No. 14-2396

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

WHEATON COLLEGE,

Plaintiff-Appellant,

v.

SYLVIA M. BURWELL, Secretary of the United States Department of Health and Human Services; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; THOMAS E. PEREZ, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Illinois

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BRIEF FOR THE APPELLEES

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INTRODUCTION

The Affordable Care Act established additional minimum standards for group health plans, including coverage of certain preventive health services for women without cost sharing. The regulations implementing this provision generally require group health plans to include coverage of contraceptive services as prescribed by a health care provider without cost sharing.

The regulations contain accommodations, however, for plans established by non-profit organizations that hold themselves out as religious organizations and that have a religious objection to contraceptive coverage. Such an organization may opt out of the contraceptive coverage requirement by notifying either its insurer or third party administrator or by notifying the Secretary of Health and Human Services (HHS) that the organization is eligible for an accommodation and is declining to provide contraceptive coverage. When an eligible organization declines to provide such coverage, the regulations generally require the insurer or third party administrator to provide contraceptive coverage separately for the affected women, at no cost to the eligible organization.

Plaintiff in this appeal is eligible for an accommodation and therefore is not required to provide contraceptive coverage, but nevertheless claims that the regulations violate its rights under the Religious Freedom Restoration Act (RFRA). The implications of plaintiff's argument are sweeping. It is one thing to urge that the government may not impose a requirement to provide contraceptive coverage on a

religious organization that objects on religious grounds. It is quite another thing to urge that the government may not ensure that women have access to separate coverage through third parties after an objecting organization exercises its option not to provide such coverage. That latter argument, if accepted, would make women's access to contraceptive coverage dependent upon the religious beliefs of their employers.

The theory rejected by the district court in this case is fundamentally mistaken, as every court of appeals to have addressed the issue has ruled. *See Geneva Coll. v. Secretary, U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015), *reh'g en banc denied*, Nos. 14-1376, 14-1377 (Apr. 6, 2015), Nos. 13-3536, 14-1374 (Apr. 13, 2015)[1]; *Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014), *petition for reh'g en banc filed*, Nos. 13-5368, 13-5371, 14-5021 (Dec. 26, 2014); *see also Michigan Catholic Conference v. Burwell*, 755 F.3d 372 (6th Cir. 2014), *vacated*, No. 14-701, 2015 WL 1879768 (S. Ct. Apr. 27, 2015); *University of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014), *vacated*, 135 S. Ct. 1528 (2015).[2]

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[1] In two of the Third Circuit appeals, Circuit Justice Alito entered an administrative stay of the mandate, pending further decision on a motion to stay the mandate. *Zubik v. Burwell*, No. 14A1065 (S. Ct.). This prompted the Third Circuit to recall and stay the mandate in the other appeals pending the Supreme Court's further action in *Zubik*. *See* No. 13-3536 (3d Cir.) (order of May 6, 2015).

[2] In *Michigan Catholic Conference* and *Notre Dame*, the Supreme Court granted petitions for writs of certiorari, vacated the decisions below, and remanded (GVR) for further consideration in light of the subsequent decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). "A GVR makes no decision as to the merits of a

Continued on next page.

The infirmity of plaintiff's position is further underscored by the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). The Supreme Court in that case held that the contraceptive coverage requirement violated RFRA with respect to closely held for-profit corporations that—unlike plaintiff here—could not opt out of the requirement. The linchpin of the Court's "very specific" holding in *Hobby Lobby* was the existence of the opt-out alternative afforded to organizations such as plaintiff in this case. *Id.* at 2759-60. The Court explained that the opt-out regulations "effectively exempt[]" organizations that are eligible for an accommodation. *Id.* at 2763. The Court also recognized that the regulations "seek[] to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." *Id.* at 2759. The Court also stressed that the effect of its decision on employees and beneficiaries "would be precisely zero," because if the accommodations were made available to for-profit organizations, "these women would still be entitled to all FDA-approved contraceptives without cost

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case," *Diaz v. Stephens*, 731 F.3d 370, 378 (5th Cir. 2013), and "does not indicate, nor even suggest, that the lower court's decision was erroneous." *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 459 F.3d 676, 680 (6th Cir. 2006); *accord, e.g., Gonzalez v. Justices of Mun. Court of Boston*, 420 F.3d 5, 7-8 (1st Cir. 2005). Rather, a GVR "promotes fairness and respects the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments that were not previously before it." *Stutson v. United States*, 516 U.S. 193, 197 (1996).

sharing," *id.* at 2760, and "they would continue to face minimal logistical and administrative obstacles because their employers' insurers would be responsible for providing information and coverage," *id.* at 2782 (internal quotation marks and citation omitted).

Because plaintiff is eligible for the accommodation it is, in the words of the Supreme Court, "effectively exempt[]," *Hobby Lobby*, 134 S. Ct. at 2763, from the contraceptive coverage requirement. Plaintiff's argument goes beyond its own exemption from providing contraceptive coverage and would preclude the government from independently ensuring that the affected employees have the "same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." *Id.* at 2759. That argument lacks support in precedent and contradicts the reasoning of *Hobby Lobby*.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1361. JA33. On June 23, 2014, the district court denied plaintiff's motion for a preliminary injunction. JA8-26. On June 26, 2014, plaintiff filed a notice of interlocutory appeal. Dkt. 65. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the Religious Freedom Restoration Act allows non-profit employers not only to opt out of providing federally required health coverage for

contraception, but also to block accommodations that allow women to obtain separate payments for contraception from third parties.

2. Whether regulations that allow plaintiff to opt out of providing contraceptive coverage violate plaintiff's rights under the First Amendment.

3. Whether the challenged regulations violate the Administrative Procedure Act.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

1. Coverage requirements for women's preventive health services

Congress has long regulated employer-sponsored group health plans. In 2010, the Patient Protection and Affordable Care Act (Affordable Care Act or Act), Pub. L. No. 111-148, 124 Stat. 119,[3] established certain additional minimum standards for group health plans as well as for health insurance issuers that offer coverage in the group and the individual health insurance markets.

The Act requires non-grandfathered group health plans and health insurance issuers offering non-grandfathered health insurance coverage to cover four categories of 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

[3] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

screenings for women as provided for in comprehensive guidelines supported by the Health Resources and Services Administration (HRSA), a component of HHS. *Id.* § 300gg-13(a)(4); *see Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014).

HHS requested the assistance of the Institute of Medicine (IOM) in developing such comprehensive guidelines for preventive services for women. 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012). Experts, "including specialists in disease prevention, women's health issues, adolescent health issues, and evidence-based guidelines," developed a list of services "shown to improve well-being, and/or decrease the likelihood or delay the onset of a targeted disease or condition." IOM, *Clinical Preventive Services for Women: Closing the Gaps* 2-3 (2011) (IOM Report). These services included the "full range" of "contraceptive methods" approved by the Food and Drug Administration, *id.* at 10; *see id.* at 102-10, which the Institute of Medicine 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 102-09.

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 health care provider. 77 Fed. Reg. at 8725 (brackets in original; citation omitted); *see Hobby Lobby*, 134 S. Ct. at 2762. The relevant regulations adopted by the three Departments implementing this portion of the Act (HHS, Labor, and Treasury) require coverage of, among other things,

preventive services, including the contraceptive methods 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).[4]

2. The regulatory accommodations for non-profit religious organizations

The implementing regulations also establish accommodations for non-profit organizations, like plaintiff here, that hold themselves out as religious organizations and that have a religious objection to contraceptive coverage. The Departments developed these accommodations to "meet two goals—providing contraceptive coverage without cost-sharing to covered individuals and accommodating the religious objections of [additional] non-profit organizations[.]" *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012) (per curiam) (quoting 77 Fed. Reg. at 8727). Regulations promulgated in July 2013 provided that to opt out, an organization need only declare its eligibility using a standard form to its insurance issuer or third party administrator. *Hobby Lobby*, 134 S. Ct. at 2782. An organization that opts out is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). The Departments subsequently augmented the regulatory accommodations to provide eligible organizations with an alternative means of opting out of the

[4] All citations to the implementing regulations are to those regulations as amended by the August 2014 interim final regulations.

contraceptive coverage requirement by providing notice to HHS. 79 Fed. Reg. 51,092 (Aug. 27, 2014).

The accommodations are available to group health plans established or maintained by an organization that qualifies as an "eligible organization" (and group health insurance coverage provided in connection with such a plan). 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.

