No. 14-12696-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ETERNAL WORD TELEVISION NETWORK, INC., an Alabama non-profit corporation,

Plaintiff-Appellant,

v.

SYLVIA M. BURWELL, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the U.S. Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; U.S. DEPARTMENT OF THE TREASURY,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Alabama

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, the undersigned counsel certifies that, to the best of our knowledge, the following persons and entities may have an interest in the outcome of this case:

American Civil Liberties Union

Amiri, Brigitte

Barbero, Megan

Bennett, Michelle R.

The Becket Fund for Religious Liberty

Blomberg, Daniel Howard

Branda, Joyce R.

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Brinkmann, Beth C.

Brown, Kenyen R.

Burnette, Jason

Burwell, Sylvia M.

Cassady, William E. (Magistrate Judge)

Delery, Stuart F.

Duncan, Stuart Kyle

Eternal Word Television Network, Inc.

Granade, Callie V.S. (District Court Judge)

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Jed, Adam C.

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Stern, Mark B.

United States Department of Health and Human Services

United States Department of Labor

United States Department of the Treasury

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REQUEST FOR ORAL ARGUMENT

These appeals present the question whether the Religious Freedom Restoration Act allows non-profit employers not only to opt out of providing or arranging federally required health coverage for contraceptives, but also to block accommodations that allow women to obtain separate payments for contraceptives from third parties. Because of the importance of the issue, the government respectfully requests oral argument.

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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 such an 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—that plaintiff triggers or facilitates the provision of coverage by opting out—is fundamentally mistaken, as two courts of appeals have also ruled. *Mich. Catholic Conference* v. *Burwell*, 755 F.3d 372, 387 (6th Cir. 2014) ("[s]ubmitting the self-certification form to the insurance issuer or third-party administrator does not 'trigger' contraceptive coverage; it is federal law that requires the insurance issuer or the third-party administrator to provide this coverage"), *reh'g en banc denied*, Nos. 13-2723, 13-6640, ECF No. 63 (Sept. 16, 2014); *accord Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547, 554 (7th Cir. 2014) ("Federal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services."), *reh'g en banc denied*, No. 13-3853, ECF No. 64 (May 7, 2014).

The infirmity of plaintiff's position is further underscored by the Supreme Court's recent 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 existence of the opt-out regulations that plaintiff challenges here was crucial to the Supreme Court's reasoning. The Court explained that the opt-out regulations "effectively exempt[]" organizations that are eligible for an accommodation. *Id.* at 2763. The Court expressly stated 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 Supreme Court concluded that the opt-out regulations demonstrated that HHS "ha[d] at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs." *Hobby Lobby*, 134 S. Ct. at 2782. The Court reasoned that the accommodations allowed under the regulations "serve[] HHS's stated interests equally well" because "female 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'" in obtaining the coverage. *Id.* at 2782 (citation omitted). Indeed, "[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 2760 (emphasis added); *see also id.* at 2759 (explaining that the accommodation "ensur[es] 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").

In August 2014, the Departments of Health and Human Services, Labor, and the Treasury (collectively, the Departments) augmented that regulatory accommodation process in light of the Supreme Court's interim order in *Wheaton College*, which identified an alternative form of accommodation that would neither affect "the ability of [Wheaton College's] employees and students to obtain, without cost, the full range of FDA approved contraceptives," nor preclude the government from relying on the notice it receives from Wheaton College "to facilitate the provision of full contraceptive coverage under the Act." *Wheaton Coll.* v. *Burwell*, 134 S. Ct. 2806, 2807 (2014). The accommodation, as originally challenged in *Wheaton College* and in this case, contemplated that an eligible organization would notify its insurer or third party administrator of its decision to opt out. Under the interim final regulations, an organization may opt out by notifying HHS directly of its decision rather than by notifying its insurance carrier or third party administrator. *See Coverage of Certain Preventive Services Under the Affordable Care Act*, 79 Fed. Reg. 51,092 (Aug. 27, 2014). This provides eligible organizations like plaintiff with an alternative mechanism for opting out of the contraceptive-coverage requirement.

Because plaintiff is eligible for accommodations 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. Dkt. 1 at 2. On June 17, 2014, the district court granted summary judgment for the Departments on plaintiff's RFRA and free speech claims. Dkt. 61. The court entered final judgment as to those claims on June 18, 2014. Dkts. 65, 66. On the same day, plaintiff filed a timely notice of appeal. Dkt. 68.

This Court has appellate jurisdiction under 28 U.S.C. §§ 1291, 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.

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,[1] 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 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

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

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 102-110, 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 102-107.

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, 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).[2]

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

2. The regulatory exemption for religious employers and accommodations for non-profit religious organizations

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

The implementing regulations also establish accommodations for non-profit organizations that hold themselves out as religious organizations and that have a religious objection to contraceptive coverage. The accommodations provision was developed by the agencies in response to religious objections raised by some commenters. The agencies stated that they would develop "'changes to these final regulations that would meet two goals'—providing contraceptive coverage without cost-sharing to covered individuals and accommodating the religious objections of [additional] non-profit organizations[.]" *Wheaton Coll.* v. *Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012) (per curiam) (quoting 77 Fed. Reg. at 8727). After notice and comment rulemaking, the Departments published in July 2013 regulations containing accommodations for non-profit religious organizations. *See* 78 Fed. Reg. 39,870, 39,874-39,886 (July 2, 2013); 45 C.F.R. § 147.131(b) (HHS); 29 C.F.R. § 2590.715-

2713A(a) (Labor); 26 C.F.R. § 54.9815-2713A(a) (Treasury). Those regulatory accommodations "devised and implemented a system that 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 other employees. *Hobby Lobby*, 134 S. Ct. at 2759. As discussed below, the Departments recently augmented the existing regulatory accommodations to provide additional accommodations for eligible organizations.

