACLU") as *amicus curiae*. No party requested an evidentiary hearing. After over 200 pages of briefing, these motions are now ready for decision.

DISCUSSION

I. Article III Standing

Late in the briefing of these motions—specifically, in their opposition to plaintiffs' motion for summary judgment filed November 1, 2013—the Government "realized" for the first time that all of the plaintiffs' health plans are "church plans" as defined under Section 3(33) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1002(33). As mentioned, the challenged regulations enforce the contraceptive coverage requirements against the TPAs of eligible organizations with self-insured group

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the Mandate, the Court has considered all of the materials submitted by the parties. *See Nat'l Med. Enters., Inc. v. Shalala*, 826 F. Supp. 558, 565 n. 11 (D.D.C. 1993) ("In reviewing a constitutional claim to an agency's decision, a court may make an independent assessment of the facts and the law and may consider additional affidavits which were not before the agency upon administrative review.") (quotation omitted).

plans through the Department of Labor's ERISA enforcement authority. *See* 78 Fed. Reg. at 39,879–39,880. Church plans, however, are specifically excluded from the ambit of ERISA. *See* 29 U.S.C. § 1003(b)(2). The Government states that it thus has no authority to require the plaintiffs' TPAs to provide contraceptive coverage at this time. Therefore, the Government argues, all of the plaintiffs lack standing because the regulations will not actually force plaintiffs' TPAs to provide coverage for the objectionable services.

The Government's belated "realization" that the challenged regulations may not actually result in the provision of contraceptive coverage to plaintiffs' employees is difficult to fathom. Not only did the Archdiocese and Diocese state, in declarations filed in August with their initial moving papers, that they (and therefore the plaintiff high schools also covered by the Archdiocese's health plan) participate in church plans, but in both the Interim Final Rules and ANPRM, defendants noted proposals to define both "religious employer" and "eligible organization" as organizations that have health plans qualifying as church plans under ERISA. *See* 77 Fed. Reg. at 8,727 ("[C]ommenters referenced alternative standards, such as tying the [religious employer] exemption to the definition of 'church plan'"); 77 Fed. Reg. at 16,504 ("[T]he intended regulations could base their definition [of an eligible organization] on another Federal law, such as section 414(e) the Code and section 3(33) of ERISA, which set forth definitions for purposes of 'church plans.' "). It is unclear how citizens like plaintiffs and their TPAs are supposed to know what the law requires of them if the

Government itself is unsure. After almost 18 months of litigation, defendants now effectively concede that the regulatory tale told by the Government was a non-sequitur.

Regardless, plaintiffs have alleged an injury-in-fact sufficient for Article III standing. It is well established that a plaintiff "may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154, 90 S. Ct. 827, 830, 25 L. Ed. 2d 184 (1970). The Government misunderstands the nature of plaintiffs' alleged injury. Plaintiffs do not object simply to the provision of contraceptive coverage to their employees. If that were plaintiffs' claim, then perhaps the uncertainty over whether their TPAs would actually provide such coverage would run afoul of the Article III requirement that "threatened injury must be *certainly impending* to constitute injury in fact, and that [a]llegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l ——USA*, U.S. ——, 133 S. Ct. 1138, 1147, 185 L. Ed. 2d 264 (2013) (quotation omitted; emphasis and alteration in original).

But plaintiffs' alleged injury is that the Mandate renders them complicit in a scheme aimed at providing coverage to which they have a religious objection. This alleged spiritual complicity is independent of whether the scheme actually succeeds at providing contraceptive coverage. It is undisputed that all of the non-exempt plaintiffs will still have to either comply with the Mandate and provide the objectionable coverage or self-certify that they qualify

for the accommodation. *See* 78 Fed. Reg. at 39,893, 39,894–95. Plaintiffs allege that their religion forbids them from completing this self-certification, because to them, authorizing others to provide services that plaintiffs themselves cannot is tantamount to an endorsement or facilitation of such services. Therefore, regardless of the effect on plaintiffs' TPAs, the regulations still require plaintiffs to take actions they believe are contrary to their religion. As for the plaintiffs that qualify for the religious employer exemption, plaintiffs allege that the Diocese and Archdiocese will have to choose between complying with the Mandate by providing the objectionable coverage or ejecting their non-exempt affiliates from their health plans. Leaving aside for now the merits of these claims, as a court must, *see Ross v. Bank of America, N.A.*, 524 F.3d 217, 222 (2d Cir. 2008), plaintiffs have adequately alleged an injury-in-fact.

II. RFRA

A. *Summary Judgment Standard*

Summary judgment is warranted where there are no genuine disputes of material fact, such that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). No genuine factual issue exists when the moving party demonstrates, on the basis of the pleadings and admissible evidence, and after drawing all inferences and resolving all ambiguities in favor of the non-movant, that no rational jury could find in the non-movant's favor. *See Chertkova v. Conn. Gen. Life Ins. Co.*, 92 F.3d 81, 86 (2d Cir. 1996). A party may not defeat a motion for summary judgment solely through "unsupported assertions" or conjecture. *Goenaga v. March of Dimes*

Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995). "Conclusory allegations or denials are ordinarily not sufficient to defeat a motion for summary judgment when the moving party has set out a documentary case." *Scott v. Coughlin*, 344 F.3d 282, 287 (2d Cir. 2003). Rather, the nonmoving party must offer "concrete evidence from which a reasonable juror could return a verdict in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986).

B. *RFRA Background*

Congress adopted the RFRA in response to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). There, the Supreme Court upheld an Oregon statute that denied unemployment benefits to drug users over a challenge by Native Americans who used peyote in religious ceremonies. The Court held that the First Amendment's Free Exercise Clause does not prohibit burdens on religious practices if they are imposed by neutral laws of general applicability, and declined to apply the "compelling government interest" test to claims brought solely under the Free Exercise Clause. "In effect, *Smith* create[d] a 'safe harbor'—if the law is 'a valid and neutral law of general applicability,' then it must simply be rationally related to a legitimate government end." *United States v. Hardman*, 297 F.3d 1116, 1126 (10th Cir. 2002).

Congress enacted the RFRA three years later. Finding that *Smith* "virtually eliminated the requirement that the government justify burdens on

religious exercise imposed by laws neutral toward religion," and that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests," 42 U.S.C. § 2000bb(a), Congress declared that the purpose of the RFRA was to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b).

In *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), the Supreme Court held the RFRA unconstitutional as applied to state and local governments because it exceeded Congress's authority under § 5 of the Fourteenth Amendment. The Court did not, however, address the RFRA's constitutionality as applied to federal law. After *Boerne*, "[e]very appellate court that has squarely addressed the question has held that the RFRA governs the activities of federal officers and agencies." *Hankins v. Lyght*, 441 F.3d 96, 105–06 (2d Cir. 2006) (collecting cases).

Under the RFRA, the federal Government may 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)." 42 U.S.C. § 2000bb– 1(a). Subsection (b) of § 2000bb–1 qualifies the ban on substantially burdening the free exercise of religion, providing that the "[g]overnment 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." 42 U.S.C. § 2000bb–1(b). In 2000, Congress expanded the definition of "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb–2(4), 2000cc–5(7)(A). The RFRA applies retrospectively and prospectively to "all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after" its effective date. 42 U.S.C. § 2000bb–3(a). The statute does not apply to a subsequently enacted law if it "explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb–3(b). The ACA does not exclude application of the RFRA.

This case is not the first challenge to the Mandate on religious grounds. Secular, for-profit corporations have brought a number of suits alleging that the Mandate violated the RFRA and the Free Exercise clause. The Seventh, Tenth, and D.C. Circuit Courts of Appeal have granted preliminary injunctions to some of these plaintiffs, holding that they had demonstrated a strong likelihood of success on their claim that the Mandate violates the RFRA. *See Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013); *Gilardi v. U.S. Dep't of Health and Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), *cert. granted*, —— U.S. ——, 134 S. Ct. 678, 187 L. Ed. 2d 544 (2013). The Third and Sixth Circuits have reached the opposite conclusion, reasoning that secular, for-profit corporations cannot engage in

"religious exercise." *See Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013); *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Servs.*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, —— U.S. ——, 134 S. Ct. 678, 187 L. Ed. 2d 544 (2013). However, none of the plaintiffs in these cases were eligible for the accommodation, and thus none of these cases bear directly on the issue at hand. To this Court's knowledge, only one district court has ruled on whether the Mandate violates the RFRA as applied to religious non-profits; that court entered a preliminary injunction in two related actions, enjoining enforcement of the Mandate against non-profit Catholic entities similarly situated to the plaintiffs here. *See Zubik v. Sebelius*, 983 F. Supp. 2d 576, Nos. 13–cv–1459, 13–cv–0303, 2013 WL 6118696 (W.D.Pa. Nov. 21, 2013).

