No. 13-3853

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNIVERSITY OF NOTRE DAME,

Plaintiff-Appellant,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of Health and Human Services, *et al.*,

Defendants-Appellees.

and

JANE DOE I, *et al.*,

Intervening-Appellees.

On Appeal From The United States District Court
For the Northern District of Indiana (No. 13-cv-01276) (Philip P. Simon, C.J.)

BRIEF FOR THE APPELLEES

STUART F. DELERY
Assistant Attorney General

DAVID A. CAPP
United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
ADAM C. JED
(202) 514-5089
Attorneys, Appellate Staff
Civil Division, Room 7531
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Statutes:

Regulations:

Legislative Materials:

Other Authorities:

INTRODUCTION

Plaintiff, the University of Notre Dame, challenges regulations that establish minimum health coverage requirements under the Affordable Care Act insofar as they include contraceptive coverage as part of women's preventive health coverage. Unlike the plaintiffs in *Korte* v. *Sebelius*, 735 F.3d 654 (7th Cir. 2013), on which the University heavily relies, Notre Dame is concededly eligible for the religious accommodations set out in the regulations and therefore is not required "to contract, arrange, pay, or refer for contraceptive coverage," 78 Fed. Reg. 39,870-01, 39,874 (July 2, 2013). To be relieved of these obligations, the University need only self-certify that it is a non-profit organization that holds itself out as a religious organization and that has a religious objection to providing coverage for contraceptive services. *See* 78 Fed. Reg. at 39,874-39,886; 45 C.F.R. § 147.131(b); 29 C.F.R. § 2590.715-2713A(b).

The University's employees and students (and their covered dependents) will instead receive coverage for contraceptive services through a different mechanism. The regulations make the insurance company that issues policies for the University's students (Aetna) and the third party administrator that administers the University's self-insured plan for employees (Meritain Health, an Aetna subsidiary) responsible for providing or arranging separate payments for contraceptive services. *See* 45 C.F.R. § 147.131(c)(2)(i)(B) and (ii); 29 C.F.R. § 2590.715-2713A(b)(3). The University will not administer this coverage and will not bear any direct or indirect costs of this coverage. *Ibid.*

As the district court summarized in denying the University's motion for a preliminary injunction, the regulations permit the University "to file a certification saying it refuses to provide such services. If Notre Dame takes that tack, someone else provides the coverage, and not on Notre Dame's dime." Short Appendix ("SA") 1.

The University "nonetheless claims that by formally opting out, it would trigger, or authorize, a third party's provision of contraception." *Ibid.* The district court recognized that this is not a substantial burden under the Religious Freedom Restoration Act ("RFRA"). "Notre Dame is free to opt out of providing the coverage itself, but it can't stop anyone else from providing it." *Ibid.* The court explained that "Notre Dame is not being asked to do or say anything it doesn't already do, and wouldn't do regardless of the outcome of this case; the only thing that changes under the healthcare law is the actions of third parties." *Id.* at 1-2. "If Notre Dame opts out of providing contraceptive coverage, as it always has and likely would going forward, it is *the government* who will authorize the third party to pay for contraception." *Id.* at 2 (emphasis in original). The district court emphasized that "[t]he government isn't violating Notre Dame's right to free exercise of religion by letting it opt out, or by arranging for third party contraception coverage." *Ibid.*

Plaintiff cannot transform an opt-out right into a substantial burden by declaring that opting out would "facilitate" (Pl. Br. 24) the provision of coverage by third parties. Employees and students will receive coverage for contraceptive services

despite plaintiff's religious objections, not because of those objections, and plaintiff has no right to veto the actions of third parties. The district court correctly held that Notre Dame failed to demonstrate a likelihood of success on the merits and was not entitled to preliminary relief.

STATEMENT OF JURISDICTION

Appellant's jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

1. Whether regulations that allow the University to opt out of providing contraceptive coverage impose a substantial burden on its religious beliefs.

2. Whether these regulations violate the University's rights under the First Amendment.

STATEMENT OF THE CASE

A. Regulatory Background

1. Congress has long regulated employer-sponsored group health plans. In 2010, the Patient Protection and Affordable Care Act established certain additional minimum standards for group health plans as well as health insurance issuers that offer coverage in the group and the individual markets. The Act requires non-grandfathered group health plans to cover four categories of recommended preventive-health services without cost sharing, that is, without requiring plan participants and beneficiaries to make copayments or pay deductibles or coinsurance. 42 U.S.C. § 300gg-13. As relevant here, these services include preventive care and

screenings for women as provided for in comprehensive guidelines supported by the Health Resources and Services Administration ("HRSA") (a component of the Department of Health and Human Services ("HHS")), *id.* § 300gg-13(a)(4).

HHS requested the assistance of the Institute of Medicine in developing comprehensive guidelines for preventive services for women. 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012). Experts, "including specialists in disease prevention, women's health issues, adolescent health issues, and evidence-based guidelines," developed a list of services "shown to improve well-being, and/or decrease the likelihood or delay the onset of a targeted disease or condition." Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 2-3 (2011). These included the "full range" of "contraceptive methods" approved by the Food and Drug Administration ("FDA"), *id.* at 10; *see id.* at 102-110, which the Institute found can greatly decrease the risk of unwanted pregnancies, adverse pregnancy outcomes, and other adverse health consequences, and vastly reduce medical expenses for women. *See id.* at 102-07.

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

§ 147.130(a)(1)(iv) (HHS); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. § 54.9815-2713(a)(1)(iv) (Treasury).