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. Under these accommodation regulations, an eligible organization is not required "to contract, arrange, pay, or refer for

contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874. Under the preexisting regulations, to be relieved of any such obligations, the organization need only "self-certify" that it is an eligible organization that "opposes providing coverage for particular contraceptive services" and provide a copy of that self-certification to its insurance issuer or third party administrator. *Hobby Lobby*, 134 S. Ct. at 2782; *see* 29 C.F.R. § 2590.715-2713A(a)(4), (b)(1), (c)(1).

If an eligible organization opts out, individuals covered under its plan generally will "still have access to insurance coverage without cost sharing for all FDA-approved contraceptives," but without involvement by the objecting organization. *Hobby Lobby*, 134 S. Ct. at 2759. Where the eligible organization is one that 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).[3]

[3] 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.

Where the eligible organization is one that offers a self-insured plan, its 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).[4] 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]." *Id.* § 2590.715-2713A(b)(3); *see* 45 C.F.R. § 156.50(d).

In all cases, an eligible organization that opts out of providing contraceptive coverage has no obligation to inform plan participants or enrollees of the availability of these separate payments made by third parties. Instead, health 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

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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.

[4] 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).

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 neither administering nor funding the contraceptive benefits. *Ibid.*

In addition, the Departments have further augmented the regulatory accommodation process in light of the Supreme Court's interim order in connection with an application for an injunction in *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014). The interim order provided 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 provisions of the ACA and related regulations "pending final disposition of appellate review." *Id.* at 2807. The order stated that this relief neither affected "the ability of [Wheaton College's] employees and students to obtain, without cost, the full range of FDA approved contraceptives," nor precluded the government from relying on the notice it receives from Wheaton College "to facilitate the provision of full contraceptive coverage under the Act." *Ibid.*

The *Wheaton College* injunction does not reflect a final Supreme Court determination that RFRA requires the government to apply the accommodations in this manner. Nevertheless, the Departments responsible for implementing the accommodations issued regulations that augment the accommodation process in light of *Wheaton College* by "provid[ing] an alternative process for the sponsor of a group

health plan or an institution of higher education to provide notice of its religious objection to coverage of all or a subset of contraceptive services." 79 Fed. Reg. at 51,094.

Under the interim final regulations, an organization may elect to opt out by notifying HHS of its decision directly rather than by notifying its insurance carrier or third party administrator. An 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).

If an eligible organization notifies HHS that it is opting out, the Departments will then make the necessary communications to ensure that health insurance issuers or third party administrators make or arrange separate payments for contraception. In the case of an "insured" group health plan, HHS "will send a separate notification to each of the plan's health insurance issuers informing the issuer" that HHS "has received a notice" that the group health plan is opting out of providing contraceptive coverage on religious grounds "and describing the obligations of the issuer" under the regulations. 45 C.F.R. § 147.131(c)(1)(ii). An issuer that receives such a notice from HHS will "remain responsible for compliance with the statutory and regulatory requirement to provide coverage for contraceptive services to participants and beneficiaries," but the objecting organization "will not have to contract, arrange, pay,

or refer for such coverage." 79 Fed. Reg. at 51,095.

In the case of a "self-insured" group health plan, the Department of Labor will "send a separate notification to each third party administrator of the ERISA plan." *Ibid.* The notice will state that HHS has received a notice that the group health plan is opting out of the contraceptive coverage requirement and will "describe[] the obligations of the third party administrator under" the applicable regulations. 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B). These include the obligation to make or arrange separate payments for contraceptive services. *Id.* § 2590.715-2713A(b)(2). The Department of Labor's communication to the third party administrator(s) will also "designate the relevant third party administrator(s) as plan administrator under section 3(16) of ERISA for those contraceptive benefits that the third party administrator would otherwise manage." 79 Fed. Reg. at 51,095; *see also* 29 C.F.R. § 2510.3-16(b).

As with the preexisting accommodations, in all cases, the eligible organization that opts out of providing contraceptive coverage has no obligation to inform plan participants or enrollees of the availability of these separate payments made by third parties. Instead, the health insurance issuer or third party administrator itself provides this notice, and does so "separate from" materials that are distributed in connection with the eligible organization's group health coverage. 45 C.F.R. § 147.131(d); 29 C.F.R. § 2590.715-2713A(d). Again, that notice must make clear that the eligible organization is neither administering nor funding the contraceptive benefits. *Ibid.*

Additionally, the interim final rules delete from the regulations the so-called "noninterference provision," which provided that eligible organizations that establish or maintain self-insured group health plans "must not, directly or indirectly seek to interfere with a third party administrator's arrangements to provide or arrange for separate payments for contraceptive services" and "must not, directly or indirectly, seek to influence a third party administrator's decision to make any such arrangements." 26 C.F.R. § 54.9815-2713A(b)(1)(iii); 29 C.F.R. § 2590.715-2713A(b)(1)(iii).

B. Factual Background and Prior Proceedings

1. Plaintiff Eternal Word Television Network, Inc. is a non-profit organization that offers health care coverage to its approximately 350 employees through a self-insured health plan administered by Blue Cross Blue Shield of Alabama and that is admittedly eligible for the religious accommodations set out above.[5] *See* Dkt. 29-9 ¶¶ 5, 24, 28. Plaintiff contends that the religious accommodations described above violate its rights under RFRA, 42 U.S.C. § 2000bb *et seq.*, which provides that the government "shall not substantially burden a person's exercise of religion" unless the application of that burden is the least restrictive means to advance a compelling governmental interest. Plaintiff argues that opting out of the contraceptive coverage requirement substantially burdens its religious exercise because doing so "triggers"

[5] The State of Alabama is also a plaintiff in this case, but has not filed a notice of appeal.

other parties providing such coverage in its stead (Appellant's Br. 13, 31), and thus "facilitate[s]" access to contraceptives to which plaintiff objects (Appellant's Br. 32). In addition to its RFRA claims, plaintiff also asserts claims under the First Amendment.[6]