C. *Substantial Burden*

1. Standard

In order to prevail on their RFRA claim, plaintiffs must first demonstrate that the Mandate has placed a substantial burden on their sincerely held religious beliefs. Plaintiffs state that their religious beliefs prohibit them from "facilitating access to abortion-inducing products, contraception, sterilization, and related counseling." [6] The

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[6] For example, the "Ethical and Religious Directives for Catholic Health Care Services" published by the United States Conference of Catholic Bishops states that "Catholic health institutions may not promote or condone contraceptive practices." This concept of responsibility for the actions of others, familiar in many religious traditions besides Catholicism, is also present in our secular law. Criminal defendants may be convicted for aiding and abetting the crimes of others, *see* 18

Government does not challenge the sincerity of this belief.

Rather, the core of the parties' dispute is how a court should determine whether a law imposes a "substantial burden" on religious exercise under the RFRA. It is undisputed—and indeed indisputable—that the substantial burden inquiry does not permit a court to determine the centrality of a particular religious practice to an adherent's faith. The RFRA states that explicitly, *see* 42 U.S.C. §§ 2000bb–2(4), 2000cc–5(7) (A), and the Supreme Court's Free Exercise cases are equally clear. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717, 101 S. Ct. 1425, 1431, 67 L. Ed. 2d 624 (1981) ("Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); *see also United States v. Ballard*, 322 U.S. 78, 86, 64 S. Ct. 882, 886, 88 L. Ed. 1148 (1944) ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others.").

Drawing on this principle and the recent decisions of the Seventh and Tenth Circuits, plaintiffs contend that the Court's "only task is to determine whether the claimant's belief is sincere, and if so, whether the

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U.S.C. § 2, and attorneys may be disciplined for violating their ethical duties through third parties. *See* Model Rules of Professional Conduct Rule 5.3(c) (2013).

government has applied substantial pressure on the claimant to violate that belief." *Hobby Lobby*, 723 F.3d at 1137; *see also Korte*, 735 F.3d at 683. The Government contends that, in addition to analyzing the magnitude of the pressure exerted on a plaintiff, a court must independently analyze the character and nature of the acts required by the challenged law, an "objective" inquiry for which "the Constitution, rather than an individual's religion, must supply the frame of reference." *Bowen v. Roy*, 476 U.S. 693, 701 n. 6, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986). According to the Government, under plaintiffs' formulation, "the standard expressed by Congress under the RFRA would convert to an 'any burden' standard." *Conestoga Wood Specialities Corp. v. Sebelius*, 917 F. Supp. 2d 394, 413–14 (E.D. Pa. 2013).

The RFRA does not define the term "substantial burden." The legislative history surrounding the 2000 passage of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and amendment of the RFRA indicates that this was an intentional omission, reflecting Congress's intent to incorporate the Supreme Court's jurisprudence in defining a "substantial burden."[7] The Second Circuit,

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[7] Specifically, Senators Hatch and Kennedy, principal sponsors of the RLUIPA, issued a Joint Statement that discussed the definition of "substantial burden":

> [t]he Act does not include a definition of the term "substantial burden" because it is not the intent of this Act to create a new standard for the definition of "substantial burden" on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence. Nothing in the Act, including the requirement in Section 5(g) that its terms

meanwhile, has stated that "a substantial burden exists where the state 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.' " *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (quoting *Thomas*, 450 U.S. at 718, 101 S. Ct. 1425). In *Jolly*, a Rastafarian inmate claimed that a tuberculosis screening test violated his religion's prohibition on taking artificial substances into his body. The Circuit held that the choice forced on the plaintiff— endure the test in violation of his religion, or be confined in a medical keeplock—was sufficient to show a substantial burden. Given that *Jolly* involved a government-enforced choice between a religiously forbidden bodily violation and indefinite confinement to a medical keeplock, that case does not directly answer the question of whether "substantial burden" may be treated as equivalent to "substantial pressure" under the RFRA. As noted, the Seventh and Tenth Circuits have explicitly applied the "substantial pressure" test advocated by plaintiffs here. *See Korte*, 735 F.3d at 683; *Hobby Lobby*, 723 F.3d at 1137. This Court holds that, regardless of whether this "substantial pressure" test should apply in all RFRA cases, it applies to the instant case.

Courts have identified three broad ways in which religious exercise may be substantially burdened. Government action may: (1) compel the plaintiff to

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be broadly construed, is intended to change that principle. The term "substantial burden" as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise.

146 Cong. Rec. S7774, 7776 (July 27, 2000).

do something that is inconsistent with his religious beliefs; (2) forbid the plaintiff from doing something that his religion motivates him to do; or (3) not directly compel the plaintiff to do something forbidden by his religious beliefs or to refrain from doing something motivated by those beliefs, but instead put substantial pressure on the plaintiff to do so. *See Hobby Lobby*, 723 F.3d at 1138 (citing *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010)). This case could be placed into the third category, as the Tenth Circuit did, if viewed as applying indirect pressure to force plaintiffs into a "Hobson's choice" between violating their religious beliefs and paying substantial fines. *See Hobby Lobby*, 723 F.3d at 1141. However, it seems that the first category is a better fit—the Mandate directly compels plaintiffs, through threat of onerous penalties, to undertake actions that their religion forbids. *See id.* at 1151–52 (Hartz, C.J., concurring); *Korte*, 735 F.3d at 707 (Rovner, C.J., dissenting).

Rather than whether the pressure is indirect or direct, it seems that the more important distinction for the case at bar is between government action that pressures an individual to *act inconsistently* with his beliefs, and government action that discourages a plaintiff from *acting consistently* with those beliefs. *See Sherbert*, 374 U.S. at 402–03, 83 S. Ct. 1790 (noting that although the government may not "compel affirmation of a repugnant belief," the Court "has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs"); *Braunfeld v. Brown*, 366 U.S. 599, 603, 81 S. Ct. 1144, 1146, 6 L. Ed. 2d 563 (1961) ("The freedom to hold religious

beliefs and opinions is absolute.... However, the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions."). Cases where the Supreme Court has declined to apply strict scrutiny have generally involved laws that make a religious activity more difficult, without pressuring the individual to actively violate their religious beliefs. *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449–50, 108 S. Ct. 1319, 1325–26, 99 L. Ed. 2d 534 (1988) (noting that although "the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," the plaintiffs would not "be coerced by the Government's action into violating their religious beliefs; nor would ... governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens"); *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303–04, 105 S. Ct. 1953, 1962–63, 85 L. Ed. 2d 278 (1985) (rejecting Free Exercise challenge to Fair Labor Standards Act, where law did not require payment of cash wages in violation of plaintiffs' religious beliefs). Where the government does not compel a plaintiff to act contrary to his stated beliefs, a court might be able to determine that a burden on religious practice is insubstantial—for example, if the challenged law only makes engaging in that religious practice somewhat more expensive. *See Hernandez v. C.I.R.*, 490 U.S. 680, 699, 109 S. Ct. 2136, 2149, 104 L. Ed. 2d 766 (1989); *Braunfeld*, 366 U.S. at 605–06,

81 S. Ct. 1144.[8] But [*sic*] is difficult to comprehend any situation where a court could rule that a plaintiff facing government compulsion to engage in affirmative acts forbidden by his religion has not suffered a substantial burden, without implicitly ruling that the belief he has been forced to violate is just not that important.