45 C.F.R. § 147.131(b); *see* 29 C.F.R. § 2590.715-2713A(a); 26 C.F.R. § 54.9815-2713A(a); 78 Fed. Reg. at 39,874-39,875.[5]

To opt out of providing contraceptive coverage, an eligible organization provides notice to its insurers or third party administrators or to HHS that it is an

[5] "'[C]hurches, their integrated auxiliaries, and conventions or associations of churches,' as well as 'the exclusively religious activities of any religious order'" are automatically exempt from the contraceptive-coverage requirement under a separate regulation that cross-references the Internal Revenue Code. *Hobby Lobby*, 134 S. Ct. at 2763 (quoting 26 U.S.C. § 6033(a)(3)(A) and citing 45 C.F.R. § 147.131(a)).

eligible organization that objects to providing coverage for some or all contraceptive services. 45 C.F.R. § 147.131(c)(1).[6] If the organization elects to give notice to its insurer or third-party administrator, it does so using a standard form supplied by the Departments. *Hobby Lobby*, 134 S. Ct. at 2782.

If an organization instead chooses to notify HHS, the organization need not use any particular form and need only indicate the basis on which it qualifies for an accommodation and its objection to providing some or all contraceptive services, as well as the type of plan and contact information for the plan's third party administrators and health insurance issuers. 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii); 45 C.F.R. § 147.131(c)(1)(ii). The Departments will then make the necessary communications to the health insurance issuers or third party administrators that make or arrange separate payments for contraception. 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B); 45 C.F.R. § 147.131(c)(1)(ii). Where the eligible organization is self-insured, the Department of Labor's communication to the third party administrator(s) will ordinarily "designate the relevant third party administrator(s) as plan administrator under section 3(16) of ERISA for those contraceptive benefits that

[6] At the time this case was before the district court, the Departments had not yet offered eligible organizations the ability to opt out by providing notice to the Secretary. This alternative was subsequently added in response to a Supreme Court order that gave interim injunctive relief to Wheaton College, discussed below. *See Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014); 79 Fed. Reg. at 51,094.

the third party administrator would otherwise manage." 79 Fed. Reg. at 51,095; *see also* 29 C.F.R. § 2510.3-16(b).[7]

If an eligible organization opts out using either mechanism, individuals covered under its plan generally will "still have access to insurance coverage without cost sharing for all FDA-approved contraceptives," *Hobby Lobby*, 134 S. Ct. at 2759, but without the objecting organization's involvement. Where the eligible organization offers an insured plan, the insurance issuer is required to "provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries." *Id.* at 2763; *see* 45 C.F.R. § 147.131(c)(2). The issuer must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the . . . plan," 45 C.F.R. § 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).[8] Where the

[7] An employer has a "self-insured" plan if it bears the financial risk of paying claims. Many self-insured employers use insurance companies or other third parties to administer their plans. These third party administrators perform functions such as developing networks of providers, negotiating payment rates, and processing claims. 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).

[8] This accommodation requires the issuer to bear the expense of providing contraceptive coverage, but does not impose any net cost because the additional

Continued on next page.

eligible organization offers a self-insured plan, the third party administrator ordinarily "must 'provide or arrange payments for contraceptive services' for the organization's employees without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries." *Hobby Lobby*, 134 S. Ct. at 2763 n.8 (quoting 78 Fed. Reg. at 39,893); *see* 29 C.F.R. § 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 the Federally-facilitated Exchange user fee[s]." 29 C.F.R. § 2590.715-2713A(b)(3); *see* 45 C.F.R. § 156.50(d).

In all cases, the objecting organization will not contract for or in any way pay for this separate coverage. 78 Fed. Reg. at 39,874, 39,887. The organization also need not inform plan participants or enrollees of the coverage provided by third parties. Instead, insurance issuers or third party administrators provide such notice and do so "separate from" materials that are distributed in connection with the eligible organization's group health coverage. 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(d). That notice must make clear that the eligible organization is not administering or funding the contraceptive benefits. *Id.*

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expense is offset by the cost savings resulting from the coverage of contraceptive services. *Hobby Lobby*, 134 S. Ct. at 2763; *see* 78 Fed. Reg. at 39,877.

B. Factual Background And Prior Proceedings

1. Plaintiff, Wheaton College, provides health coverage to thousands of students, employees, and dependents. Plaintiff offers health coverage to its approximately 3,000 students consisting of an insured plan issued by Companion Life Insurance Company. JA36-37, JA56. Plaintiff also provides three health insurance plans to its 709 full-time employees and their dependents: two HMO plans through BlueCross/BlueShield of Illinois and one PPO plan, which is self-insured and administered by BlueCross/BlueShield of Illinois. JA37, JA56, JA80, JA84, JA91, JA93.[9] Plaintiff also offers two self-funded prescription drug plans. JA56.

Plaintiff concedes that it is eligible to opt out of providing contraceptive coverage under the accommodations described above. Plaintiff, however, contends that these accommodations violate its rights under RFRA, 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. 42 U.S.C. § 2000bb-1. Plaintiff argues that opting out of the contraceptive coverage requirement substantially burdens its religious exercise because doing so "trigger[s] and facilitate[s]" other parties providing contraceptive coverage in

[9] Plaintiff alleges that as of 2013, the PPO plan was grandfathered and thus not subject to the contraceptive coverage requirement. JA56.

its stead. JA32-33. In addition to its RFRA claims, plaintiff also asserts claims under the First Amendment and the Administrative Procedure Act. JA64-77.[10]

2. Plaintiff filed a motion for a preliminary injunction. The district court denied the motion, holding that plaintiff was unlikely to succeed on the merits. JA8-26. The court concluded that plaintiff cannot "establish[] a substantial burden" under RFRA by collapsing its decision to opt out of providing contraceptive coverage with the fact that after it opts out, the government requires third parties, such as BlueCross, to provide separate coverage. JA15-18. The court explained that when plaintiff opts out, "[f]ederal law, not [plaintiff's] signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services." JA16 (quoting *University of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014), *vacated*, 135 S. Ct. 1528 (2015)). The court similarly concluded that plaintiff was unlikely to succeed on its First Amendment Religion Clause claims. JA18-20. The court further found that plaintiff's APA claim was "not persuasive" and "closely related" to the unsuccessful religion clause argument. JA20-21. And the court held that plaintiff was also not entitled to relief based on its First Amendment free speech claim. JA22-23.

[10] Plaintiff asserted additional causes of action before the district court, which are not at issue in this appeal. *See* JA9 (noting plaintiff moved for preliminary injunction as to only six of the sixteen counts in the complaint).

Plaintiff unsuccessfully sought emergency relief from this Court. App. Dkt. 12. Plaintiff then sought relief in the Supreme Court. In *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), the Supreme Court entered an interim order providing that, "[i]f [Wheaton College] informs the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services, the [Departments] are enjoined from enforcing against" Wheaton College the applicable provisions of the ACA and related regulations "pending final disposition of appellate review." *Id.* at 2807. The Court specified that "[n]othing in [its] order precludes the Government from relying on" the written notice provided by Wheaton "to facilitate the provision of full contraceptive coverage under the Act." *Id.* Accordingly, the Court explained, that "[n]othing in [its] interim order affect[ed] the ability of [Wheaton College's] employees and students to obtain, without cost, the full range of FDA approved contraceptives." *Id.* The order concluded that it "should not be construed as an expression of the Court's views on the merits." *Id.*

Consistent with the *Wheaton College* order, the Departments have provided notice to the insurers and third party administrators of plaintiff's employee and student health plans, notifying them that plaintiff has opted out and informing them of their obligation under the regulations to provide contraceptive coverage in plaintiff's stead, without cost to or involvement by Wheaton. The Departments also responded by issuing interim final regulations, giving all eligible organizations the

ability to opt out by providing notice directly to HHS. 79 Fed. Reg. at 51,094; *see also supra* note 6.

SUMMARY OF ARGUMENT

I. The regulations implementing the Affordable Care Act generally require that group health plans include coverage for FDA-approved contraceptives as prescribed by a health service provider without cost sharing. The regulations also provide, however, that non-profit religious organizations can opt out of the contraceptive coverage requirement, and it is not controverted that plaintiff is eligible for those accommodations. Plaintiff is therefore "effectively exempt[]," *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2763 (2014).