2. The district court granted the government's motion for summary judgment with respect to plaintiff's RFRA and First Amendment claims. Rejecting plaintiff's claim that the accommodation substantially burdens its exercise of religion under RFRA, the court explained that "the duties the mandate imposes on other parties are irrelevant to [plaintiff's] RFRA claim." Op. 8. Plaintiff "cannot explain how [opting out] violates its religion without reference to the obligation that the mandate will impose upon others after [plaintiff] delivers the form." Op. 9. "To the extent that [plaintiff's] third-party administrator is under compulsion to act, that compulsion comes from the law, not from Form 700." Op. 9-10 (citing *Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547, 554 (7th Cir. 2014), *reh'g en banc denied*, No. 13-3853, ECF No. 64 (May 7, 2014); *Mich. Catholic Conference* v. *Burwell*, 755 F.3d 372, 387 (6th Cir. 2014), *reh'g en banc denied*, Nos. 13-2723, 13-6640, ECF No. 63 (Sept. 16, 2014)). "Because [plaintiff's] only religious objection to the mandate hinges upon the effect it will have on other parties," the court held "the mandate does not impose a substantial burden on [plaintiff's] religious practice within the meaning of RFRA." Op. 10.

[6] Plaintiff asserted additional statutory causes of action before the district court, which are not at issue in this appeal.

The court also rejected plaintiff's claim that the accommodations violate the First Amendment. The court first rejected plaintiff's Free Exercise and Establishment Clause claims, concluding that there is "nothing in the mandate that shows an attempt to restrict [plaintiff's] religious practices 'because of their religious motivation.'" Op. 11 (quoting *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533, 113 S. Ct. 2217, 2227 (1993)). "[T]he distinction between an organization that qualifies for the religious-employer exemption and one that does not has solely to do with the organization's tax structure," which is "a valid basis of differentiation." Op. 15. The court also rejected plaintiff's Free Speech claims, noting that "[w]hen compelled speech is purely incidental to the government's regulation of conduct, there is no First Amendment problem." Op. 16. In this case, the "notice requirement is a regulation of conduct, not speech, and the fact that Form 700 uses written words to facilitate that notice is purely incidental." *Ibid.* In any event, "the accommodation's certification requirement does not compel [plaintiff] to express any opinions or beliefs that it does not hold." *Ibid.*

On June 30, 2014, this Court granted plaintiff's motion for an injunction pending appeal. *See Eternal Word Television Network* v. *Burwell*, No. 14-12696 (11th Cir. June 30, 2014) (order granting injunction pending appeal). Judge Pryor wrote a concurrence, but the panel "express[ed] no views on the ultimate merits of [plaintiff's] appeal in this case." *Id.* at 2.

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.

If plaintiff opts out of the coverage requirement, its third party administrator will be independently required under federal law to make or arrange separate payments for contraceptive coverage. 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 the Sixth and Seventh Circuits have explained in rejecting this contention, "[s]ubmitting the self-certification form to the insurance issuer or third-party administrator does not 'trigger' contraceptive coverage; it is federal law that requires the insurance issuer or the third-party administrator to provide this coverage." *Mich. Catholic Conference* v. *Burwell*, 755 F.3d 372, 387 (6th Cir. 2014), *reh'g en banc denied*, Nos. 13-2723, 13-6640, ECF No. 63 (Sept. 16, 2014); *Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547, 554 (7th Cir. 2014), *reh'g en banc denied*, No. 13-3853, ECF No. 64 (May 7, 2014).

The Supreme Court has also suggested that the government may "rely[] on" a notice from objecting parties to "facilitate the provision of full contraceptive coverage under the Act," *Wheaton Coll.* v. *Burwell*, 134 S. Ct. 2806, 2807 (2014), and the interim final regulations now provide alternative accommodations that allow eligible organizations to opt out by notifying HHS rather than their insurers or third party administrators. As with the preexisting regulations, after an organization informs HHS that it is opting out, federal law independently obligates the insurer or third party administrator to provide such coverage.

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 *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). 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, *id.* 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." *Id.* at 2785-2786 (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.'" *Id.* at 2781 n.37 (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 720, 125 S. Ct. 2113, 2121 (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. Plaintiff's First Amendment claims are similarly without merit.

First, the requirement that non-grandfathered plans cover recommended preventive-health services without cost sharing, including preventive services recommended for women, does not target religious practices in contravention of the Free Exercise Clause. The case bears no resemblance to *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520, 113 S. Ct. 2217 (1993), in which a state statute targeted the ritual animal sacrifices by members of a particular church.

Similarly, the regulations do not favor some churches or denominations over others in violation of the Establishment Clause. Under the regulations, an organization is a "religious employer" if it "is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.131(a). The fact that some religiously affiliated organizations, regardless of their denomination, are exempt from the contraceptive coverage requirement, while other religiously affiliated organizations are not, does not favor one denomination over others. This provision is wholly dissimilar to the statute at issue in *Larson* v. *Valente*, 456 U.S. 228, 102 S. Ct. 1673 (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, 102 S. Ct. at 1688.

Finally, plaintiff's free speech claims are meritless and, in any event, were rendered moot by the Departments' interim final regulations. Following the issuance of those interim final regulations, plaintiff need not provide a form to its third party administrator in order to opt out of providing contraceptive coverage. Rather, plaintiff may simply notify HHS, and it need not use any particular form to do so. Similarly, the interim final regulations deleted the "non-interference provision," to which plaintiff objects.

STANDARD OF REVIEW

This Court reviews *de novo* an award of summary judgment. *Connelly* v. *Metro. Atlanta Rapid Transit Auth.*, __ F.3d __, 2014 WL 4364905, at *4 (11th Cir. Sept. 4, 2014). "Summary judgment is proper if the pleadings, depositions, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Ibid.* (internal quotation marks omitted).