Take, for example, religious objections to the payment of taxes. Where Amish plaintiffs asserted that the act of paying social security taxes was forbidden by their religion, the Supreme Court's burden analysis was succinct: "Because the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights." *See United States v. Lee*, 455 U.S. 252, 257, 102 S. Ct. 1051, 1055, 71 L. Ed. 2d 127 (1982). However, where a plaintiff does not "allege[ ] that the mere act of paying the tax, by itself, violates its sincere religious beliefs," but that "imposition of a generally applicable tax merely decreases the amount of money [plaintiff] has to spend on its religious activities, any such burden is not constitutionally significant." *Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378, 391–92, 110

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[8] *See also Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (noting that RFRA decisions found that an "individual's exercise of religion is 'substantially burdened' if a regulation completely prevents the individual from engaging in religiously mandated activity, or if the regulation requires participation in an activity prohibited by religion" but not where "religion did not require particular means of expressing religious view[s] and alternative means of religious expression were available").

S. Ct. 688, 696–97, 107 L. Ed. 2d 796 (1990); *see also Hernandez*, 490 U.S. at 694–700, 109 S. Ct. 2136.

This distinction between laws pressuring action and those pressuring forbearance is far from precise, and may in some circumstances verge on the metaphysical.[9] Nor does the Court mean to suggest that only laws that compel action may violate the RFRA. Nonetheless, this distinction is helpful in reconciling the Supreme Court's somewhat disparate Free Exercise cases, and is in accord with the Founders' embrace of "the philosophical insight that government coercion of moral agency is odious." *Gilardi*, 733 F.3d at 1217. It also determines the standard to be applied here. Where government action coerces a religious adherent to undertake affirmative acts contrary to his religious beliefs, the "substantial burden" inquiry under RFRA should focus primarily on the "intensity of the coercion applied by the government to act." *Korte*, 735 F.3d at 683; *Hobby Lobby*, 723 F.3d at 1137. Whether this analytical approach should apply where the government pressures a plaintiff to refrain from

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[9] For example, *Sherbert* and *Thomas* are perhaps best read as holding that substantial, although indirect, government pressure to act in violation of religious conscience—whether by working on tanks in *Thomas* or working on Saturdays in *Sherbert*—establishes a substantial burden. *See Thomas*, 450 U.S. at 717–18, 101 S. Ct. 1425; *Sherbert*, 374 U.S. at 404, 83 S. Ct. 1790. But *Sherbert* could also be read as a case involving substantial government pressure on the plaintiff to forbear from her Saturday worship. *See Sherbert*, 374 U.S. at 404, 83 S. Ct. 1790 ("Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.").

acting in accordance with his religion is not before the Court in this case.

2. Application

Plaintiffs argue that the Mandate requires them to act in two specific ways. First, in order to qualify as an "eligible organization," plaintiffs must complete a self-certification form stating their religious objection, and provide that form to their TPA. Plaintiffs argue that completing this form authorizes the TPA to provide contraceptive coverage to plaintiffs' employees, thereby making plaintiffs complicit in the scheme by which those employees receive contraception. Second, plaintiffs state that although they previously sought to identify and contract with TPAs that would not provide contraceptive coverage to their employees, the Mandate would require them to identify and contract with TPAs that would do so. Both actions violate plaintiffs' religious beliefs, which preclude them from "facilitating access to abortion-inducing products, contraception, sterilization, and related counseling."

In response, the Government argues that any burden placed on plaintiffs' beliefs by the Mandate is too "*de minimis*" or "attenuated" to be substantial under the RFRA. The Government stresses that the Mandate does not require plaintiffs to "contract, arrange, pay, or refer for [contraceptive] coverage." Completing the self-certification form is a purely administrative task that would take a matter of minutes, according to the Government, and is tantamount to stating a religious objection to contraceptive coverage, a statement that plaintiffs already make to their TPAs in order to ensure their

plans do not cover contraception. As for identifying and contracting with a TPA, the Government argues that this activity is not attributable to the challenged regulations. Plaintiffs are self-insured, and thus already have TPAs; they will not be forced to find new ones, nor modify their existing contracts with their current TPAs. According to the Government, the regulations therefore do not require plaintiffs to do anything at all with regard to their TPAs.

Plaintiffs' suggestion that they will be forced to identify and contract with TPAs who will provide contraceptive coverage is indeed somewhat speculative.[10] But ultimately, this argument depends on whether the self-certification requirement itself passes muster under the RFRA. If plaintiffs cannot be compelled to complete the self-certification, they necessarily will not be required to contract with any TPA who will provide contraceptive coverage. If they can be compelled to self-certify, it seems unlikely that placing new legal obligations on the third-parties with whom plaintiffs contract could be a substantial burden on *plaintiffs'* religion. Because the Court concludes below that the self-certification requirement itself places a substantial burden on

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[10] For example, plaintiffs have given no indication that their current TPAs will refuse to provide contraceptive coverage upon receipt of the self certification form, although the regulations do give them that option. *See* 78 Fed. Reg. at 39,879 ("Upon receipt of the copy of the self certification, the third party administrator may decide not to enter into, or remain in, a contractual relationship with the eligible organization."). Indeed, in opposing defendants' standing arguments, supra, plaintiffs take the logical position that it is highly unlikely that their TPAs would refuse to comply with the Mandate.

plaintiffs' religion, the Court need not and does not reach this issue.

As for the self-certification requirement, the Court rejects the Government's position that plaintiffs may be compelled to perform affirmative acts precluded by their religion if a court deems those acts merely "*de minimis*." This argument—which essentially reduces to the claim that completing the self-certification places no burden on plaintiffs' religion because "it's just a form"—finds no support in the case law. As discussed, where a law places substantial pressure on a plaintiff to perform affirmative acts contrary to his religion, the Supreme Court has found a substantial burden without analyzing whether those acts are *de minimis*. *See Lee*, 455 U.S. 252, 102 S. Ct. 1051 (Payment of social security taxes); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (Compulsory public school attendance). Instead, in each case the Supreme Court held that the plaintiffs had demonstrated a burden on religion where a law compels them "to perform acts undeniably at odds with fundamental tenets of their religious beliefs," and then proceeded to analyze whether the Government had adequately justified that burden. *Yoder*, 406 U.S. at 218, 92 S. Ct. 1526.

Again, the Government does not contest that completing the self-certification violates plaintiffs' religious beliefs. But beyond its repeated insistence that this is an "objective" inquiry, the Government provides no framework for how a court could determine whether an act that concededly violates a plaintiff's religious beliefs is actually only "*de minimis*." Inquiring into the relative importance of a particular act to a particular plaintiff would

necessarily place the court in the unacceptable "business of evaluating the relative merits of differing religious claims." *Lee*, 455 U.S. at 263 n. 2, 102 S. Ct. 1051 (Stevens, J. concurring). There is no way that a court can, or should, determine that a coerced violation of conscience is of insufficient quantum to merit constitutional protection.

"Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals because they hold religious views abhorrent to the authorities." *Sherbert*, 374 U.S. at 402, 83 S. Ct. 1790 (citation omitted). Requiring, for example, a Jehovah's Witness to salute the flag may seem like a *de minimis* act to an "objective observer," but to a believer that action may be very significant indeed. *Cf. West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (striking down such a law on free speech grounds). The same could be said of requiring adherents to swear to, rather than affirm the veracity of their testimony, but those with religious objections have been largely exempt from doing so since before the Bill of Rights. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV.. 1409, 1466–73 (1990) ("By 1789, virtually all of the states had enacted oath exemptions.").

The Government's "it's just a form" argument suffers from the same infirmity. The non-exempt plaintiffs are required to complete and submit the self-certification, which authorizes a third-party to provide the contraceptive coverage to which they object. They consider this to be an endorsement of such coverage; to them, the self-certification

"compel[s] affirmation of a repugnant belief." *Sherbert*, 374 U.S. at 402, 83 S. Ct. 1790. It is not for this Court to say otherwise.