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

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

After notice and comment rulemaking, the Departments published the current regulations, challenged here, in July 2013. *See* 78 Fed. Reg. 39,874-39,886; 45 C.F.R. § 147.131(b) (HHS); 29 C.F.R. § 2590.715-2713A(a) (Labor); 26 C.F.R. § 54.9815-2713A(a) (Treasury). The regulations provide religion-related accommodations for group health plans established or maintained by "eligible organizations" (and group

health insurance coverage provided in connection with such plans). An "eligible organization" is an organization that satisfies the following criteria:

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

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

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

If an eligible organization chooses not to provide contraceptive coverage, the plan's participants and beneficiaries will generally have access to contraceptive

coverage without cost sharing though alternative mechanisms established by the regulations.[1]

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

[1] The accommodations also apply to student health insurance coverage arranged by an eligible organization that is an institution of higher education. *See* 45 C.F.R. § 147.131(f).

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

organization from the monies used to provide payments for contraceptive services," *id.* § 147.131(c)(2)(ii).

If an eligible organization with a self-insured group health plan (such as Notre Dame's employee plan) chooses not to provide contraceptive coverage, the regulations generally require the third party administrator to provide or arrange separate payments for contraceptive services for plan participants and beneficiaries. 29 C.F.R. § 2590.715- 2713A(b)(2). "The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services." *Id.* § 2590.715-2713A(b)(1)(ii)(A). The regulations bar the third party administrator from imposing any premium, fee, or other charge, directly or indirectly, on the eligible organization or the group health plan with respect to payments for contraceptive services. *Id.* § 2590.715-2713A(b)(2). The third party administrator may seek reimbursement for payments for contraceptive services from the federal government through an adjustment to Federally-facilitated Exchange user fees. *Id.* § 2590.715-2713A(b)(3); *see* 45 C.F.R. § 156.50(d).

Regardless of the type of plan, if an eligible organization opts out of providing contraceptive coverage, it has no obligation to inform plan participants and beneficiaries of the availability of separate payments for contraceptive services. Instead, the health insurance issuer or third party administrator itself will provide this notice, and do so "separate from" materials that are distributed in connection with the

eligible organization's group health coverage. 45 C.F.R. § 147.131(d); 29 C.F.R. § 2590.715-2713A(d). That notice must make clear that the eligible organization is neither administering nor funding the contraceptive benefits. *Ibid.*

B. Factual Background and Prior Proceedings

1. Notre Dame is a nonprofit Catholic university, and the largest employer in St. Joseph County, Indiana. Compl. ¶¶ 9, 21, 24 (Additional Appendix ("AA") 4, 6). "Notre Dame's employee healthcare is self-insured, meaning that Notre Dame underwrites its employees' medical expenses itself." Short Appendix ("SA") 3. "Although Notre Dame is financially responsible, it contracts with a third party administrator (a 'TPA') to administer the health plan." *Ibid.* That third party administrator is Meritain Health, Inc., which is an Aetna subsidiary. Compl. ¶ 37 (AA 9). Notre Dame "offers its students the option of purchasing health insurance through Aetna." SA 3; Compl. ¶ 9 (AA 9).

2. As the district court noted, although the challenged regulations were issued in July 2013, Notre Dame waited until December 3, 2013, to file this action. On December 9, it moved for a preliminary injunction.

Although the University acknowledged that it can opt out of providing contraceptive coverage by certifying that it is eligible for the religious accommodation, it claimed that the regulations violate the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, which provides that the government shall not substantially burden a person's exercise of religion unless the application of that burden is the least

restrictive means to advance a compelling governmental interest. The University also alleged claims under the First Amendment.

The district court denied the University's motion for a preliminary injunction, holding that the regulations do not impose a substantial burden on plaintiff's exercise of religion. The court explained that the regulations do not require Notre Dame to offer, authorize, endorse, or pay for contraceptive coverage, and, indeed, do not require Notre Dame to change its conduct at all. The court noted that "Notre Dame had already instructed its TPA [third party administrator] in past years to not include contraception[.]" SA 14. "If the preventive care requirements didn't exist, Notre Dame would continue to instruct its TPA not to cover contraception." *Ibid.* "The only thing that is modified, then, under the accommodation, is that when Notre Dame tells the TPA not to provide contraception on Notre Dame's plan *the government and the TPA pay for contraception*." *Id.* at 14-15 (court's emphasis).

The court found the University's reliance on *Korte* v. *Sebelius*, 735 F.3d 654 (7th Cir. 2013), to be misplaced. In *Korte*, this Court accepted the RFRA claim of a for-profit corporation that, unlike Notre Dame, is not permitted to opt out of providing contraceptive coverage. The district court explained that "this case differs greatly from *Korte* because the accommodation removes the coercion facing private for-profit companies by offering a different choice." SA 15. The court observed that "*Korte* itself recognized this important distinction when it stated that the lack of an exemption or accommodation for the for-profit plaintiffs was 'notabl[e],' suggesting

that the case might well have come out differently had the *Korte* plaintiffs had access to the accommodation now available to Notre Dame." *Ibid.* (quoting *Korte,* 735 F.3d at 662).[3]

The district court further held that, "[t]o the extent that Notre Dame claims a burden imposed by having to find a TPA that will cover contraception and enter a contract with that third party, the argument lacks factual support." SA 23. The court explained that the third party administrator that contracts with Notre Dame—Meritain Health—intends to comply with the law and cover contraception at the government's expense. *See ibid.* Thus, Notre Dame does not have "to search for a new TPA, or enter a new contract with the accommodation in mind." *Ibid.*

The court also found no basis for the University's claim that it would have to underwrite coverage for contraceptives sold at its on-campus pharmacy: "Notre Dame offered nothing to suggest that the contraception coverage requirement will force them to carry contraception on campus[,] [a]nd the government confirmed during oral argument that the ACA doesn't require pharmacies to carry contraception." *Id.* at 24. The district court also rejected the University's constitutional claims, SA 25-36, and, on December 23, the district court denied the University's motion for an injunction pending appeal. On December 30, this Court

[3] The issues presented in *Korte* are being considered by the Supreme Court in *Sebelius* v. *Hobby Lobby Stores, Inc.*, No. 13-354 (S. Ct.), and *Conestoga Wood Specialties Corp., Inc.* v. *Sebelius,* No. 13-356 (S. Ct.). We respectfully submit that the *Korte* decision is incorrect but recognize that it is circuit precedent.

denied the University's motion for an injunction pending appeal and ordered expedited briefing. AA 39.