ARGUMENT

I. The Opt-Out Regulations Accommodate The Religious Liberty Of Plaintiff While Ensuring That Women Who Work For Plaintiff Have Access To Contraceptive Coverage.

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 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. The Court explained that the opt-out regulations "effectively exempt[]" organizations that are eligible for an accommodation. *Id.* 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." *Ibid.*

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. To the contrary, the Court reiterated that

"in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'" *Id.* at 2781 n.37 (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 720, 125 S. Ct. 2113, 2121 (2005)). 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." *Id.* at 2787 (Kennedy, J., concurring).

The Supreme Court thus stressed 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 2760; *see id.* at 2782-2783. After employers opt out, 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 2786 (Kennedy, J., concurring) (explaining that the accommodation "works by requiring insurance companies" to provide contraceptive coverage and "equally furthers the Government's interest"). In responding to the dissent, the Court emphasized 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."'" *Id.* at 2783 (alterations in original, quoting dissent (in turn quoting 78 Fed. Reg. at 39,888 with alterations)).

The Supreme Court's interim order in connection with an application for an injunction in *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, "[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 provisions of the Affordable Care Act and related regulations requiring coverage without cost sharing of certain contraceptive services "pending final disposition of appellate review." *Id.* at 2807. The order stated that Wheaton College need not use the self-certification form prescribed by the government or send a copy of the executed form to its health insurance issuers or third party administrators to meet the condition for this injunctive relief. The order also stated that this relief neither affected "the ability of [Wheaton College's] employees and students to obtain, without cost, the full range of FDA approved contraceptives," nor precluded the government from relying on the notice it receives from Wheaton College "to facilitate the provision of full contraceptive coverage under the Act." *Ibid.*

The *Wheaton College* injunction does not reflect a final Supreme Court determination that RFRA requires the government to apply the accommodations in this manner. Nevertheless, the Departments have augmented the existing

accommodations and plaintiff now has an alternative means by which it may opt out of providing contraceptive coverage, and one that, like the Supreme Court's *Wheaton College* 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 declaring its intention to exclude contraceptive coverage from its plans. It 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) (providing that third party administrator shall provide payments or arrange for an issuer or other entity to provide payments "for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries."); 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 its third party administrator to make or arrange separate payments for contraceptive services for the plan participants and beneficiaries. The crux of plaintiff's theory is that opting out of the coverage requirement "triggers" or "facilitates" the provision of contraceptive coverage by third parties, because only if employers opt out does the government require or offer to pay third parties to make or arrange separate payments for contraception. *See* Appellant's Br. 35 (arguing that third parties' "obligations are triggered by the Form, which is why [plaintiff] cannot sign it"); *id.* at 33 (claiming that the opt-out form "serves a specific triggering function in the government's contraceptive delivery scheme"); *id.* at 22 (objecting to "facilitat[ing] the distribution of contraception . . . by participating in the government's scheme").

The Seventh Circuit observed in *University of Notre Dame* v. *Sebelius* that the "novelty" of this claim "deserves emphasis." 743 F.3d 547, 557 (2014), *reh'g en banc denied*, No. 13-3853, ECF No. 64 (May 7, 2014). The court explained that "United States law and public policy have a history of accommodating religious beliefs, as by

allowing conscientious objection to the military draft—and now exempting churches and religious institutions from the Affordable Care Act's requirements of coverage of contraceptive services." *Ibid.* The court stressed that "[w]hat makes this case and others like it involving the contraception exemption paradoxical and virtually unprecedented is that the beneficiaries of the religious exemption are claiming that the exemption process itself imposes a substantial burden on their religious faiths." *Ibid.* As the Seventh Circuit explained in *Notre Dame*, "[f]ederal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services." 743 F.3d at 554; *see Mich. Catholic Conference* v. *Burwell*, 755 F.3d 372, 387 (6th Cir. 2014) ("Submitting the self-certification form to the insurance issuer or third-party administrator does not 'trigger' contraceptive coverage; it is federal law that requires the insurance issuer or the third-party administrator to provide this coverage."), *reh'g en banc denied*, Nos. 13-2723, 13-6640, ECF No. 63 (Sept. 16, 2014).

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, 716-718, 101 S. Ct. 1425, 1431-1432 (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). On plaintiff's reasoning, a conscientious objector could object not only to his own military service, but also to opting out, on the theory that his opt-out would "'trigger' the drafting of a replacement who was not a conscientious objector." *Notre Dame*, 743 F.3d at 556. Similarly, 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. Thus, as the Seventh Circuit explained in *Notre Dame*, plaintiffs like Notre Dame and the plaintiff here "can derive no support from" decisions involving for-profit plaintiffs that are not eligible for the accommodations, like the Supreme Court's decision in *Hobby Lobby*, because the accommodations authorize non-profit religious employers to refuse to comply with the contraceptive regulation. 743 F.3d at 558.

Plaintiff is therefore mistaken in claiming that rejection of its RFRA claim rests on an "'attenuation' argument" that is "squarely foreclosed by the recent *Hobby Lobby* decision." Appellant's Br. 28-30. In *Hobby Lobby,* the Supreme Court held that the plaintiffs' religious beliefs were substantially burdened by the requirement that they provide contraceptive coverage, despite the fact that any decision to use that coverage would be made "by the covered employees and dependents, in consultation with their health care providers." 134 S. Ct. at 2799 (Ginsburg, J., dissenting). The majority rejected the argument that the act of providing contraceptive coverage was "simply too attenuated" from an employee's decision to use contraception. *Id.* at 2777-2778.