The Government's argument that any burden placed on plaintiffs is too "attenuated" to be substantial is similarly flawed. Defendants argue that plaintiffs' self-certification would only result in the use of contraception after a series of independent decisions by plaintiffs' employees. Although factually accurate, this argument rests on a misunderstanding (or mischaracterization) of plaintiffs' religious objection. Plaintiffs' religious objection is not only to the use of contraceptives, but also to being required to actively participate in a scheme to provide such services. The Government feels that the accommodation sufficiently insulates plaintiffs from the objectionable services, but plaintiffs disagree. Again, it is not the Court's role to say that plaintiffs are wrong about their religious beliefs. *See Thomas*, 450 U.S. at 715, 101 S. Ct. 1425 ("Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs."); *Hobby Lobby*, 723 F.3d at 1142 ("[T]he 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."); *Korte*, 735 F.3d at 685 (rejecting similar "attenuation" argument, because "[n]o civil authority can decide" the question of whether "providing this coverage impermissibly assist[s] the commission of a wrongful act in violation of the moral doctrines of the Catholic Church").

The Government's contention that the self-certification simply requires plaintiffs to inform their TPAs of their religious objection to contraceptive coverage, just as they would without the Mandate, is unpersuasive for similar reasons. Even if this were true, the self-certification would still transform a voluntary act that plaintiffs believe to be consistent with their religious beliefs into a compelled act that they believe forbidden. Clearly, plaintiffs view the latter as having vastly different religious significance than the former.[11] The Court cannot say that "the line [plaintiffs] drew was an unreasonable one." *Thomas*, 450 U.S. at 715, 101 S. Ct. 1425.

Of course, as plaintiffs correctly concede, the Mandate could not place a substantial burden on their religious beliefs if it involved "no action or forbearance" on their part. *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) ("[R]eligious exercise necessarily involves an action or practice."). But that is not the case here, and the Government's reliance on *Kaemmerling* is therefore misplaced. In *Kaemmerling*, the plaintiff objected only to the Government's collection, storage and analysis of his DNA; he did not object to the collection of any particular DNA carrier from his body, such as blood,

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[11] The similarly-situated Catholic plaintiffs in *Zubik* described the distinction "by analogy to a neighbor who asks to borrow a knife to cut something on the barbecue grill, and the request is easily granted. The next day, the same neighbor requests a knife to kill someone, and the request is refused. It is the reason the neighbor requests the knife which makes it impossible for the lender to provide it on the second day." *Zubik*, 983 F. Supp. 2d at 606–07, 2013 WL 6118696 at *25.

saliva, skin or hair. *Id.* at 678. Noting that "[t]he extraction and storage of DNA information are entirely activities of the FBI, in which Kaemmerling plays no role and which occur after the BOP has taken his fluid or tissue sample (to which he does not object)", the court held that the plaintiff had failed to allege a substantial burden because he identified "no religious observance that the DNA Act impedes, or acts in violation of his religious beliefs that it pressures him to perform." *Id.* at 678–79. Just as Kaemmerling's objection to the activities of third parties in which he played "no role" failed to allege a substantial burden under the RFRA, plaintiffs could not object if the Government simply provided contraceptive coverage to plaintiffs' employees, or worked with a third party to do so without requiring plaintiffs to do anything. What the Government cannot do—absent a compelling interest and narrow tailoring—is compel plaintiffs to act in violation of their religious beliefs.

The Diocesan plaintiffs, however, are entirely exempt from the Mandate as religious employers. The parties have made little effort to distinguish the claims of the Diocesan plaintiffs from those of the non-exempt plaintiffs. The Government merely states that the Mandate does not require the Diocesan plaintiffs to do anything; plaintiffs argue, with little elaboration, that the Diocese and Archdiocese will be forced to either comply with the Mandate or "expel" non-exempt plaintiffs like Cardinal Spellman from their health plans. Plaintiffs' argument suffers from two major flaws. First, it is not at all clear why the Diocesan plaintiffs would have to "expel" their non-exempt affiliates

from their health plans. The regulations treat eligibility for either the religious employer exemption or the accommodation on an "employer-by-employer" basis, and specifically contemplate that some group health plans would cover both religious employers and eligible organizations. *See* 78 Fed. Reg. at 39,886. If the Diocesan plaintiffs do nothing at all, their health plan remains unchanged and their employees will not receive contraceptive coverage. That the *non-exempt* plaintiffs must either provide coverage or complete the self-certification cannot be a burden on the *exempt* plaintiffs' religion. This is particularly true because, based on the remainder of this Court's opinion, those non-exempt affiliates will not even be faced with that choice.

Second, even if the law did pressure the Diocesan plaintiffs to "expel" their affiliates, plaintiffs do not state that the Diocesan plaintiffs' religious beliefs require them to have all their affiliate organizations on a single health plan, such that "expelling" the non-exempt affiliates would be an act forbidden by their religion. Rather, their claim is that expelling the non-exempt organizations could force those affiliates to provide coverage or self-certify, which in turn could mean that the Diocesan plaintiffs' prior act of expulsion facilitated the provision of contraception. This religious objection—which is not to the act itself, but instead is entirely dependent on the conduct of third parties occurring after that act—is quite similar to the claim rejected in *Kaemmerling*, 553 F.3d at 678. The Diocesan plaintiffs have therefore failed to demonstrate that the Mandate imposes a substantial burden on their religious

exercise, and defendants are entitled to summary judgment on the Diocesan plaintiffs' RFRA claims.

The non-Diocesan plaintiffs have demonstrated that the Mandate, despite the accommodation, compels them to perform acts that are contrary to their religion. And there can be no doubt that the coercive pressure here is substantial. If plaintiffs do not comply with the Mandate, they are subject to fines of $100 per day per affected beneficiary. *See* 26 U.S.C. § 4980D(b)(1). If they seek to cease providing health insurance altogether, they face an annual fine of $2,000 per full-time employee. *See* 26 U.S.C. § 4980H(a), (c)(1). The only other option available to plaintiffs is to violate their religious beliefs, by either providing the objectionable coverage or completing the objectionable self-authorization. Although the Government disagrees with some of plaintiffs' calculations as to the amount of fines to which they would potentially be exposed, the Government does not actually argue that the coercive effect of the Mandate is insubstantial. The non-Diocesan plaintiffs have demonstrated a substantial burden under the RFRA, requiring the Government to demonstrate that the Mandate is narrowly tailored to serve a compelling governmental interest.

D. *Compelling Interest Test*

Because plaintiffs have demonstrated a substantial burden on their religious beliefs, the Government bears the onus of demonstrating that the Mandate "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb–1(b). The "RFRA requires the Government to demonstrate that the compelling

interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31, 126 S. Ct. 1211, 1220–21, 163 L. Ed. 2d 1017 (2006) (quoting 42 U.S.C. § 2000bb–1(b)). "In other words, under RFRA's version of strict scrutiny, the Government must establish a compelling and specific justification for burdening *these* claimants." *Korte*, 735 F.3d at 685 (emphasis in original). It bears noting that, confronted with markedly similar arguments, every Circuit court to reach the issue in ruling on RFRA challenges brought by secular, for-profit corporations held that the Mandate fails the RFRA's test of strict scrutiny. *See Id.*; *Gilardi*, 733 F.3d at 1219–23; *Hobby Lobby*, 723 F.3d at 1143–44. For much the same reasons, the Government's arguments fail here as well.

The Government identifies two interests served by the Mandate: "the promotion of public health, and ensuring that women have equal access to health-care services." These interests are certainly important.[12] But the Supreme Court instructs courts

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[12] To some extent, the arguments advanced by defendants and *amicus* can be read as suggesting that the Mandate is an all-or-nothing proposition—either it is upheld, or women will be denied their right to contraception. Although the record is disputed as to the degree to which the Mandate would increase access to and use of contraception, it is clear that the governmental interest at stake is actually the difference between providing such access through the Mandate rather than through the current situation of public and private providers.

interpreting the RFRA 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." *O Centro*, 546 U.S. at 431, 126 S. Ct. 1211.[13]

The Government argues that granting plaintiffs the exemption they seek would "undermine defendants' ability to enforce the regulations in a rational manner." If "any organization with a religious objection were able to claim an exemption," defendants could not "administer the regulations in a manner that would achieve Congress's goals of improving the health of women and newborn children and equalizing the coverage of preventive services for women," because women who work for employers like plaintiffs would face negative health outcomes simply by virtue of their employment. In simpler terms, the

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[13] Plaintiffs appear to take this language one step further, arguing that a "broadly formulated" interest simply "cannot be characterized as compelling." *O Centro* did not set down such a broad rule, which would seem to call into question interests found compelling elsewhere in the Supreme Court's Free Exercise jurisprudence. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 604, 103 S. Ct. 2017, 2035, 76 L. Ed. 2d 157 (1983) (finding "a fundamental, overriding interest in eradicating racial discrimination in education"). Rather, the Supreme Court in *O Centro* held that "invocation of such general interests, *standing alone*, is not enough" under the RFRA. 546 U.S. at 438, 126 S. Ct. 1211 (emphasis added). Where the asserted interest is broadly formulated, a court must scrutinize closely the asserted harm an exemption would bring about. In other words, broadly formulated governmental interests invite closer scrutiny, not outright rejection.