SUMMARY OF ARGUMENT

I. The University can opt out of the contraceptive coverage requirement by completing a form and providing copies to its insurance issuer and third party administrator. It objects to doing so on the ground that, once it has opted out, third parties will separately provide payments for contraceptive services without cost to or involvement by the University.

The University declares that "[w]hile this religious exercise is different from the religious exercise at issue in *Korte*, any attempt to distinguish this case is wholly unavailing because RFRA protects 'any exercise of religion,' 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A)." Pl. Br. 28. RFRA applies, however, only to "substantial burden[s]" on the exercise of religion. The only entities required to provide contraceptive coverage are Aetna and Meritain Health, which are required to do so by federal law. The Court must determine whether, as a matter of law, the University's right to opt out of providing coverage constitutes a substantial burden under the statute. Plaintiff cannot convert that opt-out right into a violation of RFRA by deeming it a "permission slip" (Pl. Br. 10) for the provision of contraceptive coverage by third parties.

II. The University's First Amendment claims are similarly without merit.

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

B. Plaintiff's assertion that the regulations unconstitutionally compel speech largely reprises its RFRA claim and fails for the same reasons. Although the University argues that the regulations require it to become "entangled in the provision of coverage for 'counseling'" Pl. Br. 45, Notre Dame does not entangle itself with counseling or endorse its coverage by a third party when it declines to provide that coverage. In any event, the regulations address the terms of group health plans, not the content of communications between patients and their health care providers.

The University's contention that the regulations include a "gag order," Pl. Br. 20, fares no better. As the district court explained, "the regulations don't prohibit speech, but instead prevent[] 'an employer's improper attempt to interfere with its employees' ability to obtain contraceptive coverage from a third party[.]'" SA 36 (citation omitted).

C. The regulations do not violate the Establishment Clause by favoring some churches or denominations over others. Under the regulations, an organization is a

"religious employer" if it "is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.131(a). The fact that some religiously affiliated organizations, regardless of their denomination, are exempt from the contraceptive coverage requirement, while other houses of worship are not, does not favor one denomination over others. This provision is wholly dissimilar to the statute at issue in *Larson* v. *Valente*, 456 U.S. 228 (1982), relied on by plaintiff, which was "drafted with the explicit intention" of requiring "particular religious denominations" to comply with registration and reporting requirements while excluding other religious denominations. *Id.* at 254.

STANDARD OF REVIEW

The Court "review[s] legal conclusions de novo, findings of fact for clear error, and equitable balancing for abuse of discretion." *Korte* v. *Sebelius*, 735 F.3d 654, 665 (7th Cir. 2013).

ARGUMENT

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20.

The University's asserted harms turn on a likelihood of success on the merits, *see, e.g., Christian Legal Soc'y* v. *Walker*, 453 F.3d 853, 859 (7th Cir. 2006), which the University cannot demonstrate for the reasons discussed by the district court. Moreover, the balance of equities and public interest preclude a preliminary injunction. Such an injunction would prevent the University's thousands of employees and students, and their covered dependents, from obtaining payments for contraceptive services from third parties as provided by the regulations. *Cf. Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005) ("[p]roperly applying [the Religious Land Use and Institutionalized Persons Act], courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"); *id.* at 722 ("[A]n accommodation must be measured so that it does not override other significant interests").

I. The Challenged Regulations Do Not Impose a Substantial Burden On Notre Dame's Exercise of Religion.

A. Notre Dame Can Opt Out of Providing Contraceptive Coverage.

RFRA does not apply unless a governmental action imposes a "substantial burden" on a person's exercise of religion. *See* 42 U.S.C. § 2000bb-1(a). Thus, "[i]n any RFRA case, the starting point is the plaintiff offering proof that the government action in question actually substantially burdens religious exercise." SA 11 (district court opinion) (citing *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752, 760 (7th Cir. 2003) ("*CLUB*"))*; see also Henderson* v. *Kennedy*, 253 F.3d 12, 17 (D.C. Cir.

2001) ("[O]nly *substantial* burdens on the exercise of religion trigger the compelling interest requirement.") (emphasis added).[4]

Unlike the for-profit corporation in *Korte,* Notre Dame may decline to provide contraceptive coverage without facing any penalty. To opt out of this coverage requirement, the University need only complete a form stating that it is an eligible organization and provide a copy to its insurance issuer or third party administrator. *See* 78 Fed. Reg. 39,870-01, 39,874-75 (July 2, 2013); *see, e.g.*, 29 C.F.R. § 2590.715-2713A(a)(4), (b)(1), (c)(1). As the district court observed, Notre Dame would need to inform its insurer and third party administrator of its objection to providing contraceptive coverage even if it "were completely exempt from the contraception requirement," SA 14, to ensure that it would not be responsible for contracting, arranging, paying, or referring for such coverage. Even if Notre Dame were to succeed in this litigation, it would need to inform these third parties of its objection to providing contraceptive coverage.