Plaintiff argues, however, that the act of opting out itself burdens its practice of religion because its decision not to provide coverage "triggers" the independent provision of contraceptive coverage by third parties. As every court of appeals to have addressed the issue has recognized, "the accommodation[s] here work[] [as] such mechanisms ordinarily do," "reliev[ing] Plaintiff[] from the obligation to provide or pay for contraceptive coverage, and instead obligat[ing] [or offering] a third party to provide that coverage separately." *Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 250-52 (D.C. Cir. 2014), *petition for reh'g en banc filed*, Nos. 13-5368, 13-5371, 14-5021 (Dec. 26, 2014). After plaintiff opts out, "the insurers' or TPAs' obligation to provide contraceptive coverage originates from the ACA and its attendant regulations, not from Plaintiff[']s self-certification or alternative notice." *Id.*

at 252; *see Geneva Coll. v. Secretary, U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 437 (3d Cir. 2015) ("*Federal law*, rather than any involvement by the appellees in filling out or submitting the self-certification form, creates the obligation of the insurance issuers and third-party administrators to provide coverage for contraceptive services."), *reh'g en banc denied*, Nos. 14-1376, 14-1377 (Apr. 6, 2015), Nos. 13-3536, 14-1374 (Apr. 13, 2015), subsequent history at *supra* n.1. The Supreme Court has also suggested that the government may "rely[] on" a notice from objecting parties—specifically, plaintiff here—to "facilitate the provision of full contraceptive coverage under the Act." *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014).

Plaintiff would transform RFRA from a shield into a sword by invoking its own religious beliefs to preclude women from receiving health coverage for recommended preventive health care services from third parties. That position finds no support in precedent and is sharply at odds with the Supreme Court's analysis in *Hobby Lobby*. There, the Supreme Court addressed a different group of employers not at issue in this case, *i.e.*, for-profit employers not eligible for the accommodations, and contrasted their obligations to those of non-profit religious organizations such as the plaintiff here. The Court explained that the opt-out regulations "effectively exempt[]" eligible non-profit religious organizations, 134 S. Ct. at 2763, and do so by "seek[ing] to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved

contraceptives as employees of companies whose owners have no religious objections to providing such coverage," *id.* at 2759.

The regulations provide opt-out mechanisms that respect religious liberty while allowing the government to achieve its "compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee." *Hobby Lobby*, 134 S. Ct. at 2785-86 (Kennedy, J., concurring); *accord id.* at 2800 & n.23 (Ginsburg, J., dissenting). They offer an administrable way for organizations to state that they object and opt out—including without contacting their insurers or third party administrators directly—while ensuring that the government has the information needed to implement the independent obligation that third parties provide contraceptive coverage so that participants and beneficiaries can "obtain, without cost, the full range of FDA approved contraceptives." *Wheaton Coll.*, 134 S. Ct. at 2807. As the Supreme Court emphasized in *Hobby Lobby*, "[t]he effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be *precisely zero*." 134 S. Ct. at 2760 (emphasis added).

Plaintiff's position ignores the Supreme Court's repeated admonition that "in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'" *Hobby Lobby*, 134 S. Ct. at 2781 n.37 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)); *see also id.* at 2787 (Kennedy, J., concurring) (explaining that the free exercise of religion protected by

RFRA cannot "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling").

II. The district court correctly rejected plaintiff's additional claims. First, plaintiff's free speech claims are meritless. The requirement that plaintiff provide notice that it wishes to opt out of providing contraceptive coverage "no more compels [its] speech in violation of the First Amendment than does demanding that a conscientious objector self-identify as such." *Priests For Life*, 772 F.3d at 271. Plaintiff's challenge to the so-called "noninterference provision" of the original regulations was rendered moot by the Departments' interim final regulations, which rescinded that provision. Plaintiff's attempt to manufacture a new "noninterference provision" is based on a simple misreading of the interim final regulations.

Second, the regulations do not favor some churches or denominations over others in violation of the Establishment Clause. As the D.C. Circuit recognized in *Priests For Life*, 772 F.3d at 273, the regulations here are wholly dissimilar to the statute at issue in *Larson v. Valente*, 456 U.S. 228 (1982), on which plaintiff relies, 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. To the extent plaintiff is also invoking the Free Exercise Clause, that clause is not implicated here because the regulations are neutral and generally applicable.

Third, plaintiff's APA claims are without merit. Plaintiff argues that the contraceptive coverage regulations violate the Employee Retirement Income Security Act of 1974 (ERISA). In rejecting a similar argument in *Priests For Life*, the D.C. Circuit explained that the government is authorized to designate a plan instrument and to name the TPA as the plan administrator for contraceptive coverage in that plan instrument. 772 F.3d at 255. Because the plan administrator is specifically designated by the plan instrument, 29 U.S.C. § 1002(16)(A)(i), plaintiff's arguments about the limitations on the Secretary of Labor's authority to designate a plan administrator when the plan instrument does not do so are beside the point. Plaintiff's second APA argument, which essentially recasts its argument that the regulations violate the Religion Clauses as an APA argument, also fails because the Departments adequately explained the reasons for the religious-employer exemption.

STANDARD OF REVIEW

This Court reviews the district court's legal conclusions de novo, its findings of fact for clear error, and its balancing of the injunction factors for an abuse of discretion. *See Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011).

ARGUMENT

I. THE OPT-OUT REGULATIONS DO NOT VIOLATE RFRA

A. The Supreme Court's Decision In *Hobby Lobby* And Order In *Wheaton College* Confirm The Validity Of The Accommodations

The Affordable Care Act generally requires group health plans to cover recommended women's preventive health services without cost sharing. Under the regulations implementing that requirement, group health plans generally must cover FDA-approved contraceptives as prescribed by a health care provider without cost sharing. The regulations automatically exempt from the contraceptive coverage requirement all religious employers as defined by reference to a provision of the Internal Revenue Code, and also provide accommodations for non-profit religious organizations that meet criteria set forth in the regulations such that they also are relieved of the requirement to provide contraceptive coverage.

To opt out of the contraceptive coverage requirement, an organization need only provide to its insurance issuer or third party administrator a copy of a form stating that it is an eligible organization, *see* 78 Fed. Reg. 39,870, 39,874-39,875 (July 2, 2013); *see also, e.g.*, 29 C.F.R. § 2590.715-2713A(a)(4), (b)(1), (c)(1), or notify HHS of its objection, the plan name and type, and the name and contact information of the insurance issuer(s) or third party administrator(s), *see, e.g.,* 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii).

If an eligible organization declines to provide contraceptive coverage, the regulations generally require the insurance issuer or third party administrator to make or arrange separate payments for contraceptive services for the plan participants and beneficiaries. *See, e.g.,* 29 C.F.R. § 2590.715-2713A(c). The regulations bar the insurance issuer or third party administrator from charging the eligible organization, 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), (ii) (same for self-insured plans).

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

Plaintiff here is eligible to opt out of the contraceptive coverage requirement. Plaintiff urges, however, that it is insufficient that plaintiff is free to decline to provide

such coverage, and that the government may not require third parties to provide the coverage that plaintiff declines to provide itself.

The Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), confirms the validity of the regulatory accommodations, and its reasoning cannot be reconciled with plaintiff's position here. The Supreme Court held that application of the contraceptive coverage requirement to the plaintiffs in that case—closely held companies that were not eligible for the regulatory opt-out—violated their rights under RFRA. Central to the Court's reasoning was the existence of the opt-out alternative that the Departments afford to organizations such as the plaintiff here. As the D.C. Circuit has noted, "the opt out already available to [p]laintiff[] is precisely the alternative the Supreme Court considered in *Hobby Lobby* and assumed would not impinge on the for-profit corporations' religious beliefs even as it fully served the government's interest." *Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 245 (D.C. Cir. 2014) (citing *Hobby Lobby*, 134 S. Ct. at 2782).

In *Hobby Lobby*, the Court explained that the opt-out regulations "effectively exempt[]" organizations that are eligible for an accommodation. 134 S. Ct. at 2763. This accommodation, the Supreme Court explained, "seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such

coverage." *Id.* at 2759. The Court declared that this accommodation is "an alternative" that "achieves" the aim of seamlessly providing coverage of recommended health services to women "while providing greater respect for religious liberty." *Id.*

The Supreme Court did not suggest that employers could (or should be entitled to) prevent their employees from obtaining contraceptive coverage from third parties through the regulatory accommodations. *See Hobby Lobby*, 134 S. Ct. at 2781 n.37 ("in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries'") (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)). Indeed, the *Hobby Lobby* majority found it necessary to emphasize in at least seven separate places that the accommodations would not interfere with the ability of female employees to access contraceptives without additional burdens. *See, e.g., id.* at 2759 (the accommodations "ensur[e] that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage"); *id.* (the "system available to religious nonprofits . . . . constitutes an alternative that achieves all of the Government's aims"); *id.* at 2760 ("The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero."); *id.* at 2781 n.37 ("[O]ur decision in these cases need not result in any detrimental effect on any third party"); *id.* at 2782 (the accommodations would "protect the asserted

needs of women as effectively" insofar as employees "would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to face minimal logistical and administrative obstacles because their employers' insurers would be responsible for providing information and coverage") (internal quotation marks and citation omitted); *id.* (the accommodation "serves HHS's stated interests equally well"); *id.* at 2783 (the accommodations would not "'[i]mped[e] women's receipt of benefits by "requiring them to take steps to learn about, and to sign up for, a new government funded and administered health benefit"'") (alterations in original, quoting dissent (in turn quoting 78 Fed. Reg. 39,870, 39,888 (July 2, 2013) (with alterations))).