Government argues that many fewer women will be covered.

The Supreme Court has made clear that a general interest in uniformity is not enough to show a compelling interest; rather, the Government "can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program." *O Centro*, 546 U.S. at 435–36, 126 S. Ct. 1211 (collecting cases). For example, the Court has found a sufficiently compelling interest where the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Lee*, 455 U.S. at 258, 102 S. Ct. 1051; *see also Hernandez*, 490 U.S. at 700, 109 S. Ct. 2136 (same). Similarly, in *Braunfeld*, "[t]he whole point of a uniform day of rest for all workers would have been defeated by exceptions." *O Centro*, 546 U.S. at 435, 126 S. Ct. 1211 (discussing *Braunfeld*).

The Government has not made a similar showing of a compelling interest in uniform enforcement of the Mandate, for the simple reason that enforcement of the Mandate is currently anything but uniform. Tens of millions of people are exempt from the Mandate, under exemptions for grandfathered health plans, small businesses, and "religious employers" like the Diocesan plaintiffs here. Millions of women thus will not receive contraceptive coverage without cost-sharing through the Mandate. Having granted so many exemptions already, the Government cannot show a compelling interest in denying one to these

plaintiffs. *See Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547, 113 S. Ct. 2217, 2234, 124 L. Ed. 2d 472 (1993) ("It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' ... when it leaves appreciable damage to that supposedly vital interest unprohibited."); *see also Korte*, 735 F.3d at 686 (holding that ACA's myriad exemptions meant that the Government could not pass the compelling interest test of the RFRA); *Gilardi*, 733 F.3d at 1222–23 (same); *Hobby Lobby*, 723 F.3d at 1144 (same).

The Government does not contest the existence or breadth of the ACA's exemptions, but instead justifies each one individually—the grandfathering provisions are intended only to be temporary; small employers are not exempt from the Mandate, but from the mechanisms that impose penalties if they do not provide health coverage, which they are encouraged to do through tax and other incentives; fully exempting religious employers but not religious non-profit organizations is rational because employees of the former are less likely to use contraception than employees of the latter. Assuming all this to be true, it misses the point—the RFRA requires the Government to identify a compelling interest in applying the law to "the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 431–32, 126 S. Ct. 1211. The fact that these exemptions work the same harm to the Government's interests as would any exemption granted to plaintiffs greatly undermines the Government's assertion that it has a compelling interest in

enforcing the Mandate against plaintiffs. *See id.* at 434, 126 S. Ct. 1211.

The cases upon which the Government relies do not support its position. In rejecting a Rastafarian's claim that the RFRA required a religious exemption for probationers to smoke marijuana, the court in *United States v. Israel*, 317 F.3d 768, 772 (7th Cir. 2003), noted that "[a]ny judicial attempt to carve out a religious exemption in this situation would lead to significant administrative problems for the probation office and open the door to a weed-like proliferation of claims for religious exemptions." No exemptions existed that allowed federal probationers to smoke marijuana, and granting one would undermine not only the federal probation scheme, but also federal criminal prohibitions on marijuana use. *South Ridge Baptist Church v. Industrial Com'n of Ohio*, 911 F.2d 1203, 1208–09 (6th Cir. 1990), held that the existence of narrow religious exemptions to a workers' compensation law did not undermine the state's interest in uniformity. But that decision rested heavily on *Lee*, where the Government fended off a strict-scrutiny challenge by demonstrating that granting any exemptions to social security taxes beyond the narrow ones Congress had already created would render "a comprehensive national social security system ... difficult, if not impossible, to administer." *Lee*, 455 U.S. at 258, 102 S. Ct. 1051. The exemptions here are not nearly so narrow as in *Lee* or *South Ridge*, and the Government has not demonstrated that its interest in uniform application of the Mandate is as strong as in the uniform application of the tax laws.

Finally, but very significantly, the Government's belated revelation that the regulations *do not even require plaintiffs' TPAs to provide contraceptive coverage* [14] fatally undermines any claim that imposing the Mandate on these plaintiffs serves a compelling governmental interest. To demonstrate a compelling interest in remedying an identified harm, defendants must show "that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664, 114 S. Ct. 2445, 2470, 129 L. Ed. 2d 497 (1994). Here, the Government implicitly acknowledges that applying the Mandate to plaintiffs may in fact do nothing at all to expand contraceptive coverage, because plaintiffs' TPAs aren't actually required to do anything after receiving the self-certification. In other words, the Mandate forces plaintiffs to fill out a form which, though it violates their religious beliefs, may ultimately serve no purpose whatsoever. A law that is totally ineffective cannot serve a compelling interest.

Nor is the Mandate the least restrictive means by which the Government can improve public health and equalize women's access to healthcare. "A statute or regulation is the least restrictive means if 'no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights.'" *Kaemmerling*, 553 F.3d at 684 (quoting *Sherbert*, 374 U.S. at 407, 83 S. Ct. 1790).

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[14] *See supra*, discussing defendants' argument that plaintiffs lack Article III standing because defendants did not have authority under ERISA to require the TPAs of "church plans" to provide coverage.

At this point, it is important to recall the nature of the burden on plaintiffs' religion. The Mandate does not burden plaintiffs' religion because it allows their employees to receive and use contraception at no cost; indeed, "it goes without saying that [plaintiffs] may neither inquire about nor interfere with the private choices of their employees on these subjects." *Korte*, 735 F.3d at 684. Rather, the Mandate burdens plaintiffs' religion by coercing them into authorizing third parties to provide this coverage through the self-certification requirement, an act forbidden by plaintiffs' religion.

In view of this burden, numerous less restrictive alternatives are readily apparent. The Government could provide the contraceptive services or insurance coverage directly to plaintiffs' employees, or work with third parties—be it insurers, health care providers, drug manufacturers, or non-profits—to do so without requiring plaintiffs' active participation. It could also provide tax incentives to consumers or producers of contraceptive products. Many of these options have been recognized as feasible alternatives by other courts. *See Korte*, 735 F.3d at 686.

It is true that a proposed alternative scheme must be workable in order to qualify as a viable less restrictive means. *See Fisher v. Univ. of Texas* at Austin, —— U.S. ——, 133 S. Ct. 2411, 2420, 186 L. Ed. 2d 474 (2013). The Government first argues that the alternatives above are infeasible because the defendants lack statutory authority to enact some of them. This argument makes no sense; in any challenge to the constitutionality of a federal law, the question is whether the *federal government* could adopt a less restrictive means, not any particular

branch within it. It would set a dangerous precedent to hold that if the Executive Branch cannot act unilaterally, then there is no alternative solution. If defendants lack the required statutory authority, Congress may pass appropriate legislation.

The Government also argues that these alternatives would impose new administrative costs or not be as effective in advancing the Government's goals. As for the first argument, the Government has not identified these costs with any specificity, and in any event a less restrictive alternative is not infeasible simply because it is somewhat more expensive for the Government. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 799–800, 108 S. Ct. 2667, 2680, 101 L. Ed. 2d 669 (1988) (noting that a state "may vigorously enforce its antifraud laws" as a less restrictive alternative to compelled disclosures). As for the second, the Government argues that the proposed alternatives would be less effective because they require women to take extra, burdensome steps including "find[ing] out about the availability of and sign[ing] up for a new benefit," rather than the "minimal logistical and administrative obstacles" they would enjoy under the Mandate. The Government does not, however, further explain these steps and why they would be burdensome on plaintiffs' employees. If these steps only entail filling out a form, it seems that the burden of filling out that form should fall on those who have no religious objection to doing so. If finding out about these benefits is burdensome, the Government could make a stronger effort to inform the public about them.