If the University opts out of providing contraceptive coverage to its students and employees, the regulations require the insurance issuer and third party

[4] The initial version of RFRA prohibited the government from imposing any "burden" on free exercise, substantial or otherwise. Congress amended the legislation to add the word "substantially," "to make it clear that the compelling interest standards set forth in the act" apply "only to Government actions [that] place a substantial burden on the exercise of" religious liberty. 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); *see also id.* (text of Amendment No. 1082).

administrator to make separate payments for contraceptive services for the University's employees and students. The cost of these payments will not be borne by University. The regulations bar the insurance issuer and third party administrator from charging the University, directly or indirectly, with respect to payments for contraceptive services. *See* 45 C.F.R. § 147.131(c)(2)(ii) (insured plans) ("With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries."); 29 C.F.R. § 2590.715-2713A(b)(2)(i) and (ii) (same for self-insured plans).

The insurance issuer or third party administrator—rather than the University—must notify plan participants and beneficiaries of the availability of separate payments for contraceptive services, and "[t]he notice must specify that the [University] does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services[.]" 45 C.F.R. § 147.131(d) (insured plans); *see also* 29 C.F.R. § 2590.715-2713A(d) (same for self-insured plans). The University is therefore not required to "to provide insurance coverage for these drugs and services in violation of [its] faith." *Korte*, 735 F.3d at 684-85.

B. Notre Dame's Ability to Opt Out of Providing Coverage Does Not Substantially Burden Its Exercise of Religion.

The University incorrectly asserts that the regulations require it to "facilitate" contraceptive coverage. *E.g.*, Pl. Br. 4, 13, 19, 24, 31, 32. The five specific "actions or forbearances" itemized at page 27 of its brief confirm that this "facilitation" is simply completing a form conveying that the University does not intend to provide contraceptive coverage and providing copies to its issuer and third party administrator.[5]

(1) Notre Dame argues that it must "[c]ontract with and pay premiums to an insurance company or TPA that is authorized to provide Notre Dame's students or employees with the objectionable coverage." The University does not contend, however, that the regulations require it to enter into new or different contracts, to pay premiums or claims for contraceptive coverage, or to administer such coverage. As discussed above, the regulations prohibit insurance issuers and third party

[5] The district court (SA 6-7) summarized the obligations placed on the University with respect to its employee plan:

> As far as Notre Dame's involvement, they fill out the form stating they are opposed to contraceptive services on religious grounds, and their work is done. At that point the ball is in the court of the TPA to pay for contraceptive services or arrange for payments through an insurer or other entity. Contraception costs are recouped by an insurance company that participates in a federally-run health insurance exchange—the insurer gets a fee adjustment. That money doesn't just cover the money paid out for contraception, but "include[s] an allowance for administrative costs and margin." 78 Fed. Reg. 39,870, 39,880-81[.]

administrators from imposing on an eligible organization any premium, fee, or other charge, directly or indirectly, with respect to payments for contraceptive services. *See* 45 C.F.R. § 147.131(c)(2) (insured plans); 29 C.F.R. § 2590.715-2713A(b)(2)(i) and (ii) (self-insured plans). The University objects only to the fact that the insurance issuer (Aetna) will separately make payments for contraceptives available for students and that the third party administrator (Meritain Health) will make such payments available to employees with costs reimbursed by the government.

(2) Notre Dame states that it will have to "[o]ffer enrollment paperwork for students or employees to enroll in a health plan overseen by an insurance company or TPA that is authorized to provide the objectionable coverage." But the regulations make the insurance issuer and the third party administrator responsible for all paperwork required in connection with claims for contraceptive coverage. *See* 45 C.F.R. 147.131(d) (insurance plans); 29 C.F.R. § 2590.715-2713A(d) (self-insured plans). The University will offer only the same "enrollment paperwork" that it provides to students and employees already. The regulations do not require it to offer any additional or different paperwork.

(3) Notre Dame states that it will be required to "[s]end health-plan-enrollment paperwork (or tell students or employees where to send it) to an insurance company or TPA that is authorized to provide the objectionable coverage." This assertion is a variation of the previous contention that the University is required to provide students and employees with paperwork in connection with its own health plans and it

fails for the same reason. It is the obligation of the health insurance issuer or third party administrator to provide notice that contraceptive coverage is being made available "separate from" materials that are distributed in connection with the eligible organization's group health coverage, and that notice must make clear that the eligible organization is neither administering nor funding the contraceptive benefits. 45 C.F.R. § 147.131(d); 29 C.F.R. § 2590.715-2713A(d).

(4) Notre Dame states that it must "[i]dentify for its insurance company or TPA [third party administrator] which students or employees will participate in Notre Dame's health plan, when the insurance company or TPA is authorized to provide objectionable coverage to those participating students or employees." This assertion is another variation of the paperwork argument. The insurance issuer and third party administrator already have the information they need to make separate payments for contraceptive services for these students and employees. The regulations impose no additional requirement on the University.

(5) Notre Dame states that it must "[r]efrain from canceling its insurance arrangement with an insurance company or TPA authorized to provide objectionable coverage to its students or employees." This assertion reveals the nature of the University's objection. The regulations do not impose any burden on the University, which need only inform Aetna and Meritain Health that it is exercising its right not to provide contraceptive coverage. The University insists, however, that Aetna, Meritain Health, and the government may not separately arrange payments for contraceptive

services for students and employees of the University. At bottom, Notre Dame objects not to requirements placed on itself, but on its inability to veto the actions of others.