Justice Kennedy's concurrence similarly emphasized that "the means to reconcile" the "two priorities" of respecting religious freedom without "unduly restrict[ing] other persons, such as employees, in protecting their own interests, interests the law deems compelling" "are at hand in the existing accommodation." *Hobby Lobby*, 134 S. Ct. at 2787 (Kennedy, J., concurring). And he confirmed that "a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees" and explained that the accommodation "works by requiring insurance companies" to provide contraceptive coverage and "equally furthers the Government's interest." *Id.* at 2786. He also made clear that the majority opinion should not be read to suggest

that religious objectors need be accommodated through the adoption of a new government program. *Id.*

The Supreme Court's interim order in connection with an application for an injunction in this case, *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), further underscores the validity of the alternative method of opting out promulgated in the interim final regulations. The Supreme Court's interim order provided that Wheaton College could "inform[] the Secretary of Health and Human Services in writing" that it satisfied the eligibility requirements for the accommodations and made clear that the Departments could "rely[] on" this notice to "facilitate the provision of full contraceptive coverage under the Act." *Id.* at 2807. Accordingly, the Court emphasized that "[n]othing in [its] interim order affects the ability of [Wheaton's] employees and students to obtain, without cost, the full range of FDA approved contraceptives." *Id.* The Supreme Court's acknowledgment that an objector must notify the government that it is opting out, and the government may rely on that notice to compel third parties to provide coverage, is in significant tension with plaintiff's position here—that it may state a RFRA claim by alleging that the government will rely on plaintiff's opt-out to arrange for these third parties to provide coverage.

The Supreme Court's interim injunction in this case made clear that it was not a decision on the merits and does not reflect a final determination that RFRA requires the government to apply the accommodations in this manner. 134 S. Ct. at 2807.

Nevertheless, the Departments augmented the accommodations to provide an alternative means by which plaintiff may opt out of providing contraceptive coverage that, like the Supreme Court's interim order, provides for notice to the government, rather than to the insurer or third party administrator.

B. The Challenged Accommodations, Which Allow Plaintiff To Opt Out Of Providing Contraceptive Coverage, Do Not Substantially Burden Plaintiff's Religious Exercise Under RFRA

Plaintiff does not object to informing third parties or the government that it is legally permitted to opt out of providing contraceptive coverage and chooses to do so. Plaintiff has done so in the past and would presumably continue to do so even if it obtained the injunctions that it seeks. Nor does plaintiff claim that it is required in any way to subsidize the provision of contraceptive coverage under the accommodations. The regulations bar an insurance issuer or third party administrator from charging the eligible organization, directly or indirectly, with respect to payments for contraceptive services. *See* 29 C.F.R. § 2590.715-2713A(b)(2)(i), (ii) (self-insured plans); 45 C.F.R. § 147.131(c)(2)(ii) (same for insured plans). The insurance issuer or third party administrator must also notify plan participants and beneficiaries of the availability of separate payments for contraceptive services, and "[t]he notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services." 29 C.F.R. § 2590.715-2713A(d) (self-insured plans); *accord* 45 C.F.R. § 147.131(d) (insured plans).

Plaintiff objects instead to the fact that after it opts out of providing contraceptive coverage, the government requires companies like BlueCross to make or arrange separate payments for contraceptive services for the plan participants and beneficiaries. But "[t]he accommodation here works in the way such mechanisms ordinarily do: the objector completes the written equivalent of raising a hand in response to the government's query as to which religious organizations want to opt out." *Priests For Life*, 772 F.3d at 250. Plaintiff is then discharged from any responsibility to provide contraceptive coverage, and the government tasks third-parties, who do not share plaintiff's religious objections, with providing contraceptive coverage in plaintiff's stead. *Id.* at 250-52.

The linchpin of plaintiff's appeal is its insistence that because after plaintiff opts out, the government will require someone else to provide coverage, the act of opting out is a "trigger" and a "substantial burden" under RFRA. *See* Br. 23-39. But as an initial matter, plaintiff is no longer required to raise its hand and opt out. As we have explained to the Court, pursuant to the augmented accommodations, the government has treated plaintiff's notifications and filings in this case as an opt-out. App. Dkt. 38, at 5; App. Dkt. 44. Plaintiff is thus not required to take any further action. The government has notified the appropriate insurance issuers and third party administrators, such as BlueCross, that Wheaton is not required to provide contraceptive coverage and that they are required to provide separate coverage. The fact that plaintiff nonetheless continues to argue that it objects to the act of opting

out underscores that plaintiff simply is trying to block the provision of contraceptive coverage by third parties.

In any event, plaintiff cannot attempt to collapse its decision not to provide contraceptive coverage with the government's arrangements for others to provide such coverage in plaintiff's stead. The district court correctly explained that when plaintiff opts out, "[f]ederal law, not [plaintiff's] signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services." JA16 (quoting *University of Notre Dame v. Sebelius*, 743 F.3d 547, 554 (7th Cir. 2014), *vacated*, 135 S. Ct. 1528 (2015)); *see Geneva Coll. v. Secretary, U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 437 (3d Cir. 2015) ("*Federal law*, rather than any involvement by the appellees in filling out or submitting the self-certification form, creates the obligation of the insurance issuers and third-party administrators to provide coverage for contraceptive services."); *Priests For Life*, 772 F.3d at 253 ("[T]he beneficiaries receive contraceptive coverage not because Plaintiffs have completed the self-certification or alternative notice, but because the ACA imposes an independent obligation on insurers and [third party administrators] to provide this coverage."); *see also Michigan Catholic Conference v. Burwell*, 755 F.3d 372, 387 (6th Cir. 2014), *vacated*, No. 14-701, 2015 WL 1879768 (S. Ct. Apr. 27, 2015); *Notre Dame*, 743 F.3d at 554.

Plaintiff's contrary argument is "extraordinary and potentially far reaching." *Priests For Life*, 772 F.3d at 245. Plaintiff's view that its opt-out can constitute a

"substantial burden" under RFRA is at odds with our Nation's long history of allowing religious objectors to opt out and the government then requiring others to fill the objectors' shoes. *See, e.g., Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716-18 (1981); *cf.* EEOC Compliance Manual § 12-IV.C. (Example 43) (July 22, 2008), *available at* http://www.eeoc.gov/policy/docs/religion.html#_Toc203359529 (explaining that reasonable accommodations of workplace religious objections can include requiring the objecting employee to transfer objectionable tasks to co-workers). Plaintiff's reasoning "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." *Priests For Life*, 772 F.3d at 246. Similarly, under plaintiff's logic, the claimant in *Thomas* could have demanded not only that he not make weapons but also that he not be required to *opt out* of doing so, because his opt-out would cause someone else to take his place on the assembly line. Plaintiff's claim that it is substantially burdened by the opt-out procedure merely because contraceptives will be provided despite that opt-out is thus "paradoxical and virtually unprecedented." *Id.* (quoting *Notre Dame*, 743 F.3d at 557).

In arguing that the challenged regulations impose a substantial burden under RFRA, plaintiff seeks to pretermit the pertinent legal inquiry by urging that it views the burden as significant. But while it is not for this Court to "say [whether plaintiff's]

religious beliefs are mistaken," *Hobby Lobby*, 134 S. Ct. at 2779, it is the Court that determines whether the type of burden alleged is a "substantial burden" under RFRA, the type of burden that triggers RFRA's compelling interest test. *See, e.g., Priests For Life,* 772 F.3d at 247 (this "is a question of law for courts to decide, not a question of fact."); *cf. Bowen v. Roy*, 476 U.S. 693, 701 n.6 (1986) ("Roy's religious views may not accept this distinction between individual and governmental conduct," but the law "recognize[s] such a distinction."); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448 (1988) (similar). While the government does not dispute plaintiff's judgment as to what constitutes "moral complicity" (Br. 31), plaintiff may not "collapse[] the distinction between sincerely held belief and substantial burden." *Priests For Life*, 772 F.3d at 249; *see also Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (explaining that "[i]n addition to showing . . . a sincerely held religious belief," plaintiffs "also b[ear] the burden of proving" that the challenged policy constitutes a substantial burden).[11]

[11] While the initial version of RFRA applied where government action resulted in any "burden" on religious exercise, Congress added the word "substantially" "to make it clear that the compelling interest standards set forth in the act" apply "only to Government actions [that] place a substantial burden on the exercise of" religion, as contemplated by the case law leading up to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *See* 139 Cong. Rec. S14350, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); *id.* (statement of Sen. Hatch). Consistent with RFRA's restorative purpose, Congress expected courts considering RFRA claims to "look to free exercise cases decided prior to *Smith* for guidance." S. Rep. No. 111, 103d Cong., 1st Sess. 8-9 (1993); *see* H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993) (same); *see also* 146 Cong. Rec. S7774, S7776 (daily ed. July 27, 2000)

Continued on next page.