Relatedly, the Government and the ACLU as *amicus* argue that exempting plaintiffs from the

Mandate would deny to plaintiffs' employees the benefits that Congress sought to provide them, effectively allowing plaintiffs to impose their religious beliefs on employees who might not share them. The potential burden that granting an exemption would impose upon third parties is certainly a relevant consideration in Free Exercise cases. *See e.g., Sherbert*, 374 U.S. at 409, 83 S. Ct. 1790 (noting that granting exemption did not "serve to abridge any other person's religious liberties"); *see also Korte*, 735 F.3d at 719–20 (Rovner, C.J., dissenting) (collecting cases). But this is not a case where, for example, plaintiffs claim a religious right to engage in invidious discrimination that Congress has sought to remedy. *Cf. Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990) (religiously-motivated disparate pay for female employees). The Court is cognizant of the fact that, if plaintiffs were exempt, their employees would not be able to receive a benefit that Congress intended to grant them, at least temporarily. But the availability of less restrictive means by which Congress can provide this benefit means that the burden on plaintiffs' employees does not change the result here.

In sum, the non-Diocesan plaintiffs have demonstrated that there is no genuine issue of material fact as to whether the Mandate substantially burdens their religious exercise, and the Government has failed to show that the Mandate is the least restrictive means of advancing a compelling governmental interest. The non-Diocesan plaintiffs are therefore entitled to summary judgment on their RFRA claims. This holding renders the remainder of the non-Diocesan plaintiffs' claims moot.

III. Diocesan Plaintiffs' Non–RFRA Claims

As discussed, the parties made little effort to distinguish between the RFRA claims brought by the exempt and non-exempt plaintiffs; they have made almost none with regard to plaintiffs' other claims. The Court's ruling that the Diocesan plaintiffs have not suffered a substantial burden on their religion under the RFRA because they are exempt from the Mandate largely compels the conclusion that these plaintiffs cannot succeed on their remaining claims. Defendants are entitled to summary judgment as to these claims.

Having failed to meet the more lenient standard of the RFRA, the Diocesan plaintiffs cannot succeed on their Free Exercise constitutional claim, Count II of the Amended Complaint. Count VI of the Amended Complaint alleges that the Mandate unconstitutionally interferes with the Catholic Church's internal governance by "artificially splitting the Catholic Church in two," dividing its religious arm from its charitable and educational arms. This is little more than a restatement of the Diocesan plaintiffs' RFRA claim, and fails for much the same reasons. The Mandate does not "split" the Catholic Church in two—it does not require any change to the religious structure, hierarchy or organization of the Church and its affiliated organizations. At most, it could "split" the Church's health plan in two.[15] The prohibition on interference with internal church

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[15] As noted *supra*, it is not clear why it would even do that. The Diocesan plaintiffs are exempt from the Mandate, and in any event this decision enjoins enforcement of the Mandate against the affiliated non-exempt plaintiffs.

governance applies to ecclesiastical matters such as the selection and supervision of ministers by religious authorities, and plaintiffs have not cited any case that even remotely suggests that a health plan may constitute a matter of "internal church governance" protected by the First Amendment. *Cf. Hosanna–Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, —— U.S. ——, 132 S. Ct. 694, 706, 181 L. Ed. 2d 650 (2012) ("Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church."); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 73 S. Ct. 143, 97 L. Ed. 120 (1952) (striking down state law that sought to transfer the right to use St. Nicholas Cathedral from one archbishop to another by requiring every Russian Orthodox church in New York to recognize the determination of the governing body of the North American churches as authoritative); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 20 L. Ed. 666 (1871) (declining to interfere with decision by church authorities in a dispute between antislavery and proslavery factions over who controlled the property of a specific Presbyterian church).

The Diocesan plaintiffs' Free Speech claims must fail because the none of the claimed infringements—that paying for contraceptive and other counseling is compelled speech; that self-certification requirement is also compelled speech; or that the prohibition on an eligible organization seeking to "influence" a TPA's decision to provide contraceptive benefits imposes a "gag order"—actually apply to the Diocesan plaintiffs, who qualify as exempt religious employers. Plaintiffs

also claim that the Mandate is invalid under Administrative Procedure Act because it violates the Weldon Amendment to the Consolidated Appropriations Act of 2012, which states that funds cannot be made available to a Federal agency or program if it "subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Pub. L. No. 112–74, §§ 506, 507, 125 Stat. 786, 1111–12. This claim fails as to the Diocesan plaintiffs because, again, they are entirely exempt from the Mandate. The Mandate thus cannot discriminate against them. Finally, the Diocesan plaintiffs' Establishment Clause challenges to the religious employer exemption must also fail because it is undisputed that they qualify for the exemption, and thus cannot claim to be harmed by it.[16]

IV. Injunctive Relief

The standard for granting a permanent injunction is essentially the same as that for a preliminary injunction, except that the moving party must demonstrate actual, rather than likely, success on the merits of its claim. *See Richards v. Napolitano*, 642 F. Supp. 2d 118 (E.D.N.Y. 2009). In determining whether to grant a permanent injunction, therefore, a court must consider: (1) success on the merits; (2) whether the movant will suffer irreparable injury

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[16] Plaintiffs did not oppose defendants' motion for summary judgment on Count VIII of the Amended Complaint, which alleged that defendants improperly interpreted the religious employer exemption. That portion of the motion is therefore also granted.

absent an injunction; (3) the balance of hardships between the parties; and (4) whether the public interest supports granting the requested injunction. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

As set forth above, the non-Diocesan plaintiffs have demonstrated success on the merits of their RFRA claims. For the same reasons, they have also demonstrated that they will suffer irreparable injury absent an injunction. "The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *New York Progress and Protection PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)). Indeed, the Government concedes that resolution of these first two prongs depends on the merits of plaintiffs' RFRA claims.

Plaintiffs have also satisfied the remaining two prongs. The balance of equities weighs in favor of plaintiffs. Although it is true that "there is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce," *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C.2008), entering an injunction in this case would simply maintain the status quo, and therefore would not place any significant additional burden on the Government. *See Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 129–30 (D.D.C.2012). And though the Government argues that granting injunctive relief to plaintiffs would "would undermine the Government's ability to achieve Congress's goals of improving the health of women and newborn

children and equalizing the coverage of preventive services for women and men," the Court has already held that the Government has not demonstrated a compelling interest in advancing these interests by burdening these particular plaintiffs in this particular manner. By contrast, denying injunctive relief would force plaintiffs to choose between violating their stated religious beliefs and paying onerous financial penalties.

The public interest similarly weighs in favor of granting an injunction. "[S]ecuring First Amendment rights is in the public interest." *Walsh*, 733 F.3d at 488. The countervailing public interests cited by the Government—in uniform enforcement of the Mandate and in allowing plaintiffs' employees to enjoy its benefits—do not outweigh the public interest in protecting plaintiffs' religious liberty. First, as described earlier, the Government has not shown a compelling interest in uniform enforcement of the Mandate; enjoining its enforcement simply adds plaintiffs to the large number of employers not subject to the Mandate.

Second, the Government is correct that, as the Ninth Circuit has held, "[t]here is a general public interest in ensuring that all citizens have timely access to lawfully prescribed medications." *Stormans Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). But *Stormans*, which involved a Free Exercise challenge brought by religious pharmacists against enforcement of a state regulation requiring pharmacies to fill prescriptions of Plan B, actually demonstrates why this public interest does not change the result here. The Ninth Circuit in *Stormans* vacated the district court's preliminary

injunction in part because it was vastly overbroad; the district court had enjoined enforcement of the regulation against all pharmacies and pharmacists who refused to fill Plan B prescriptions, without limitation to the parties before the court or even those with religious objections to doing so. The Ninth Circuit noted that enjoining enforcement only against the plaintiffs themselves, as the plaintiffs in this case request, would not present great hardship to the public. In addition, the public interest identified in *Stormans* was *access* to prescribed medications, which would indeed be curtailed if pharmacies refused to fill prescriptions. Here, the public interest identified by the Government is in access to *free* contraception. An injunction will not prevent or unreasonably delay plaintiffs' employees from accessing prescribed medications; rather, an injunction would simply require them to pay for it, as they would have to without the Mandate. The non-Diocesan plaintiffs have demonstrated that they are entitled to an injunction against enforcement of the Mandate against them.