In this case, however, opting out of providing contraceptive coverage is not merely "attenuated" from an employee's decision to use contraception and a third party's provision of contraceptive coverage, it is distinct and independent from that coverage. Indeed, as the Supreme Court explained, eligible non-profit plaintiffs like plaintiff here are "effectively exempt[]" from the contraceptive coverage requirement. *Hobby Lobby*, 134 S. Ct. at 2763; *see also Notre Dame*, 743 F.3d at 554 ("Federal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services."); *Mich. Catholic Conference*, 755 F.3d at 387 ("[I]t is federal law that requires the insurance issuer or the third-party administrator to provide this coverage.").

Plaintiff's objections to the opt-out form it may choose to provide to its insurer or third party administrator are beside the point. *See* Appellants's Br. 33-40; *see also Eternal Word Television Network v. Burwell*, No. 14-12696 (11th Cir. June 30, 2014), at 20-23 (Pryor, J., concurring).[7] Plaintiff notes that the opt-out form "will be treated as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits," for purposes of ERISA, 78 Fed. Reg. at 39,879, and will serve as "an instrument under which the plan is operated," 29 C.F.R.

[7] Judge Pryor wrote his concurrence on June 30, 2014, before the Departments augmented the accommodations through issuance of the interim final regulations. *See Coverage of Certain Preventive Services Under the Affordable Care Act*, 79 Fed. Reg. 51,092 (Aug. 27, 2014).

§ 2510.3-16(b), and suggests that this aspect of the accommodation for self-insured organizations raises concerns that are not presented by the accommodation for insured organizations. Even if plaintiff were correct (and it is not), plaintiff no longer needs to use that form in order to opt out. As noted, following the Supreme Court's issuance of a temporary injunction in *Wheaton College*, the Departments provided an additional means by which an eligible organization may opt out. If it prefers not to notify its insurer or third party administrator of its decision, it may instead notify the government. Plaintiff therefore can choose to inform HHS that it wishes to opt out, and it need not use any particular form to do so. 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii); 45 C.F.R. § 147.131(c)(1)(ii).

In any event, plaintiff misunderstands the regulations and their relationship to ERISA. The section of the preamble from which plaintiff quotes explains that the self-certification is "a document notifying the third party administrator(s) that the eligible organization will not provide, fund, or administer payments for contraceptive services," and therefore is "one of the instruments under which the employer's plan is operated under ERISA section 3(16)(A)(i)." 78 Fed. Reg. at 39,879. The form directs third party administrators to their own "obligations set forth in the[] final regulations" and makes clear that the eligible organization has no such obligations. *Ibid.*; *see also* 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(A). The preamble explains that the third party administrator's legal obligations derive from ERISA section 3(16). Insofar as the result of an eligible organization opting out is that, under ERISA, the regulations

impose legal obligations on the third party administrator to act in the employer's stead, the form "*will be treated* as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits[.]" 78 Fed. Reg. at 39,879 (emphasis added). The preamble notes that "[t]he Departments have determined that the ERISA section 3(16) approach most effectively enables eligible organizations to avoid contracting, arranging, paying, or referring for contraceptive coverage after meeting the self-certification standard, while also creating the fewest barriers to or delays in plan participants and beneficiaries obtaining contraceptive services without cost sharing." *Ibid.*[8]

Finally, plaintiff suggests that the government's failure to dispute plaintiff's sincerely held beliefs obviates the need for this Court to engage in any meaningful substantial burden analysis. *See, e.g.*, Appellant's Br. 24 (noting that "[t]he government does not dispute that [plaintiff's] refusal to sign and deliver [the opt-out form] is required by [plaintiff's] religious beliefs"). But whether a burden is "substantial" under RFRA is a question of law, not a "question[] of fact, proven by the credibility of the claimant." *Mich. Catholic Conference*, 755 F.3d at 385 (quoting *Mahoney* v. *Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011)). *Accord Notre Dame*, 743 F.3d at 558

[8] Moreover, if an employer objects to particular aspects of the accommodation for *self-insured* plans, it is free to offer its employees an *insured* plan. This option obviates any objection based on the particulars of the accommodation for self-insured organizations. *See Tony & Susan Alamo Found.* v. *Sec'y of Labor*, 471 U.S. 290, 303-305, 105 S. Ct. 1953, 1962-1964 (1985) (option to compensate employees by furnishing room and board obviates religious objection to paying cash wages).

("substantiality—like compelling governmental interest—is for the court to decide"); *Kaemmerling* v. *Lappin*, 553 F.3d 669, 673-674, 678-679 (D.C. Cir. 2008) ("[a]ccepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened"); *see also Bowen* v. *Roy*, 476 U.S. 693, 701 n.6, 106 S. Ct. 2147, 2152 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. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448, 108 S. Ct. 1319, 1325 (1988) (similar). Accordingly, it is both necessary and appropriate for this Court to determine whether plaintiff has established a substantial burden on its religious exercise.[9]

[9] 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, 110 S. Ct. 1595 (1990). *See* 139 Cong. Rec. S14350, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); *ibid.* (statement of Sen. Hatch). Consistent with RFRA's restorative purpose, Congress expected courts considering RFRA claims to "look to free exercise cases decided prior to *Smith* for guidance." S. Rep. No. 111, 103d Cong., 1st Sess. 8-9 (1993) (Senate Report); *see* H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993) (same); *see also* 146 Cong. Rec. S7774, S7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy) (explaining that, for purposes of the Religious Land Use and Institutionalized Persons Act of 2000, which was modeled on RFRA, "[t]he term 'substantial burden' . . . is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise").

In sum, plaintiff is "effectively exempt[]," *Hobby Lobby*, 134 S. Ct. at 2763, and its 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.'" *Mich. 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*.

1. In *Hobby Lobby*, 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 2785-2786 (Kennedy, J., concurring); *accord 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").