As to that legal question, plaintiff's argument hinges on its attempt to collapse its decision not to provide contraceptive coverage with the government's arrangements for others to provide such coverage in plaintiff's stead. As courts of appeals have repeatedly recognized, it is the government that requires or offers to pay third parties to provide contraceptive coverage if an eligible organization declines to do so.

Plaintiff does not advance its argument by noting that the government will enlist the same insurers and third parties that administer plaintiff's health coverage to provide contraceptive coverage to plaintiff's employees and students. *See, e.g.*, Br. 13, 29 (objecting that their plan is a "vehicle"); Br. 29 (objecting to "maintain[ing] a contractual relationship" with a company that will provide contraceptive coverage). Plaintiff objects not to a requirement imposed on itself but to obligations that the government imposes on third parties. It is those entities—such as BlueCross—not the plaintiff, that would provide coverage. And they would do so "separate from" materials that are distributed in connection with plaintiff's group health coverage and would have to make clear that plaintiff is neither administering nor funding the contraceptive benefits. 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(d). *See*

(joint statement of Sens. Hatch and Kennedy) (explaining that, for purposes of the Religious Land Use and Institutionalized Persons Act of 2000, which was modeled on RFRA, "[t]he term 'substantial burden' . . . is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise").

Notre Dame, 743 F.3d at 553 ("The university is permitted to opt out of providing federally mandated contraceptive services, and the federal government determines (enlists, drafts, conscripts) substitute providers, and naturally they are the providers who are already providing health services to the university personnel."); *see also Priests For Life*, 772 F.3d at 253-54 (rejecting argument that there is a substantial burden because the plans serve as a "conduit"). The fact that plaintiff has a contractual relationship with BlueCross does not strip the government of its regulatory authority over this non-party.[12]

Finally, plaintiff argues (Br. 24) that the automatic exemption from the contraceptive coverage regulations for houses of worship (instead of the "effective[] exempt[ion]" available to plaintiff, *Hobby Lobby*, 134 S. Ct. at 2763), demonstrates that the opt-out procedure substantially burdens religious exercise. That is plainly incorrect. The automatic exemption for houses of worship here reflects "a long-recognized and permissible distinction between houses of worship and religious nonprofits." *Priests For Life,* 772 F.3d at 272; *see id.* at 238 (category is "longstanding and familiar"). It cross-references an Internal Revenue Code provision that provides houses of worship and their integrated auxiliaries (but not other religious non-profits)

[12] Plaintiff tries to convert the government's regulation of BlueCross into a direct regulation of plaintiff by asserting that it is being forced "to maintain a contractual relationship" with BlueCross, which will provide the "objectionable coverage." Br. 29. But this is incorrect. "Plaintiff[] [is] free to fire [its] insurers or [third party administrators]." *Priests For Life*, 772 F.3d at 272 n.28.

with automatic tax-exempt status without having to file an informational tax return. *See* 45 C.F.R. § 147.131(a) (cross-referencing 26 U.S.C. § 6033(a)(3)(A)(i), (iii)). The fact that houses of worship are not required to file tax returns is not a concession that filing a tax return substantially burdens religion, but rather, a reflection of a traditional sphere of autonomy for houses of worship.

In sum, plaintiff's attempt to collapse the provision of contraceptive coverage by third parties with its own decision not to provide such coverage fails. If employees of organizations that have opted out of providing contraceptive coverage nonetheless receive contraceptive coverage, they will do so "'*despite* plaintiffs' religious objections, not *because* of them.'" *Michigan Catholic Conference*, 755 F.3d at 389 (emphases added; citation omitted).

C. Plaintiff's Reasoning Would Deprive The Government Of Reasonable Means To Advance Its Compelling Interests In Seamlessly Providing Contraceptive Coverage

Plaintiff's claims would fail even if the accommodations were subject to RFRA's compelling interest test. The challenged accommodations serve a number of interrelated and compelling interests, as the Supreme Court acknowledged in *Hobby Lobby*. And they are the least restrictive means of vindicating those interests.

1. Plaintiff's brief largely ignores the subject of compelling interest, even though the issue was briefed extensively below. The government was explicit in its district court briefing that it was "rais[ing] the arguments . . . to preserve them for appeal." Dkt. 26, at 18.

Plaintiff notes that the government's district court papers acknowledged that *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), had rejected the government's compelling interest arguments in the course of sustaining a RFRA claim brought by a for-profit corporation that was ineligible for the opt-out. Br. 23, 25. Since the government filed its brief in district court, the Supreme Court decided *Hobby Lobby*, in which five members of the Court endorsed the position that providing contraceptive coverage to employees "serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee." 134 S. Ct. at 2785-86 (Kennedy, J., concurring); *accord id.* at 2787 (referring to "interests the law deems compelling"); *id.* at 2799-2800 & n.23 (Ginsburg, J., dissenting). The remaining Justices assumed without deciding that the contraceptive coverage requirement furthers compelling interests, *id.* at 2780, and emphasized that, under the accommodations for eligible non-profit organizations, employees "would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to face minimal logistical and administrative obstacles because their employers' insurers would be responsible for providing information and coverage," *id.* at 2782 (citation and internal quotation marks omitted); *see id.* at 2760 (stressing that "[t]he effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero"); *id.* at 2783 (emphasizing that the accommodations would

not "'[i]mped[e] women's receipt of benefits by "requiring them to take steps to learn about, and to sign up for, a new government funded and administered health benefit'"") (alterations in original, quoting dissent (in turn quoting 78 Fed. Reg. at 39,888 with alterations)); *id.* at 2786 (Kennedy, J., concurring) (explaining that the accommodation "works by requiring insurance companies" to provide contraceptive coverage and "equally furthers the Government's interest"). *Korte* can thus no longer be considered controlling precedent on this point.

Hobby Lobby confirms that, when religious objectors opt out of their legal obligations, the government may fill those gaps and do so as seamlessly as possible. *See* 134 S. Ct. at 2782-83. In our diverse Nation, many requirements may be the object of religious objections. But government programs, and particularly national systems of health and welfare, need not vary from point to point or, for example, be based around what, if any, method of provision of medical coverage can be agreed upon by all parties, including those who object. The challenged accommodations provide an administrable way for organizations to state that they object and opt out, and for the government to require third parties to provide contraceptive coverage. The Supreme Court has made clear that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen*, 476 U.S. at 699. It cannot be correct that the government may not accommodate religious concerns by permitting an objector to opt out of an objectionable requirement and then filling the

resulting gap by shifting the objector's obligations to a third party; the government need not fundamentally restructure its operations, as plaintiff asserts.

The D.C. Circuit correctly found that "[a] confluence of compelling interests supports maintaining seamless application of contraceptive coverage to insured individuals even as Plaintiffs are excused from providing it." *Priests For Life*, 772 F.3d at 237; *see id.* at. 259-64. The government's requirement that insurance issuers and third party administrators provide contraceptive coverage after employers decline to do so in particular furthers compelling interests by directly and substantially reducing the incidence of unintended pregnancies, improving birth spacing, protecting women with certain health conditions for whom pregnancy is contraindicated, and otherwise preventing adverse health conditions. *See* 78 Fed. Reg. at 39,872; IOM Report 103-09; *see also Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring) ("There are many medical conditions for which pregnancy is contraindicated," and "[i]t is important to confirm that a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees.").

Physician and public health organizations, such as the American Medical Association, the American Academy of Pediatrics, and the March of Dimes accordingly "recommend the use of family planning services as part of preventive care for women." IOM Report 104. Use of contraceptives reduces the incidence of unintended pregnancies. IOM Report 102-04. Unintended pregnancies pose special

health risks because a woman with an unintended pregnancy "may not immediately be aware that [she is] pregnant, and thus delay prenatal care" and engage in behaviors that "pose pregnancy-related risks." 78 Fed. Reg. at 39,872; *see* IOM Report 103. As a result, "[s]tudies show a greater risk of preterm birth and low birth weight among unintended pregnancies." 78 Fed. Reg. at 39,872. And, because contraceptives reduce the number of unintended pregnancies, they "reduce the number of women seeking abortions." *Id.*

The contraceptive coverage regulations, including the religious accommodations, also advance the government's related compelling interest in assuring that women have equal access to recommended health care services. 78 Fed. Reg. at 39,872, 39,887. Congress enacted the women's preventive-services coverage provision because "women have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. 29,070 (2009) (statement of Sen. Feinstein); *see* IOM Report 18. Prior to the Affordable Care Act, "[w]omen of childbearing age spen[t] 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. at 29,070 (statement of Sen. Feinstein); *see* Ctrs. for Medicare & Medicaid Servs., *National Health Care Spending By Gender and Age: 2004 Highlights*, *available at* http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/downloads/2004GenderandAgeHighlights.pdf. These disproportionately high costs had a tangible impact: Women often found that copayments and other cost sharing for important preventive

services "[were] so high that they avoid[ed] getting [the services] in the first place." 155 Cong. Rec. at 29,302 (statement of Sen. Mikulski). Studies have demonstrated that "even moderate copayments for preventive services" can "deter patients from receiving those services." IOM Report 19.