CONCLUSION

The non-Diocesan plaintiffs' motion for summary judgment on their RFRA claims is granted, and their remaining claims are dismissed as moot. The Government's motion for summary judgment is granted as to the Diocesan plaintiffs' claims. Pursuant to Federal Rule of Civil Procedure 58, a Final Judgment and Injunction shall issue separately.

SO ORDERED.

APPENDIX C

United States District Court, E.D. New York.

THE ROMAN CATHOLIC ARCHDIOCES OF NEW YORK, et al., Plaintiffs,

v.

Kathleen SEBELIUS, in Her Official Capacity As Secretary, United States Department of Health and Human Services, et al., Defendants.

No. 12 Civ. 2542 (BMC).

December 16, 2013.

Final Judgment and Injunction

The Court, having considered the parties' cross-motions for summary judgment, and having entered its Memorandum Decision and Order dated December 13, 2013, granting in part and denying in part the parties' motions for summary judgment, thereby directing dismissal of the claims of the Roman Catholic Archdiocese of New York and the Roman Catholic Diocese of Rockville Centre, New York, and entry of judgment in favor of Catholic Health Care System, Catholic Health Services of Long Island; Cardinal Spellman High School; and Monsignor Farrell High School (the "prevailing plaintiffs"), it is hereby:

ORDERED, ADJUDGED, AND DECREED, as follows:

1. Defendants are each ENJOINED and RESTRAINED from enforcing or implementing the

challenged regulations, which require the prevailing plaintiffs and their respective health plans to provide, or execute a self-certification to enable a third party administrator to provide, health insurance coverage for all Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling concerning these subjects, including 45 C.F.R. §§147.130, 147.131, against the prevailing plaintiffs.

2. Any party may seek modification of this Order, at any time, by written motion and for good cause based on changed circumstances or otherwise.

3. This Court shall retain jurisdiction to enforce this Final Judgment and Injunction. **SO ORDERED.**

Digitally signed by Brian M. Cogan

USD.J.

Dated: Brooklyn, New York

December 13, 2013

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of January, two thousand and sixteen.

Before: Pierre N. Leval,
Rosemary S. Pooler,
Denny Chin,
Circuit Judges.

Catholic Health Care System, Catholic Health Services Of Long Island, Cardinal Spellman High School, Monsignor Farrell High School, Plaintiffs-Appellees, v. Sylvia Matthews Burwell, *et al.*, Defendants - Appellants.	**ORDER** Docket No. 14-427

Appellees move to stay the mandate pending the filing and disposition of a petition for a writ of certiorari.

IT IS HEREBY ORDERED that the motion is GRANTED.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court

[SEAL]

/s/ Catherine O'Hagan Wolfe

January 4, 2016

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of December, two thousand fifteen.

Catholic Health Care System, Catholic Health Services Of Long Island, Cardinal Spellman High School, Monsignor Farrell High School,

Plaintiffs-Appellees,

v.

Sylvia Matthews Burwell, in her official capacity as Secretary of the United States Department of Health and Human Services, United States Department of Health and Human Services, Thomas Perez, in his official capacity as Secretary of the United States Department of

ORDER

Docket No: 14-427

Labor, United States Department of Labor, Jacob L. Lew, in his official capacity as Secretary of the United States Department of Treasury, United States Department of Treasury,

Defendants - Appellants.

Appellees, Cardinal Spellman High School, Catholic Health Care System, Catholic Health Services Of Long Island, Monsignor Farrell High School and Roman Catholic Archdiocese of New York, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

December 1, 2015

APPENDIX F

42 U.S.C. § 2000bb-1 provides:

§ 2000bb-1. Free exercise of religion protected

(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.A. § 2000bb-2 provides:

§ 2000bb-2. Definitions

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.

42 U.S.C. § 2000cc-5 provides:

§ 2000cc-5 Definitions

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)(4) provides:

§ 300gg-13. Coverage of preventive health services

(a) In general

A group health plan and a health insurances 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.

26 U.S.C. § 4980D provides:

§ 4980D. Failure to meet certain group health plan requirements

(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 provides:

§ 4980H. Shared responsibility for employers regarding health coverage.

(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 cost- sharing 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 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

(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 cost-sharing 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 full-time 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 full-time 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 cost- sharing 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.

26 C.F.R. § 54.9815–2713 provides:

§ 54.9815–2713 Coverage of preventive health services

(a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 54.9815–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

* * *

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

* * *

26 C.F.R. § 54.9815–2713A provides:

§ 54.9815–2713A. Accommodations in connection with coverage of preventive health services

(a) Eligible organizations. An eligible organization is an organization that meets the criteria of paragraphs (a)(1) through (3) of this section.

(1) The organization opposes providing coverage for some or all of any contraceptive items or services required to be covered under § 54.9815–2713(a)(1)(iv) on account of religious objections.

(2)(i) The organization is organized and operates as a nonprofit entity and holds itself out as a religious organization; or

(ii) The organization is organized and operates as a closely held for-profit entity, as defined in paragraph (a)(4) of this section, and the organization's highest governing body (such as its board of directors, board of trustees, or owners, if managed directly by its owners) has adopted a resolution or similar action, under the organization's applicable rules of governance and consistent with state law, establishing that it objects to covering some or all of the contraceptive services on account of the owner's sincerely held religious beliefs.

(3) The organization must self-certify in the form and manner specified by the Secretary of Labor or provide notice to the Secretary of Health and Human Services as described in paragraph (b) or (c) of this section. The organization must make such self-certification or notice 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 or notice must be executed by a person authorized to make the certification or notice on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(4) A closely held for-profit entity is an entity that—

(i) Is not a nonprofit entity;

(ii) Has no publicly traded ownership interests, (for this purpose, a publicly traded ownership interest is any class of common equity securities required to be registered under section 12 of the Securities Exchange Act of 1934); and

(iii) Has more than 50 percent of the value of its ownership interest owned directly or indirectly by five or fewer individuals, or has an ownership structure that is substantially similar thereto, as of the date of the entity's self-certification or notice described in paragraph (b) or (c) of this section.

(iv) For the purpose of the calculation in paragraph (a)(4)(iii) of this section, the following rules apply:

(A) Ownership interests owned by a corporation, partnership, estate, or trust are considered owned proportionately by such entity's shareholders, partners, or beneficiaries. Ownership interests owned by a nonprofit entity are considered owned by a single owner.

(B) An individual is considered to own the ownership interests owned, directly or indirectly, by or for his or her family. Family includes only brothers

and sisters (including half-brothers and half-sisters), a spouse, ancestors, and lineal descendants.

(C) If a person holds an option to purchase ownership interests, he or she is considered to be the owner of those ownership interests.

(v) A for profit entity that seeks further information regarding whether it qualifies for the accommodation described in this section may send a letter describing its ownership structure to the Department of Health and Human Services. An entity must submit the letter in the manner described by the Department of Health and Human Services. If the entity does not receive a response from the Department of Health and Human Services to a properly submitted letter describing the entity's current ownership structure within 60 calendar days, as long as the entity maintains that structure it will be considered to meet the requirement set forth in paragraph (a)(4)(iii) of this section.

(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.

(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.

(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 (that is, 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.

(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 (that is, 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.

(2) Payments for contraceptive services. (i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (c)(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) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the

eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 9815. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services—self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that

the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) Reliance—insured group health plans. (1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply

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

(f) [Reserved]. For further guidance, see § 54.9815-2713AT(f).

29 C.F.R. § 2510.3-16 provides:

§ 2510.3-16 Definition of "plan administrator."

(a) In general. The term "plan administrator" or "administrator" means the person specifically so designated by the terms of the instrument under which the plan is operated. If an administrator is not so designated, the plan administrator is the plan sponsor, as defined in section 3(16)(B) of ERISA.