The University does not advance its argument by declaring that the form that it provides to the third party administrator of its employee plan "'designat[es]' Notre Dame's 'third party administrator[] as plan administrator and claims administrator for contraceptive benefits,' 78 Fed. Reg. at 39,879, serves as 'an instrument under which [Notre Dame's health] plan[s are] operated,' 29 C.F.R. § 2510.3–16(b), and 'notifies the TPA or issuer of their obligations to provide contraceptive-coverage to [Notre Dame's] employees [and students and to inform them] of their ability to obtain those benefits.'" Pl. Br. 25-26 (alterations in original) (*quoting E. Tex. Baptist Univ.* v. *Sebelius*, No. 12-cv-3009, 2013 WL 6838893, at *11 (S.D. Tex. Dec. 27, 2013)).

The section of the preamble cited by the University makes clear that the import of its self-certification is precisely that described by the district court. The preamble discusses the interaction of ERISA provisions. It explains that the self-certification is "a document notifying the third party administrator(s) that the eligible organization will not provide, fund, or administer payments for contraceptive services," and therefore is "one of the instruments under which the employer's plan is operated under ERISA section 3(16)(A)(i)." 78 Fed. Reg. at 39,879. The form directs third party administrators to their own "obligations set forth in the[] final regulations" and makes clear that the eligible organization has no such obligations. *Ibid.*; *see also* 29

C.F.R. § 2590.715- 2713A(b)(1)(ii)(A) and (B) (form "shall include notice" that "[t]he eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services" and that"[o]bligations of the third party administrator are set forth in [Department of Labor regulations]"). The preamble explains that the third party administrator's legal obligations derive from ERISA section 3(16). Insofar as the result of an eligible organization's opting out is that the third party administrator has its own legal obligations to act in the employer's stead, the form "*will be treated* as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits[.]" 78 Fed. Reg. at 39,879. (emphasis added). The preamble notes that "[t]he Departments have determined that the ERISA section 3(16) approach most effectively enables eligible organizations to avoid contracting, arranging, paying, or referring for contraceptive coverage after meeting the self-certification standard, while also creating the fewest barriers to or delays in plan participants and beneficiaries obtaining contraceptive services without cost sharing." *Ibid.*

In any event, if the University objects to particular aspects of the accommodation for self-insured plans, it is free to offer its employees an insured plan, as it does for its students. *See, e.g., Tony & Susan Alamo Found.* v. *Sec'y of Labor*, 471 U.S. 290, 303-05 (1985) (alternative means to satisfy an obligation obviates a free exercise claim).

The theme of the University's argument is well captured when it asserts that the self-certification by which it opts out of providing contraceptive coverage "'is, in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects.'" Pl. Br. 10 (quoting *S. Nazarene Univ.* v. *Sebelius*, No. 13-cv-1015, 2013 WL 6804265, at *8-9 (W.D. Okla. Dec. 23, 2013)). Notre Dame cannot collapse the provision of contraceptive coverage by third parties with its own decision *not* to provide such coverage. Notre Dame is not providing "permission" to third parties to perform duties established by federal law any more than it provides "permission" to the United States to reimburse the third party administrator for its payments on behalf of individuals availing themselves of contraceptive services without cost-sharing. The University is merely informing third parties that the University is *not* providing coverage so that the insurers and third party administrators can then comply with obligations that are imposed on them, not by Notre Dame, but by federal law. As the district court emphasized, "[t]he only thing that is modified, then, under the accommodation, is that when Notre Dame tells the [third party administrator] not to provide contraception on Notre Dame's plan *the government and the TPA pay for contraception*." SA 14-15 (court's emphasis). And, as the district court explained, "Notre Dame need only step aside from contraception coverage, as it has always done and most assuredly would always do. By opting out it

is not condoning or supporting the government's provision of access to contraception." *Id.* at 16.

C. It is the Province of This Court to Consider Whether Regulations That Allow the University to Decline to Provide Contraceptive Coverage Substantially Burden Plaintiff's Exercise of Religion.

1. Although the University relies heavily on this Court's decision in *Korte,* this case "differs greatly from *Korte* because the accommodation removes the coercion facing private for-profit companies by offering a different choice." SA 15 (district court opinion). Indeed, as the district court observed, "*Korte* itself recognized this important distinction when it stated that the lack of an exemption or accommodation for the for-profit plaintiffs was 'notabl[e],' suggesting that the case might well have come out differently had the *Korte* plaintiffs had access to the accommodation now available to Notre Dame." *Ibid.* (quoting *Korte*, 735 F.3d at 662).

The University is thus wrong to insist that it faces "the exact choice, and the exact penalties, that this Court found imposed a substantial burden in *Korte*." Pl. Br. 30. Unlike the for-profit corporation in *Korte,* the University can decline to provide coverage and face no penalties at all.

2. The University declares, however, that "[w]hile this religious exercise is different from the religious exercise at issue in *Korte*, any attempt to distinguish this case is wholly unavailing because RFRA protects 'any exercise of religion,' 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A)." Pl. Br. 28. In plaintiff's view, it is thus immaterial whether it is required to offer and pay for contraceptive coverage—like the plaintiff

corporation in *Korte*—or whether it may decline to do so. Nothing in *Korte* supports this assertion. *See Korte* at 735 F.3d at 687 (plaintiff corporations "are asking for relief from a regulatory mandate that coerces *them* to pay for something—insurance coverage for contraception") (court's emphasis).