Plaintiff's contention that its employees and students share its religious beliefs (Br. 22), does not further its argument. Plaintiff cannot seriously contend that the government must conduct discovery of these non-parties' gender, age, medical needs, religious views, and sexual activities to determine how many will benefit from the availability of FDA-approved, doctor-prescribed contraception.[13] Plaintiff has several thousand students and employees, and if plaintiff declines to provide those individuals

[13] In determining whether application of a "burden to the person" being burdened "is in furtherance of a compelling governmental interest," 42 U.S.C. § 2000bb-1(b), courts must look to the type of exception being demanded. The outcome does not vary, for example, based on whether there is a large class of plaintiffs (and thus a high likelihood that some employees or students will benefit from contraceptive coverage), or a small class. Thus, in analogous contexts, the Supreme Court looked at the effect of a religious exception writ large, not just as applied to particular plaintiffs before the Court. *See Wisconsin* v. *Yoder*, 406 U.S. 205, 221 (1972) (evaluating the effects of "the claimed Amish exemption" even though only three families were before the Court); *see also Thomas*, 450 U.S. at 719 (considering "the number of people" who may be affected by the kind of accommodation sought in the case); *United States v. Lee*, 455 U.S. 252, 260 (1982) (looking at the effect if other adherents opted out of the Social Security system). This mode of analysis was preserved in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006), which described *Yoder* as having recognized an "Amish exemption," and described *Sherbert v. Verner*, 374 U.S. 398 (1963), as relating to claims of "those who would not work on Saturdays," rather than that of the single plaintiff in that case.

with important medical coverage, the government should be able to make such coverage available.[14]

Plaintiff notes that not every employer is presently required to provide contraceptive coverage. Br. 7-9, 22. But, of course, "[t]he government can have an interest in the uniform application of a law, even if that law allows some exceptions." *Priests For Life*, 772 F.3d at 266. Numerous organizations are not required to pay taxes; more than half of the country is exempt from registering for the draft; and Title VII does not apply to the 80% of employers in the United States that have fewer than fifteen employees. *See* 42 U.S.C. § 2000e(b).[15] Yet it does not follow that raising tax revenue, raising an army, and combatting race discrimination are not compelling interests.

For example, plaintiff notes that grandfathered plans are not subject to the contraceptive coverage regulations. *E.g.*, Br. 8, 22. But the Affordable Care Act's grandfathering provision applies to a wide host of the Act's requirements, and has the

[14] Plaintiff's suggestion that its employees and students share the belief "that Scripture condemns the taking of innocent life," JA129 (cited at Br. 22), does not establish that plaintiff's employees and students will not use the contraception to which plaintiff objects. Nor does it establish anything about the views of dependent family members who obtain health coverage from plaintiff. *See* JA80, JA84, JA91, JA93; *see also* IOM Report 20 ("women with employer-based insurance are almost twice as likely as men to be covered as dependents").

[15] Nearly 79% of firms that employed others in 2008 had nine or fewer employees, while more than 89% of those firms had 19 or fewer employees. *See* U.S. Census Bureau, U.S. Dep't of Commerce, *Statistics about Business Size (including Small Business)*, tbl. 2a (2008), https://www.census.gov/econ/smallbus.html.

effect of allowing a transition period for compliance with a number of the Act's requirements (including, but not limited to, the contraceptive coverage and other preventive-services coverage provisions). The compelling nature of an interest is not diminished because the government phases in a regulation advancing it in order to avoid undue disruption. *See, e.g.,* 42 U.S.C. §§ 12182(b)(2)(A)(iv), 12183(a)(1) (Americans with Disabilities Act); *cf. Heckler v. Mathews*, 465 U.S. 728, 746-48 (1984) (noting that "protection of reasonable reliance interests is . . . a legitimate governmental objective" that Congress may permissibly advance through phased implementation of regulatory requirements). And, indeed, grandfathered plans are being rapidly phased out. *See Priests For Life*, 772 F.3d at 266 n.25 ("According to a 2013 study conducted by Kaiser Health News, the grandfathering is already quickly phasing down.").

Plaintiff similarly notes that houses of worship are exempted from the regulations. Br. 8, 22. But, as discussed above, this exemption must be understood in light of the long tradition of protecting the autonomy of a church through exemptions of this kind, and the Religion Clauses of the First Amendment, which limit "government interference with an internal church decision that affects the faith and mission of the church itself." *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012); 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011) (exemption intended in part to "respect[ ] the unique relationship between a house of worship and its employees in ministerial positions"). Indeed, the exception for

religious organizations draws on the definition used in 26 U.S.C. § 6033(a)(3)(A)(i) and (iii), which defines the organizations exempt from filing a tax return. *See* 45 C.F.R. § 147.131(a). Under plaintiff's logic, there can be no interest in requiring Catholic hospitals and schools to file tax returns because the government has chosen to exempt archdioceses. That a special solicitude has been shown for churches does not mean that there is no compelling interest in providing plaintiff's employees and students with access to important medical services.

In *United States v. Lee*, 455 U.S. 252 (1982), the Supreme Court rejected an argument that was analogous to plaintiff's reasoning here. The Supreme Court rejected a Free Exercise claim on the ground that it would undermine the comprehensive and mandatory nature of Social Security, *id.* at 258-60, even as the Court emphasized that Congress had provided religion-based exemptions for self-employed individuals, *id.* at 260-61. The Supreme Court concluded that "[c]onfining [the exemption] to the self-employed provided for a narrow category which was readily identifiable," *id.*, and held that Congress's inclusion of such a limited exemption did not undermine the government's interest in enforcing the law outside the exemption's confines. Here, too, the limited exemption for houses of worship does not undermine the government's interest in requiring or arranging for contraceptive coverage outside that narrow context.

2. Plaintiff makes little effort to identify less-restrictive alternative means through which the government could achieve its compelling interests. Indeed,

plaintiff could characterize any alternative that is only available if plaintiff declines to provide coverage as rendering plaintiff's provision of health coverage or its opt-out from contraceptive coverage a "trigger." Plaintiff suggested below that the government can work with third parties by, *e.g.*, "[e]mpower[ing] willing actors . . . to deliver the drugs." Dkt. 41, at 27. But this ignores that, in the regulations at issue here, the government *is* working with third parties to provide contraceptive coverage, and it offers to pay third party administrators of self-insured plans for providing or arranging such coverage. In this Court, plaintiff suggests in passing (Br. 5) that the government might require affected women to obtain contraception through health care exchanges, or create some new program to provide contraceptives directly to affected women. Below, plaintiff also posited that the government could provide tax credits to employees who purchase their own contraceptives, or use government resources to "inform the public" about the availability of contraception "in a wide array of publicly-funded venues." Dkt. 41, at 27. But these suggestions ignore the core teachings of *Hobby Lobby*.

As the Supreme Court emphasized, the accommodations ensure that women "would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to face minimal logistical and administrative obstacles because their employers' insurers would be responsible for providing information and coverage." *Hobby Lobby*, 134 S. Ct. at 2782 (citation and internal quotation marks omitted); *see also id.* at 2760 (stressing that "[t]he effect of the

HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero"); *id.* at 2783 (emphasizing that the accommodations would not "'[i]mped[e] women's receipt of benefits by "requiring them to take steps to learn about, and to sign up for, a new government funded and administered health benefit"'") (alterations in original, quoting dissent (in turn quoting 78 Fed. Reg. at 39,888 with alterations)); *id.* at 2786 (Kennedy, J., concurring) (explaining that the accommodation "works by requiring insurance companies" to provide contraceptive coverage and "equally furthers the Government's interest"); *see also supra* pp. 23-25.