(b) In the case of a self-insured group health plan established or maintained by an eligible organization, as defined in § 2590.715-2713A(a) of this chapter, if the eligible organization provides a copy of the self-certification of its objection to administering or funding any contraceptive benefits in accordance with § 2590.715-2713A(b)(1)(ii) of this chapter to a third party administrator, the self-certification shall be an instrument under which the plan is operated, 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, and shall supersede any earlier designation. If, instead, the eligible organization notifies the Secretary of Health and

Human Services of its objection to administering or funding any contraceptive benefits in accordance with § 2590.715-2713A(b)(1)(ii) of this chapter, the Department of Labor, working with the Department of Health and Human Services, shall separately provide notification to each third party administrator that such third party administrator shall be 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, with respect to benefits for contraceptive services that the third party administrator would otherwise manage. Such notification from the Department of Labor shall be an instrument under which the plan is operated and shall supersede any earlier designation.

(c) A third party administrator that becomes a plan administrator pursuant to this section shall be responsible for—

(1) Complying with section 2713 of the Public Health Service Act (42 U.S.C. 300gg-13) (as incorporated into section 715 of ERISA) and § 2590.715-2713 of this chapter with respect to coverage of contraceptive services. To the extent the plan contracts with different third party administrators for different classifications of benefits (such as prescription drug benefits versus inpatient and outpatient benefits), each third party administrator is responsible for providing contraceptive coverage that complies with section 2713 of the Public Health Service Act (as incorporated into section 715 of ERISA) and § 2590.715-2713 of this chapter with respect to the classification or classifications of benefits subject to

its contract.

(2) Establishing and operating a procedure for determining such claims for contraceptive services in accordance with § 2560.503-1 of this chapter.

(3) Complying with disclosure and other requirements applicable to group health plans under Title I of ERISA with respect to such benefits.

26 C.F.R. § 54.9815-2713AT provides:

§ 54.9815-2713AT Accommodations in connection with coverage of preventive health services (temporary).

(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.

(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. § 2590.715–2713 provides:

§ 2590.715–2713 Coverage of preventive health services

(a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 2590.715–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

* * *

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

* * *

29 C.F.R. § 2590.715-2713A provides:

§ 2590.715-2713A. Accommodations in connection with coverage of preventive health services

(a) Eligible organizations. An eligible organization is an organization that meets the criteria of paragraphs (a)(1) through (3) of this section.

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

(2)(i) The organization is organized and operates as a nonprofit entity and holds itself out as a religious organization; or

(ii) The organization is organized and operates as a closely held for-profit entity, as defined in paragraph (a)(4) of this section, and the organization's highest governing body (such as its board of directors, board of trustees, or owners, if managed directly by its owners) has adopted a resolution or similar action, under the organization's applicable rules of governance and consistent with state law, establishing that it objects to covering some or all of the contraceptive services on account of the owners' sincerely held religious beliefs.

(3) The organization must self-certify in the form and manner specified by the Secretary or provide notice to the Secretary of Health and Human Services as described in paragraph (b) or (c) of this section. The organization must make such self-certification or notice 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 or notice must be executed by a person authorized to make the certification or notice on behalf of the organization, and must be maintained in a manner consistent with

the record retention requirements under section 107 of ERISA.

(4) A closely held for-profit entity is an entity that—

(i) Is not a nonprofit entity;

(ii) Has no publicly traded ownership interests (for this purpose, a publicly traded ownership interest is any class of common equity securities required to be registered under section 12 of the Securities Exchange Act of 1934); and

(iii) Has more than 50 percent of the value of its ownership interest owned directly or indirectly by five or fewer individuals, or has an ownership structure that is substantially similar thereto, as of the date of the entity's self-certification or notice described in paragraph (b) or (c) of this section.

(iv) For the purpose of the calculation in paragraph (a)(4)(iii) of this section, the following rules apply:

(A) Ownership interests owned by a corporation, partnership, estate, or trust are considered owned proportionately by such entity's shareholders, partners, or beneficiaries. Ownership interests owned by a nonprofit entity are considered owned by a single owner.

(B) An individual is considered to own the ownership interests owned, directly or indirectly, by or for his or her family. Family includes only brothers and sisters (including half-brothers and half-sisters), a spouse, ancestors, and lineal descendants.

(C) If a person holds an option to purchase ownership interests, he or she is considered to be the

owner of those ownership interests.

(v) A for-profit entity that seeks further information regarding whether it qualifies for the accommodation described in this section may send a letter describing its ownership structure to the Department of Health and Human Services. An entity must submit the letter in the manner described by the Department of Health and Human Services. If the entity does not receive a response from the Department of Health and Human Services to a properly submitted letter describing the entity's current ownership structure within 60 calendar days, as long as the entity maintains that structure it will be considered to meet the requirement set forth in paragraph (a)(4)(iii) of this section.

(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 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.

(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 § 2510.3–16 of this chapter and this section.

(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), shall 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 § 2510.3–16 of this chapter and this section.

(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 § 2590.715–2713(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 § 2590.715–2713. 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.

(2) Payments for contraceptive services—

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (c)(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 § 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. § 147.130 provides:

§ 147.130 Coverage of preventive health services.

(a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 147.131, a group health plan, or a health insurance issuer offering group or individual health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

* * *

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings

provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration.

* * *

45 C.F.R. § 147.131 provides:

§ 147.131 Exemption and accommodations in connection with coverage of preventive health services.

(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 meets the criteria of paragraphs (b)(1) through (3) of this section.

(1) The organization opposes providing coverage for some or all of any contraceptive items or services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2)(i) The organization is organized and operates as a nonprofit entity and holds itself out as a

religious organization; or

(ii) The organization is organized and operates as a closely held for-profit entity, as defined in paragraph (b)(4) of this section, and the organization's highest governing body (such as its board of directors, board of trustees, or owners, if managed directly by its owners) has adopted a resolution or similar action, under the organization's applicable rules of governance and consistent with state law, establishing that it objects to covering some or all of the contraceptive services on account of the owners' sincerely held religious beliefs.

(3) The organization must self-certify in the form and manner specified by the Secretary of Labor or provide notice to the Secretary of Health and Human Services as described in paragraph (c) of this section. The organization must make such self-certification or notice 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 or notice must be executed by a person authorized to make the certification or notice on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(4) A closely held for-profit entity is an entity that—

(i) Is not a nonprofit entity;

(ii) Has no publicly traded ownership interests (for this purpose, a publicly traded ownership interest is any class of common equity securities required to be registered under section 12 of the

Securities Exchange Act of 1934); and

(iii) Has more than 50 percent of the value of its ownership interest owned directly or indirectly by five or fewer individuals, or has an ownership structure that is substantially similar thereto, as of the date of the entity's self-certification or notice described in paragraph (b) or (c) of this section.

(iv) For the purpose of the calculation in paragraph (b)(4)(iii) of this section, the following rules apply:

(A) Ownership interests owned by a corporation, partnership, estate, or trust are considered owned proportionately by such entity's shareholders, partners, or beneficiaries. Ownership interests owned by a nonprofit entity are considered owned by a single owner.

(B) An individual is considered to own the ownership interests owned, directly or indirectly, by or for his or her family. Family includes only brothers and sisters (including half-brothers and half-sisters), a spouse, ancestors, and lineal descendants.

(C) If a person holds an option to purchase ownership interests, he or she is considered to be the owner of those ownership interests.

(v) A for-profit entity that seeks further information regarding whether it qualifies for the accommodation described in this section may send a letter describing its ownership structure to the Department of Health and Human Services. An entity must submit the letter in the manner described by the Department of Health and Human Services. If the entity does not receive a response from the Department of Health and Human Services

to a properly submitted letter describing the entity's current ownership structure within 60 calendar days, as long as the entity maintains that structure it will be considered to meet the requirement set forth in paragraph (b)(4)(iii) 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 § 147.130(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 self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 147.130. 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 § 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.

(2) Payments for contraceptive services—

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (c)(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 § 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 as defined in 20 U.S.C. 1002 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.