As an initial matter, the government's ability to accommodate religious concerns in this and other areas depends on the government's ability to fill the gaps created by the accommodations. Plaintiff, by contrast, asserts that it is insufficient to permit an objector to opt out of an objectionable requirement; in its view, the government's filling each gap must itself be subject to compelling-interest analysis and thus the government often may not shift plaintiff's obligations to a third party but must instead fundamentally restructure its operations.

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 2782-2783. 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.

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 103-107; *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. This is not a "broadly formulated interest[] justifying the general applicability of government mandates," *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431, 126 S. Ct. 1211, 1220 (2006), but rather a concrete and specific one, supported by a wealth of empirical evidence.

Use of contraceptives reduces the incidence of unintended pregnancies. IOM Report 102-104. 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." *Ibid.*

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.

The impact on third parties that would result from plaintiff's position would undermine comprehensive efforts to protect the public health, which is unquestionably a compelling governmental interest. Contrary to plaintiff's assertions (Appellant's Br. 41-43), this is not a "broadly formulated interest[] justifying the general applicability of government mandates," *O Centro*, 546 U.S. at 431, but rather a concrete and specific one, supported by a wealth of empirical evidence. And while plaintiff objects that its employees share its religious beliefs (Appellant's Br. 43), no

one is required to use coverage they do not want. The fact that effected women will use such coverage only if they decide to do so, in consultation with their health care providers, only underscores the government's compelling interest in making such coverage available. 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.[10]

Plaintiff also is mistaken in suggesting that the exemption for religious employers and grandfathered health plans demonstrate that these interests are not compelling. Appellant's Br. 42-45.

[10] Moreover, 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 it is highly likely that some employees 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, 92 S. Ct. 1526, 1536 (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, 101 S. Ct. at 1432 (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, 102 S. Ct. 1051, 1056-1057 (1982) (looking at the effect if other adherents opted out of the Social Security system); *id.* at 262-263, 102 S. Ct. at 1057-1059 (Stevens, J., concurring in the judgment) (explaining that the effect of the opt out on just the plaintiffs before the Court was small).

The regulatory exemption for religious employers extends to "churches and other houses of worship" and their integrated auxiliaries. 78 Fed. Reg. at 39,874; *see* 45 C.F.R. § 147.131(a). There is a long tradition of protecting the autonomy of a church through exemptions of this kind, and the Religion Clauses of the First Amendment give "'special solicitude to the rights of religious organizations' as religious organizations, respecting their autonomy to shape their own missions, conduct their own ministries, and generally govern themselves in accordance with their own doctrines as religious institutions." *Korte* v. *Sebelius*, 735 F.3d 654, 677 (7th Cir. 2013) (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 706 (2012)). In establishing the religious-employer exemption, the Departments explained that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection" and that those employees "would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874. That limited exemption does not undermine the government's interest in ensuring that women generally have access to contraceptive coverage.

In *United States* v. *Lee*, 455 U.S. 252, 102 S. Ct. 1051 (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 258-260, 102 S. Ct. at

1056-1057, even as the Court emphasized that Congress had provided religion-based exemptions for self-employed individuals, *id.* at 260-261, 102 S. Ct. at 1057. The Supreme Court concluded that "[c]onfining [the exemption] to the self-employed provided for a narrow category which was readily identifiable," *ibid.*, 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.

Nor does the Affordable Care Act's grandfathering provision, 42 U.S.C. § 18011; 45 C.F.R. § 147.140(g), provide any basis to deny women the separate payments for contraceptives that the regulations require. The Affordable Care Act's grandfathering provision has the effect of allowing a transition period for compliance with a number of the Act's requirements (including, but not limited to, the contraceptive coverage and other preventive-services coverage provisions). The compelling nature of an interest is not diminished because the government phases in a regulation advancing it in order to avoid undue disruption. *Cf. Heckler* v. *Mathews*, 465 U.S. 728, 746-748, 104 S. Ct. 1387, 1398-1400 (1984) (noting that "protection of reasonable reliance interests is . . . a legitimate governmental objective" that Congress may permissibly advance through phased implementation of regulatory requirements). In enacting the Americans with Disabilities Act, for example, Congress imposed different requirements on existing grandfathered facilities than on later-constructed

facilities, *see* 42 U.S.C. §§ 12183(a)(1), 12182(b)(2)(A)(iv), but that reasonable distinction did not undermine the interests served by the law.[11]

2. 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

[11] Similarly, it is irrelevant that employers with fewer than 50 full-time-equivalent employees are exempt from a different provision, 26 U.S.C. § 4980H, which subjects certain large employers to a possible tax if they fail to offer full-time employees (and their dependents) adequate health coverage, 26 U.S.C. § 4980H(c)(2)(A). The preventive-services coverage requirements apply to any employer that provides coverage without regard to its size. 42 U.S.C. § 300gg-13. Moreover, if employers with fewer than 50 employees do not offer any health coverage, then many of their employees may be able to obtain subsidies to purchase health insurance that covers all essential health benefits including contraceptive benefits. *See* 26 U.S.C. § 36B. Federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by those statutes. *See, e.g., Arbaugh* v. *Y&H Corp.*, 546 U.S 500, 504-505 & n.2, 126 S. Ct. 1235, 1239 & n.2 (2006) (explaining that, when Title VII was first enacted, the statute's prohibitions on employment discrimination did not apply to employers with fewer than 25 employees, and those prohibitions still do not apply to employers with fewer than 15 employees); *Lee*, 455 U.S. at 258 n.7, 102 S. Ct. at 1055 n.7 (noting ways in which Social Security Act's coverage was "broadened" over the years).

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").