Plaintiff's "alternatives" would not "protect the asserted needs of women as effectively," *Hobby Lobby*, 134 S. Ct. at 2782, or "equally further[] the Government's interest," *id.* at 2786 (Kennedy, J., concurring), because—as the Supreme Court disclaimed—such programs would at the very least require affected women "to take steps to learn about, and to sign up for, a new government funded and administered health benefit." *Id.* at 2783 (internal quotation marks omitted). "Those alternatives would substantially impair the government's interest" because they "would add steps—requiring women to identify different providers or reimbursement sources, enroll in additional and unfamiliar programs, pay out of pocket and wait for reimbursement, or file for tax credits (assuming their income made them eligible)—or pose other financial, logistical, informational, and administrative burdens." *Priests For Life*, 772 F.3d at 265. Indeed, the very point of requiring that health coverage include

coverage of preventive services, including contraception, without cost sharing is that even small burdens prevent people from obtaining important preventive services, including contraception. *See, e.g.,* 78 Fed. Reg. at 39,888 (purpose of the program is "providing coverage of recommended preventive services through the existing employer-based system of health coverage so that women face minimal logistical and administrative obstacles" and "[i]mposing additional barriers to women receiving the intended coverage . . . by requiring them to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women"); IOM Report 18-19, 109; *see also Wheaton College*, 134 S. Ct. at 2807 ("Nothing in this interim order affects the ability of the applicant's employees and students to obtain, without cost, the full range of FDA approved contraceptives."); *see generally Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997) (question under free speech strict scrutiny is whether "less restrictive alternatives would be *at least as effective* in achieving the legitimate purpose that the statute was enacted to serve") (emphasis added).

Moreover, RFRA does not require the government to create entirely new programs to deliver contraception in order to accommodate religious objections. *See, e.g., Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring) ("In these cases, it is the Court's understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government."). And, in any event, the Departments do not have the legal authority to create the kinds of

programs that plaintiff suggests.[16] Congress's statutory directive in RFRA cannot properly be interpreted to require agencies to adopt alternatives not currently authorized by law. If RFRA did not take cognizance of the limits of the Departments' statutory authority, then affected women would be left without coverage altogether unless Congress itself revised RFRA or authorized new programs. Such a result cannot be squared with the Supreme Court's reasoning in *Hobby Lobby* and *Wheaton College*, which emphasized that the Supreme Court was not impairing women's access to contraceptive coverage.

The regulatory accommodation process is the least restrictive means of ensuring that women seamlessly obtain coverage for contraception alongside their other health coverage. Accordingly, plaintiff's RFRA challenge fails.

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[16] For example, even assuming that it would not undermine the point of the preventive services requirement, making women buy subsidized coverage of contraception alone, or full plans on health care Exchanges, is not a viable alternative. *See* Br. 5, 32. By statute, exchanges may only make available "qualified health plan[s]" providing comprehensive health coverage, and could not offer contraception-only policies. 42 U.S.C. § 18031(d)(2)(B)(i); *see* 42 U.S.C. § 18021(a)(1)(B); 78 Fed. Reg. at 39,882. And the Act's subsidies have income-based requirements and are generally unavailable to individuals eligible for coverage under employer-sponsored plans. 26 U.S.C. §§ 36B(c)(2)(B), 5000A(f)(1)(B). Similarly, plaintiff has suggested (Dkt. 41, at 28) that the government fund contraception through "grants to . . . health center sites in medically underserved areas" and through Title X of the Public Health Service Act. But unlike employer-based coverage, the health centers and Title X grantees provide services directly, not through reimbursement to third party providers. By statute, moreover, priority for Title X services must be given to "low-income families." 42 U.S.C. § 300a-4(c); *see also id.* § 254b(a)(1) (defining "health center" as an entity serving a "medically underserved" population).

II. PLAINTIFF'S OTHER ARGUMENTS LACK MERIT

A. The Regulations Do Not Violate The Free Speech Clause Of The First Amendment

Plaintiff has alleged two free speech violations, both of which the district court correctly rejected.

1. Plaintiff first argues that the regulations unconstitutionally compel the speech involved in opting out. Br. 39 (quoting 79 Fed. Reg. at 51,095). But "[r]equiring Plaintiffs to give notice that they wish to opt out of the contraceptive coverage requirement no more compels their speech in violation of the First Amendment than does demanding that a conscientious objector self-identify as such." *Priests For Life*, 772 F.3d at 271. As the D.C. Circuit has explained, although the opt-out mechanisms "may include 'elements of speech'" they are "'a far cry from the compelled speech' that the Supreme Court previously has found to be unconstitutional." *Id.* (quoting *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47, 61-62 (2006)). "[A]ny speech required by the self-certification or alternative notice is . . . incidental to the accommodation's regulation of conduct." *Id.*; *see FAIR*, 547 U.S. at 61-62. Moreover, "[n]othing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." 78 Fed. Reg. at 39,880 n.41; *see also Priests For Life*, 772 F.3d at 271 ("Completing the self-certification form does not limit what Plaintiffs may say about contraception—or any other topic—nor does it limit where, when, or how they may say it."). In fact, by

opting out, plaintiff would explicitly proclaim its objection to contraception. "[T]he opt out here is designed to ensure that Plaintiffs do not have to express, in words or symbolic backing, any support for contraception." *Id.* Finally, the Departments have already implemented plaintiff's opt-out here, so plaintiff need not take any further action.

2. Plaintiff's second free speech claim does not survive the interim final regulations. Plaintiff challenged the so-called "noninterference provision," which "originally barred self-insured employers from 'directly or indirectly, seek[ing] to influence the [TPA's] decision' to provide or arrange separate payments for contraceptive services." *Priests For Life*, 772 F.3d at 272 n.28 (quoting 79 Fed. Reg. at 51,095). Because "that provision has been rescinded, [plaintiff's] challenge is moot." *Id.*

Recognizing that the provision it challenged has been rescinded, plaintiff misreads the interim final rules to impose a "new gag rule," which plaintiff asserts makes it "'unlawful' for Wheaton to instruct its [third party administrator] not to provide contraceptives." Br. 41 (quoting 79 Fed. Reg. at 51,095). But what plaintiff terms a "new gag rule" is nothing more than the Departments' statement of the reasons for rescinding the non-interference provision. The Departments explained that they had interpreted the non-interference provisions "solely as prohibiting the use of bribery, threats, or other forms of economic coercion in an attempt to prevent a third party administrator from fulfilling its independent legal obligations to provide

or arrange separate payments for contraceptive services." 79 Fed. Reg. at 51,095. Recognizing that "such conduct," *i.e.*, "bribery, threats, or other forms of economic coercion," is already "generally unlawful and . . . prohibited under other state and federal laws, and to reduce unnecessary confusion," the Departments rescinded the non-interference provision. *Id.* In other words, it is not plaintiff's instructions to third party administers that are "generally unlawful" under the interim final rules, as plaintiff now asserts (Br. 41), but rather the use of bribery, threats, or coercion to prevent a third party from fulfilling its legal obligations, which have been and continue to be unlawful under separate state and federal laws. Plaintiff's argument that there is an unconstitutionally vague and overbroad "new gag rule" finds no support in the interim final regulations.

B. The Regulations Do Not Violate The Religion Clauses

Plaintiff urges that the regulations "violate[] the Religion Clauses by discriminating among religious institutions that are engaged in the same religious exercise." Br. 41. Plaintiff contends that the regulations unconstitutionally discriminate by exempting houses of worship and their integrated auxiliaries from the contraceptive coverage requirement while making opt-out accommodations available to other religious non-profit organizations like plaintiff. Br. 41-42. In its brief on appeal, as in the district court, "[p]laintiff does not separate out its Religion Clause contentions." JA19; *see* Br. 41-45. The district court correctly rejected plaintiff's

claims, finding they were without merit whether based on alleged violations of the Establishment Clause or the Free Exercise Clause. JA18-20.

The D.C. Circuit has rejected the same argument that plaintiff raises here and has distinguished the same cases on which plaintiff relies (Br. 42-45), explaining that "[t]he regulations at issue here draw distinctions based on organizational form and purpose, and not religious belief or denomination." *Priests For Life*, 772 F.3d at 273. Indeed, the regulations "draw a long-recognized and permissible distinction between houses of worship and religious nonprofits." *Id.* at 272; *see also Notre Dame*, 743 F.3d at 560 (explaining that "religious employers, defined as in the cited regulation, have long enjoyed advantages (notably tax advantages) over other entities, 26 U.S.C. §§ 6033(a)(3)(A)(i), (iii), without these advantages being thought to violate the establishment clause" (citing *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 666 (1970)).