In parallel litigation, the Archdiocese of Washington has urged the Supreme Court that "[t]he Government could provide the contraceptives services or insurance coverage directly to plaintiffs' employees, or work with third parties—be it insurers, health care providers, drug manufactures, or non-profits—to do so without requiring plaintiffs' active participation." Petition for a Writ of Certiorari before Judgment 25, *Roman Catholic Archbishop of Washington* v. *Sebelius*, No. 13-829 (S. Ct.). Under the existing regulations, the government *is* working with insurers to provide "insurance coverage directly to plaintiff[]' employees." Plaintiff is required only to inform the insurers that it will not be providing coverage itself. It is for a court to determine whether this requirement constitutes a substantial burden.

3. Although a court must accept a litigant's sincerely held religious beliefs, it also must assess the nature of a claimed burden on religious exercise to determine whether, as a legal matter, that burden is substantial. Notre Dame cannot preclude that inquiry by collapsing the question of substantial burden into the sincerity of its beliefs. Were that the case, any individual or religious institution would not only be able to declare a sincerely held religious belief but would also be able to demand

absolute deference to its assessment of what constitutes a substantial burden on that belief.

Nevertheless, the University is quite clear that, in its view, a court is bound to accept its position that the opt-out provision imposes a substantial burden on its exercise of religion. It declares: "Simply put, 'federal courts are not empowered to decide . . . religious questions.'" Pl. Br. 19 (*quoting McCarthy* v. *Fuller*, 714 F.3d 971, 980 (7th Cir. 2013)). Accordingly, plaintiff asserts that, "[w]hile the Government, and the court below, may 'feel[] that the accommodation sufficiently insulates [Notre Dame] from the objectionable services, . . . it is not the Court's role to say that plaintiffs are wrong about their religious beliefs.'" *Ibid.* (*quoting Roman Catholic Archdiocese of N.Y.* v. *Sebelius*, No. 12-cv-2542, 2013 WL 6579764, at *14 (E.D.N.Y. Dec. 16, 2013)).

Plaintiff's proposition does not accord with settled law. Whether a burden is "substantial" under RFRA is a question of law, not a "question[] of fact, proven by the credibility of the claimant." *Mahoney* v. *Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011); *see, e.g., Bowen* v. *Roy*, 476 U.S. 693, 701 n.6 (1986) ("Roy's religious views may not accept this distinction between individual and governmental conduct" but the law "recognize[s] such a distinction"); *Kaemmerling* v. *Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) ("[a]ccepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened").

The extent of the University's misunderstanding is suggested by its reliance on *McCarthy* v. *Fuller*, which provides no support for the position it asserts here. *McCarthy* was a defamation action concerning, among other things, a dispute about the defendant's status as a member of a religious order. This Court held that "insofar as [the defendant] is simply disagreeing with the Holy See's denial that she is a nun or a sister, the federal judiciary has no authority to entertain the argument." 714 F.3d at 978. The Court's refusal to second-guess a determination as to whether the defendant was, in fact, a nun, does not indicate that it is without power to determine whether a regulation substantially burdens a religious belief.

The University's attempt to distinguish *Kaemmerling* is equally unavailing. The University asserts that the plaintiff in that case "did not object to any action he was forced to take, but only 'to the government extracting DNA information from . . . specimen[s]' *it already had*." Pl. Br. 35-36 (quoting *Kaemmerling,* 553 F.3d at 679) (plaintiff's emphasis). That is not an accurate account of the decision. The law at issue in that case required Kaemmerling to give "'a tissue, fluid, or other bodily sample . . . on which a[n] . . . analysis of the [DNA] identification information' can be carried out[.]" 553 F.3d at 673. That sample was to be used by the FBI to "creat[e] the donor's unique DNA profile" and "record[] a copy of the profile in the CODIS [database]." *Ibid.* Kaemmerling sought a preliminary injunction before a sample was collected. *See* Opening Brief of Appointed *Amicus Curiae*, 2008 WL 2520867, at * at *8, *51-*52 (discussing motion for TRO and risk that Kaemmerling would be forced

to give a sample). He "alleged that . . . *submitting to* DNA 'sampling, collection and storage with no clear limitations of use' is repugnant to his strongly held religious beliefs" against "the collection and retention of his DNA information." 553 F.3d at 674 (emphasis added); *see also id.* at 678. He posited that he would be forced "either [to] comply with the Act or . . . to violate a sincerely held religious belief," and that "forced participation in the seizure of blood for storage, [and] DNA sampling" was a substantial burden. Brief of Appellant, 2008 WL 2520866, at *19, *21. A court-appointed *amicus curiae* supporting the *pro se* plaintiff explained, based on the complaint and record, that Kaemmerling objected to taking an active role in the process of DNA analysis by "'*submitting to* DNA sampling, collection and storage.'" Opening Brief of Appointed *Amicus Curiae*, 2008 WL 2520867, at *41 (quoting App. 14-15) (emphasis added); *see also id.* at *40-*41 (urging that Act "'forc[es] [him] *to provide* DNA samples'" and stating that his "'religious beliefs do not allow [him] *to consent* to DNA sampling.'") (quoting App. 72) (emphasis added).

Concluding that Kaemmerling had failed to allege a "substantial burden" under RFRA, the D.C. Circuit explained 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" he has given a tissue sample. 553 F.3d at 679. "The government's extraction, analysis, and storage of Kaemmerling's DNA information does not call for Kaemmerling to modify his religious behavior in any way[.]" *Ibid.*

Thus, like the University in this case, Kaemmerling did not contend that his own action (giving a sample of hair or blood) was objectionable in itself. Instead, like the University here, he objected to subsequent actions by others, claiming that his religion required him not to cooperate with "DNA sampling"—the action that would subsequently be taken by the government.