The initial accommodations offer plaintiff a way to opt out by notifying its third party administrator that it does not wish to provide contraceptive coverage, while requiring or encouraging third parties to make or arrange separate payments for contraception where employers have opted out. The augmented regulatory accommodation process offers plaintiff an alternative but still administrable way to state that it objects and opts out—without contacting its third party administrator—while providing the government with the information needed to implement the requirement 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.[12] Under both methods of opting

[12] Under the augmented accommodation whereby plaintiff may notify HHS, "[t]he content required for the notice represents the minimum information necessary for the Departments to determine which entities are covered by the accommodation, to administer the accommodation, and to implement the policies in the July 2013 final regulations." 79 Fed. Reg. at 51,095.

out, the effect on participants and beneficiaries is "precisely zero," *Hobby Lobby*, 134 S. Ct. at 2760.

Plaintiff's attempt to identify equally effective alternative means for providing contraceptive coverage fails. Whereas "[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," *Hobby Lobby*, 134 S. Ct. at 2760, plaintiff's schemes would not "equally further[] the Government's interest," *id.* at 2786 (Kennedy, J., concurring), by ensuring that women can seamlessly obtain contraceptive coverage without additional burden—the very point of requiring that health coverage include coverage of contraceptives without cost sharing. *See* 78 Fed. Reg. at 39,888; IOM Report 18-19. *See generally Reno* v. *Am. Civil Liberties Union*, 521 U.S. 844, 874, 117 S. Ct. 2329, 2346 (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).

Plaintiff's suggestion that the government can work with third parties by, e.g., "[e]mpower[ing] willing actors . . . to deliver the drugs" (Dkt. 30, at 26), ignores the fact 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.

Plaintiff suggests that the government should directly provide contraceptives to women, *see* Appellant's Br. 47, or provide tax credits to women who pay for

contraception out of pocket themselves (Dkt. 30, at 26). But RFRA does not require the government to create entirely new programs to accommodate religious objections. *See, e.g., Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring) ("[T]he Court does not address whether the proper response to a legitimate claim for freedom in the health care arena is for the Government to create an additional program. The Court properly does not resolve whether one freedom should be protected by creating incentives for additional government constraints. 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.").

Plaintiff nonetheless insists (Appellant's Br. 47-48) that the government could fund contraceptive coverage "through Title X of the Public Health Service Act." But unlike employer-based coverage, Title X grantees provide services directly, not through reimbursement to third party providers. By statute, moreover, priority for services must be given to "low-income families." 42 U.S.C. § 300a-4(c). Consistent with this requirement, patients whose income exceeds 250% of the federal poverty level must pay the reasonable cost of any services they receive. 42 C.F.R. § 59.5(a)(8). Title X thus is not available to provide contraceptive coverage for employees of objecting organizations. And even if it were, providing such coverage through Title X—or, for that matter, some other existing or potential government program—would not effectively implement Congress's objective of "providing coverage of recommended preventive services through the existing employer-based system of

health coverage so that women face minimal logistical and administrative obstacles." 78 Fed. Reg. at 39,888. To the contrary, "[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." *Ibid.*

Plaintiff also contends that that the government could "offer subsidies to [its] employees who wish to purchase comprehensive policies on the government-run exchanges." Appellant's Br. 48. But, by statute, exchanges may only make available "qualified health plans" providing comprehensive health coverage, and could not make available contraception-coverage-only policies. 42 U.S.C. § 18031(d)(2)(B)(i); *see* 42 U.S.C. § 18021(a)(1)(B). Moreover, as the Departments explained in promulgating the accommodations, HHS "does not have the authority to require issuers offering coverage through the Exchanges to provide separate contraceptive coverage at no cost to [employees]." 78 Fed. Reg. at 39,882.

The Supreme Court repeatedly explained in *Hobby Lobby* that the regulatory accommodations challenged by plaintiff here "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." 134 S. Ct. at 2759; *id.* at 2760; *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"). The regulatory accommodation process is the least restrictive means of ensuring that women seamlessly obtain coverage for contraception alongside their remaining health coverage.

II. Plaintiff Has Not Identified Any Violation of Its Constitutional Rights.

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

The Free Exercise Clause is not implicated by laws that are neutral and generally applicable. *See Employment Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 1600 (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, 117 S. Ct. 2157, 2168 (1997); *see id.* at 530, 117 S. Ct. at 2169 (Free Exercise clause prohibits "laws passed because of religious bigotry"); *id.* at 535 , 117 S. Ct. at 2171(explaining that if a law "disproportionately burdened a particular class of religious observers," the relevance under the Free Exercise clause is to suggest "an impermissible legislative motive"). "Neutrality and general applicability are interrelated." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 2226 (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, 113 S. Ct. at 2227. 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, 113 S. Ct. at 2232.

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

The district court rejected plaintiff's contention that the preventive-services coverage regulations are not generally applicable because of statutory provisions that pertain to small businesses and grandfathered plans. *See* Appellant's Br. 51-54. "The rules applicable to grandfathered health plans and small employers are equally available to religious and secular employers, so they do not undermine the mandate's general applicability." Dkt. 61, at 13. Thus, unlike the regime at issue in *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209-210 (3rd Cir. 2004), the small businesses and grandfathered health plans provisions apply to any entity that satisfies well-defined conditions and thus do not "create[] a regime of individualized, discretionary exemptions."[13]

[13] Plaintiff also finds no support in *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1235 (11th Cir. 2004), in which this Court held that a zoning restriction that included "private clubs and lodges as permitted uses in Surfside's business

Continued on next page.

The district court also rejected plaintiff's assertion that the challenged regulations are not neutral because they exempt certain religious employers from the contraceptive coverage requirement while eligible organizations such as plaintiff are eligible for the accommodations. Appellant's Br. 54-56. Plaintiff urges that the regulations "expressly discriminat[e] among religious objectors." Appellant's Br. 54. But, as the district court reasoned, "that argument misses the mark; to the extent that the mandate treats some religious organizations differently than others, the difference has nothing to do with the organization's religious beliefs or practices; it turns on whether the organization qualifies for tax-exempt status under the Internal Revenue Code." Dkt. 61, at 12 (citing 78 Fed. Reg. at 39,874).