Plaintiff's reliance (Br. 42-43) on cases such as *Larson v. Valente*, 456 U.S. 228, (1982), is entirely misplaced. 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. *Id.* 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."). The Supreme Court in *Larson* contrasted the case with its earlier decision upholding an exemption from the draft, where "conscientious objector status

was available on an equal basis to both the Quaker and the Roman Catholic." *Id.* at 246 n.23 (discussing *Gillette v. United States*, 401 U.S. 437 (1971)).[17] Here, too, the religious employer exemption does not grant any denominational preference or otherwise discriminate among religions. Plaintiff thus incorrectly "equate[s]" a permissible distinction "based on organizational form and purpose[] with constitutionally impermissible distinctions based on denomination." *Priests For Life*, 772 F.3d at 272-73.

Plaintiff further contends that the regulations interfere with internal church governance, "namely whether a religious mission is best achieved by ceding control to centralized church authorities." Br. 44 (citing *Hosanna-Tabor*, 132 S. Ct. at 707). The D.C. Circuit correctly rejected this same argument in *Priests For Life*, explaining that the

[17] Plaintiff seeks to cast doubt on the constitutionality of the tax code provision exempting churches and their integrated auxiliaries from filing informational tax returns, contending that to qualify "under the IRS rules, an exempt organization must not 'normally receive[] more than 50 percent of its support' from non-church sources." Br. 43 (quoting 26 C.F.R. § 1.6033-2(h)(2)-(4)). Plaintiff argues that this "qualification . . . closely parallels the criteria condemned in *Larson*." *Id.* Plaintiff fails to mention, however, that unlike *Larson*, the tax code provision exempts all churches from the filing requirement. *See* 26 U.S.C. § 6033(a)(3)(A)(i); 26 C.F.R. § 1.6033-2(g)(i). The provision on which plaintiff relies relates to the definition of an integrated auxiliary, which, in order to qualify for the tax-return exemption, must be affiliated with a church and internally supported. 26 C.F.R. § 1.6033-2(h). In this context, the internal support requirement relates to the organization's form and purpose and—unlike the provision at issue in *Larson*—is not explicitly aimed at distinguishing "between 'well-established churches' that have 'achieved strong but not total financial support from their members,' on the one hand, and 'churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members,' on the other hand." *Larson*, 456 U.S. at 246 n.23.

"regulations do not address religious governance at all. The regulations' separate treatment of functions that Plaintiffs might prefer to group together does not interfere with how the Plaintiffs govern themselves internally." 772 F.3d at 274. Unlike in *Hosanna-Tabor*, "nothing about the regulation challenged here would 'depriv[e] the church of control over the selection of those who [would] personify its beliefs'—the Church's own ministers." *Id.* (quoting *Hosanna-Tabor*, 132 S. Ct. at 706) (brackets in original).

Finally, to the extent plaintiff is invoking the Free Exercise Clause, that clause is not implicated here because the regulations are neutral and generally applicable. *See Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). It prohibits only laws with "the unconstitutional object of targeting religious beliefs and practices." *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997). "Neutrality and general applicability are interrelated." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). A law is not neutral "if the object of the law is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. A law is not generally applicable if it "in a selective manner impose[s] burdens only on conduct motivated by religious belief." *Id.* at 543. The contraceptive coverage requirement "is both, in the relevant sense of not selectively targeting religious conduct, whether facially or intentionally, and broadly applying across religious and nonreligious groups alike." *Priests For Life*, 772 F.3d at 268. Plaintiff makes no specific argument to the contrary.

C. The Regulations Do Not Violate The Administrative Procedure Act

1. Plaintiff makes two arguments that the challenged regulations violate the Administrative Procedure Act because they are contrary to law. First, plaintiff mistakenly argues that the district court committed legal error by noting that the standard of review for an APA claim is "'significantly more deferential'" than the standard of review for a constitutional challenge. Br. 45 (quoting Add. 14). But this is a correct statement of the law. The district court's observation was nothing more than a reference to the fact that plaintiff's closely related constitutional argument had already been rejected and that the APA only "authorizes federal courts to set aside agency actions that are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" JA20 (quoting 5 U.S.C. § 706(2)(A)).[18]

Plaintiff also argues for the first time on appeal (Br. 45, 46-48) that the Secretary of Labor lacks authority under ERISA to designate a third party administrator as a plan administrator for the provision of contraceptive coverage. As an initial matter, this argument is waived because plaintiff failed to raise it in the district court. *See Hale v. Chu*, 614 F.3d 741, 744 (7th Cir. 2010).[19] To the extent that

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[18] Plaintiff relatedly insists that the district court erroneously applied *Chevron* deference (Br. 46), but the district court did not even cite *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[19] Plaintiff states that "[t]he district court rejected this claim." Br. 45 (citing Add. 14). But the court's discussion makes clear that plaintiff's APA argument in the district court was "very closely related to the religion clauses argument," which did

Continued on next page.

plaintiff intends for this argument to address the augmented accommodation, which was not in place when the district court denied plaintiff's motion for a preliminary injunction, that argument may properly be raised in district court as this case proceeds.

In any event, in the interim final regulations, the Department of Labor reasonably provided that the notification that its Secretary provides to a third party administrator "will be an instrument under which the plan is operated," and "will designate the relevant third party administrator(s) as plan administrator . . . for those contraceptive benefits that the third party administrator would otherwise manage." 79 Fed. Reg. at 51,095; *see* 29 C.F.R. § 2510.3-16(b); *see also, e.g.*, *Pettaway v. Teachers Ins. & Annuity Ass'n of Am.*, 644 F.3d 427, 433-34 (D.C. Cir. 2011) (recognizing that a plan may be operated subject to multiple instruments).[20] As the D.C. Circuit explained, "[o]nce the government receives the alternative notice, it directs the TPA to cover

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not involve ERISA authority. JA20 (Add. 13). The regulations have been augmented since the district court issued its opinion, but plaintiff should not be allowed to seek reversal of the district court's denial of a preliminary injunction on an entirely new legal theory that the district court had no opportunity to consider.

[20] The Department of Labor has broad rulemaking authority under ERISA, 29 U.S.C. § 1135, and its interpretation of that statute is entitled to deference, *see Massachusetts v. Morash*, 490 U.S. 107, 116 (1989). ERISA does not define the term "instrument," but the Department of Labor has long interpreted that term broadly. *See, e.g.*, 63 Fed. Reg. 48,376, 48,378 n.8 (Sept. 9, 1998) (indicating that procedures governing qualified domestic relations order determinations and qualified medical child support order determinations "would constitute an instrument under which a plan is operated").

contraceptive services and, treating its own direction as the new plan instrument, the government names the TPA as the plan administrator of contraceptive coverage." *Priests For Life*, 772 F.3d at 255. Indeed, "ERISA expressly permits a plan instrument to name a plan administrator." *Id.* (citing 29 U.S.C. § 1002(16)(A)(i)). Because the plan administrator for contraception is "specifically so designated by the terms of the instrument under which the plan is operated [*i.e.*, the government's directive to the TPA]," 29 U.S.C. § 1002(16)(A)(i), plaintiff's arguments about the limitations on the Secretary's authority to designate a plan administrator when the plan instrument does not do so are beside the point. *See* Br. 47-48. "By naming the plan administrator in the plan instrument, the government complies with ERISA." *Priests For Life*, 772 F.3d at 255.

2. Plaintiff additionally argues (Br. 48-51) that the challenged regulations are arbitrary and capricious because they automatically exempt houses of worship and their integrated auxiliaries. Plaintiff describes this exemption as being based on the "false assumption" that "church employees are 'more likely' to object to the use of contraceptives than employees of religious non-profits." Br. 49, 50. As an initial matter, plaintiff does not explain how the decision to exempt churches causes *plaintiff* any injury. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Even if plaintiff was correct (which it is not) that the only reason for treating churches differently was a mistaken factual conclusion, then it would follow that churches and

other non-profit religious organizations should be asked to opt out like other religious objectors. But that does not give plaintiff standing to raise the issue.

In any event, plaintiff misunderstands the Department's reasoning. As noted, there is a long tradition of recognizing the autonomy of churches through exemptions of this kind. *See, e.g., Priests For Life*, 772 F.3d at 238-39. Thus, the Departments incorporated by reference to the tax code an existing and easily identifiable category of religious organizations. *See* 45 C.F.R. § 147.131(a). In initially creating this exemption, the Departments explained it in familiar terms often used to describe a sphere of autonomy for houses of worship. *See, e.g.,* 76 Fed. Reg. at 46,623 (exemption intended in part to "respect[ ] the unique relationship between a house of worship and its employees in ministerial positions"). As the district court correctly recognized, the government is not required "to furnish a detailed explanation that specifically addresses every single evidentiary submission made to it during a notice-and-comment period." JA21 (citing 5 U.S.C. § 553(c)). This Court should also reject plaintiff's attempt to shoehorn its Religion Clauses contentions into an APA claim.

CONCLUSION

The decision of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I hereby certify this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 13,810 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2015, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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