Plaintiff's discussion of other case law is similarly wide of the mark. In *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981), for example, the plaintiff's "religious beliefs prevented him from participating in the production of war materials." *Id.* at 709. When his employer transferred him "to a department that fabricated turrets for military tanks," he looked for openings in departments not "engaged directly in the production of weapons," and, when he could not find one, quit his job. *Id.* at 710. He was denied unemployment compensation on the ground that "a termination motivated by religion is not for 'good cause' objectively related to the work." *Id.* at 711-13.

The Supreme Court held that the state could not deny unemployment compensation "because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs[.]" *Id.* at 717-18. Notably, Thomas objected to *his* "fabricat[ing] turrets for military tanks." *Id.* at 710; *see id.* at 711 (finding that he objected to "producing or directly aiding in the manufacture of items used in warfare"). He did not object to *opting out* of doing so. Indeed, Thomas looked for jobs in the same company not

"engaged directly in the production of weapons." *Id.* at 710; *see also id.* at 711-12 (""Claimant continually searched for a transfer to another department which would not be so armament related""). The burden in *Thomas* thus resulted from the absence of the type of opt-out mechanism available in this case. Thomas did not suggest that his religious rights would be burdened if, as a consequence of his actions, *another employee* was assigned to work on armaments manufacture.

In short, while this Court does not scrutinize the sincerity of the University's religious beliefs, it properly determines whether the challenged regulations impose a substantial burden on those beliefs. Unlike the plaintiffs in *Korte,* the University may decline to provide contraceptive coverage without facing any penalties. RFRA does not allow the University to block the government and third parties from making payments for contraceptive services in its stead.[6]

II. The University Has Not Identified Any Violation of Its Rights Under the Free Exercise, Free Speech, or Establishment Clauses of the First Amendment.

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

The Free Exercise Clause is not implicated by laws that are neutral and generally applicable. *See Employment Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S.

[6] Even if the regulations were found to impose more than a *de minimis* burden on the exercise of religion, any such burden would be too attenuated to be substantial and would be "the least restrictive means of furthering [a] compelling governmental interest," 42 U.S.C. § 2000bb-1(b). In light of *Korte*, we have not made these arguments at this juncture.

872, 879 (1990). Even assuming *arguendo* that the contraceptive-coverage provision burdens plaintiff's exercise of religion, there would be no violation of the Free Exercise Clause because that burden is imposed by a neutral and generally applicable requirement.

Plaintiff incorrectly asserts that the challenged regulation "is not 'neutral' because it is specifically targeted at Notre Dame's religious practice of refusing to facilitate access to or participate in the Government's scheme to provide objectionable products and services." Pl. Br. 42. It urges that the government "was acutely aware that any gap in coverage for contraception was due primarily to the religious beliefs and practices of employers such as the Catholic Church," and infers that the coverage requirement was therefore aimed at these religious beliefs. *Ibid.*

As the district court explained, "there is nothing to support [the University's] inference" that "the contraceptive requirement is aimed at religious objectors." SA 27-28. Although Notre Dame focuses on the contraceptive-coverage provision, "the women's preventive health care requirements include many services completely unrelated to contraception, many of which Notre Dame does not appear to contest." *Ibid.* "The fact that contraceptive services are included among a bevy of other services that must be offered is not evidence that the government is targeting those who object to contraception on religious grounds. On the contrary, the comprehensive approach to women's health issues laid out in the ACA proves the precise opposite." *Ibid.*

The court noted that the legislative history confirms "that the purpose of the women's preventive healthcare requirements were not related to religion. As articulated by its sponsor, the purpose of the women's health requirements is to 'guarantee[] women access to lifesaving preventive services and screenings,' and remedying gender discrimination in health insurance and the fact that '[w]omen are more likely than men to neglect care or treatment because of cost.'" SA 29 (quoting 155 Cong. Rec. S11985, S11986 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski)); *see also, e.g.,* 155 Cong. Rec. S12265, S12271 (daily ed. Dec. 3, 2009) (statement of Sen. Franken) ("The problem [with the current bill] is, several crucial women's health services are omitted. [The Women's Health Amendment] closes this gap."); 155 Cong. Rec. S12021-02, S12027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand) (". . . in general women of childbearing age spend 68 percent more in out-of-pocket health care costs than men. . . . This fundamental inequity in the current system is dangerous and discriminatory and we must act.").

The district court also rejected the University's contention that the preventive services coverage regulations are not generally applicable because of statutory provisions that pertain to small businesses and grandfathered plans. The court explained that "[t]he categories that the ACA creates and of which Notre Dame complains are objectively delineated, without reference to religion. They do not make the law not neutral." SA 30 (citing *United States* v. *Lee*, 455 U.S. 252, 260-61 (1982)

(social security tax requirements constitutional notwithstanding the system's categorical exemptions).

Plaintiff's reliance (Pl. Br. 41) on *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520, 531 (1993), underscores the error in its reasoning. In that case, the legislature specifically targeted the religious exercise of members of a single church (Santeria) by enacting ordinances that used terms such as "sacrifice" and "ritual," 508 U.S. at 533-34, and prohibited few, if any, animal killings other than Santeria sacrifices, *id.* at 535-36. The statute was drawn so "that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering to the orishas, not food consumption." *Id.* at 536. "Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished." *Ibid.* *Lukumi* does not remotely suggest that an exemption from the contraceptive-coverage provision for plans offered by churches and other houses of worship is evidence that the government targeted the religious practices of any church or denomination.