Under the regulations, an organization is a "religious employer" if it "is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.131(a). If so, it qualifies for the exemption, without any government action whatsoever. This exemption does not impermissibly favor some religions over

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district, while simultaneously excluding religious assemblies, violates the principles of neutrality and general applicability." This Court concluded that the zoning restriction improperly "targeted religious assemblies" by "fail[ing] to treat . . . analgous groups equally." *Ibid.* (reasoning that "private clubs and lodges endanger Surfside's interest in retail synergy as much or more than churches and synagogues"). By contrast, the provisions that pertain to small businesses and grandfathered plans are equally available to secular and religious organizations.

others. Although plaintiff apparently believes that these Internal Revenue Code provisions are unconstitutional, it offers no plausible basis for this contention.

Plaintiff's reliance on *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520, 113 S. Ct. 2217(1993), underscores the error in its reasoning. In that case, the legislature specifically targeted the religious exercise of members of a single church (Santeria) by enacting ordinances that used terms such as "sacrifice" and "ritual," 508 U.S. at 533-534, 113 S. Ct. at 2227, and prohibited few, if any, animal killings other than Santeria sacrifices, *id.* at 535-536, 113 S. Ct. at 2228. The statute was drawn so "that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering to the orishas, not food consumption." *Id.* at 536, 113 S. Ct. at 2228. "Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished." *Ibid.* *Lukumi* does not remotely suggest that an exemption from the contraceptive coverage provision for plans offered by churches and other houses of worship is evidence that the government targeted the religious practices of any church or denomination.

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

Plaintiff also asserts that the regulations violate the Establishment Clause of the First Amendment by "impermissibly discriminating among religious

organizations." Appellant's Br. 56. Rejecting the same argument, the Seventh Circuit explained 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." *Notre Dame*, 743 F.3d at 560 (citing *Walz* v. *Tax Comm'n of the City of New York*, 397 U.S. 664, 666, 905 S. Ct. 1409, 1410 (1970) (upholding property tax exemptions for real property owned by religious organizations and used exclusively for religious worship)).

Plaintiff's reliance (Appellant's Br. 59-61) on cases such as *Larson* v. *Valente*, 456 U.S. 228, 244-246, 102 S. Ct. 1673, 1683-1684 (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, 102 S. Ct. at 1688; *see also id.* at 244, 102 S. Ct. at 1683 ("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, 102 S. Ct. at 1684 n.23 (discussing *Gillette* v. *United States*, 401 U.S. 437, 91 S. Ct. 828 (1971)). Here, too, the religious employer exemption does not grant any denominational preference or otherwise discriminate among religions. As the Sixth

Circuit explained, "[b]ecause the exemption and accommodation arrangement distinguishes between entities based on organizational form, not denomination, it does not express an unconstitutional state preference on the basis of religion." *Mich. Catholic Conference*, 755 F.3d at 395.

C. 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. This Court need not even reach the district court's reasoning, however, because both of plaintiff's free speech claims are moot following issuance of the Departments' interim final regulations. *See Coverage of Certain Preventive Services Under the Affordable Care Act*, 79 Fed. Reg. 51,092 (Aug. 27, 2014).

1. Plaintiff first argues that the regulations "compel [plaintiff] to speak 'in a form and manner specified by the Secretary.'" Appellant's Br. 61 (quoting 45 C.F.R. § 147.131(b)(4), (c)). But the interim final regulations address any objection plaintiff may have to the form it would use if it chose to opt out by directly notifying its third party administrator. Under the interim final regulations, an organization need not use any particular form in order to opt out. An organization may instead elect to opt out by notifying HHS of its decision directly rather than by notifying its insurance carrier or third party administrator. Such an organization need only indicate to HHS 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, and it need not use any particular form to do so. 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii); 45 C.F.R. § 147.131(c)(1)(ii).

In any event, as the district court reasoned, "to the extent the accommodation requires [plaintiff] to certify its beliefs in a particular form, that requirement is meant only to facilitate appropriate notice of [plaintiff's] decision to opt out of the mandate's requirements." Dkt. 61, at 16. "When compelled speech is purely incidental to the government's regulation of conduct, there is no First Amendment problem." *Ibid.*; *see also Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47, 61-62, 126 S. Ct. 1297, 1308 (2006). Moreover, "[n]othing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." 78 Fed. Reg. 39,870, 39,880 n.41; *see also Mich. Catholic Conference*, 755 F.3d at 391-392 (noting that "the self-certification form does not deprive appellants of the freedom to speak out about abortion and contraception on their own terms"). Indeed, by opting out, plaintiff would explicitly proclaim its objection to contraception. "Here the accommodation's certification requirement does not compel [plaintiff] to express any opinions or beliefs that it does not hold." Dkt. 61, at 16. "Even assuming that the government is compelling this speech, it is not speech that the appellants disagree with and so cannot be the basis of a First Amendment claim." *Mich. Catholic Conference*, 755 F.3d at 392.

2. Plaintiff's second free speech claim also is foreclosed by the interim final regulations. Plaintiff challenges the so-called "noninterference provision," which provided that eligible organizations that establish or maintain self-insured group health plans "must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services" and "must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements." Appellant's Br. 64-65 (quoting prior version of 26 C.F.R. § 54.9815-2713A(b)(iii)). Because the Departments interpreted that provision "solely as prohibiting the use of bribery, threats, or other forms of economic coercion" and "[b]ecause such conduct is generally unlawful," the interim final regulations deleted that provision from the regulations. *Coverage of Certain Preventive Services Under the Affordable Care Act*, 79 Fed. Reg. 51,092, 51,095 (Aug. 27, 2014). Plaintiff's claim is therefore moot.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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SEPTEMBER 2014

CERTIFICATIONS OF COMPLIANCE

I hereby certify this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 13,716 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 September 26 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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