B. The Regulations Do Not Violate the Free Speech Clause of the First Amendment.

As the district court noted, the University "alleges two separate free speech violations: first, that the government compels it to speak contrary to its beliefs, and second, that the regulations contain a 'gag order' prohibiting Notre Dame from

speaking as it wishes." SA 35 (emphasis omitted). The district court correctly held that neither claim has merit.

1. Plaintiff's "compelled speech" argument has two prongs. First, plaintiff argues that the regulations "require[] Notre Dame to facilitate access to and become entangled in the provision of coverage for 'counseling' related to abortion-inducing products, contraception, and sterilization for its employees." Pl. Br. 45. Among the incorrect premises underlying this assertion is assumption that the University becomes "entangled in the provision of coverage for 'counseling'" by declining to provide insurance coverage for counseling.

Even apart from the University's ability to opt out of the contraceptive coverage requirement, its argument would fail because the challenged provisions regulate the terms of group health plans, not the content of communications between patients and their healthcare providers. The regulations require coverage of "'education and counseling for all women with reproductive capacity' as prescribed by a provider," 77 Fed. Reg. at 8725 (quoting HRSA Guidelines), and do not require that this counseling encourage any particular service.

The second prong of the "compelled speech" argument urges that the act of opting out of providing contraceptive coverage is itself speech and "triggers provision of the objectionable products and services, and . . . deprives Notre Dame of the freedom to speak on the issue of abortion and contraception on its own terms[.]" Pl. Br. 46. This assertion is inexplicable. The requirement to complete an

opt-out form does not constrain the University's speech on any topic; on the contrary, the Departments emphasized in that "[n]othing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." SA 36 (quoting 78 Fed. Reg. 39,870, 39,880 n.41). Moreover, by opting out, the University would explicitly proclaim its objection to contraception. The University need not "do or say anything it wouldn't do *or* say otherwise" (SA 35), and completion of the self-certification form is "plainly incidental to the . . . regulation of conduct," *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006).

2. Plaintiff's "gag order" claim challenges the provision stating that eligible organizations shall not "directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements." 29 C.F.R. § 2590.715-2713A(b)(1)(iii). As the district court observed, the Departments emphasized in promulgating this provision that "'[n]othing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives,'" SA 36 (quoting 78 Fed. Reg. at 39,880 n.41). "The text accompanying the final rules could not be clearer that Notre Dame is free to speak all it wants," and "[t]he prohibition on influencing the TPA must involve something more than expressing Notre Dame's views." *Ibid.* As the court explained, "the regulations don't prohibit speech, but instead prevent[] 'an employer's improper

attempt to interfere with its employees' ability to obtain contraceptive coverage from a third party[.]" *Ibid.* (quoting Gov't Opp. to Preliminary Injunction at 22).

The Supreme Court has long recognized that it is not "an abridgment of freedom of speech" to "make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." *Ohralik* v. *Ohio State Bar Ass'n,* 436 U.S. 447, 456 (1978) (citation and internal quotation marks omitted). Thus, the Supreme Court has distinguished between "an employer's free speech right to communicate his views" and a right to make "threat[s] of reprisal or force or promise of benefit." *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969); The district court correctly rejected plaintiff's attempt to characterize the regulation as an impermissible "gag order."

C. The Regulations Do Not Violate the Establishment Clause of the First Amendment.

The University asserts that the regulations violate the Establishment Clause of the First Amendment by "creat[ing] an artificial, Government-favored category of 'religious employers,' which favors some types of religious organizations and denominations over others," and by "creat[ing] an excessive entanglement between government and religion." Pl. Br. 47.

Under the regulations, an organization is a "religious employer" if it "is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended[.]"

45 C.F.R. § 147.131(a). If it does, it qualifies for the exemption, without any government action whatsoever.

This exception does not impermissibly favor some religions over others. Although the University apparently believes that these provisions of the tax code are unconstitutional, it offers no plausible basis for its contentions. As the district court explained, the University's reliance on *Larson* v. *Valente*, 456 U.S. 228, 244 (1982) is entirely misplaced. SA 32. The statute held unconstitutional in that case was "drafted with the explicit intention" of requiring "particular religious denominations" to comply with registration and reporting requirements while excluding other religious denominations. *Larson*, 456 U.S. at 254; *see also id.* at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). No similar circumstance exists here: the challenged exemption does not grant any denominational preference or otherwise discriminate among religions. *See Gillette* v. *United States*, 401 U.S. 437, 450-51 (1971) (upholding exemption from the draft); *Walz* v. *Tax Comm'n of the City of New York*, 397 U.S. 664, 666 (1970) (upholding property tax exemptions for real property owned by religious organizations and used exclusively for religious worship); *see also Larson*, 456 U.S. at 246 n.23 ("[C]onscientious objector status was available on an equal basis to both the Quaker and the Roman Catholic.")

Nor does this exception entangle the government. The University objects to a longstanding, non-exhaustive, and non-binding list of factors that the IRS uses when

determining whether an organization is a church. *See* Pl. Br. 49-52. But the University does not challenge any determination that has been made using those factors or explain how its objection to those factors bear on the regulation at issue here. The qualification for the religious employer exemption does not require the government to make any determination, whether as a result of the application of the non-exhaustive list or otherwise.

CONCLUSION

The denial of a preliminary injunction should be affirmed.

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

DAVID A. CAPP
United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

/s/ Mark B. Stern
MARK. B. STERN
ALISA B. KLEIN
ADAM C. JED
(202) 514-5089
Attorneys, Appellate Staff
Civil Division, Room 7531
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

JANUARY 2014

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,195 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Mark B. Stern
Mark B. Stern

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Mark B. Stern
Mark B. Stern