

Nos. 13-2723, 13-6640

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

MICHIGAN CATHOLIC CONFERENCE, *et al.*, and
CATHOLIC DIOCESE OF NASHVILLE, *et al.*,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court for the
Western District of Michigan (No. 13-cv-1247) (Quist, J.), and the United States District
Court for the Middle District of Tennessee (No. 13-cv-1303) (Campbell, J.)

BRIEF FOR THE APPELLEES

STUART F. DELERY

Assistant Attorney General

PATRICK A. MILES, JR.

DAVID RIVERA

United States Attorneys

BETH S. BRINKMANN

Deputy Assistant Attorney General

MARK B. STERN

ALISA B. KLEIN

ADAM C. JED

(202) 514-5089

Attorneys, Appellate Staff

Civil Division, Room 7531

U.S. Department of Justice

950 Pennsylvania Ave., N.W.

Washington, D.C. 20530

REQUEST FOR ORAL ARGUMENT

This appeal presents the question whether the Religious Freedom Restoration Act (“RFRA”) allows employers not only to opt out of providing federally required health coverage benefits but also to prevent third parties from providing such coverage. Given the importance of the issue, the government respectfully requests oral argument.

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.....	1
STATEMENT OF JURISDICTION	2
STATEMENT OF THE ISSUES	3
STATEMENT OF THE CASE	3
A. Regulatory Background.....	3
B. Factual Background and Prior Proceedings	9
SUMMARY OF ARGUMENT.....	13
STANDARD OF REVIEW.....	16
ARGUMENT	16
I. The Challenged Regulations Do Not Impermissibly Burden Plaintiffs’ Exercise of Religion Under RFRA.....	17
A. The Challenged Accommodation, Which Allows Plaintiffs to Opt Out of Providing Contraceptive Coverage, is Not a Substantial Burden Under RFRA.....	17
1. Plaintiffs are either exempt or permitted to opt out of providing contraceptive coverage	17
2. After an eligible organization opts out, contraceptive coverage is provided independently, by law, without cost to or involvement by the eligible organization	20
3. Plaintiffs object to requirements imposed on third parties, not on themselves	25

4.	Plaintiffs’ analysis disregards the burdens placed on plan participants and beneficiaries if plaintiffs’ position were accepted	29
5.	It is the province of this Court to consider whether regulations that allow plaintiffs to decline to provide contraceptive coverage substantially burden their exercise of religion	31
B.	Plaintiffs’ Challenges Would Fail Even if the Regulations Were Subject to RFRA’s Compelling Interest Test.....	36
1.	The contraceptive coverage provision advances compelling governmental interests	36
2.	Plaintiffs’ alternative proposals are not less restrictive means.....	45
II.	Plaintiffs Have Not Identified Any Violation of Their Rights Under the Constitution or Administrative Procedure Act	47
A.	The Regulations Do Not Violate the Free Exercise Clause of the First Amendment.....	47
B.	The Regulations Do Not Violate the Free Speech Clause of the First Amendment.....	50
C.	The Regulations Do Not Violate the Establishment Clause of the First Amendment.....	53
D.	The Regulations Do Not Violate the Administrative Procedure Act	55
	CONCLUSION	60
	CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)	
	CERTIFICATE OF SERVICE	
	DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS	

TABLE OF AUTHORITIES

Cases:	<u>Page</u>
<i>Arbaugh v. Y&H Corp.</i> , 546 U.S. 500 (2006)	44
<i>Autocam Corp. v. Sebelius</i> , 730 F.3d 618 (6th Cir. 2013)	16, 17, 18, 26, 30
<i>Board of Education v. Allen</i> , 392 U.S. 236 (1968)	28
<i>Bowen v. Roy</i> , 476 U.S. 693 (1986)	11, 32
<i>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993)	14, 47, 49, 50
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997)	47
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005)	31, 36, 37
<i>Eden Foods, Inc. v. Sebelius</i> , 733 F.3d 626 (6th Cir. 2013)	26
<i>Employment Division v. Smith</i> , 494 U.S. 872 (1990)	17, 47
<i>Estate of Thornton v. Caldor, Inc.</i> , 472 U.S. 703 (1985)	31
<i>Gilardi v. U.S. Dep't of Health & Human Servs.</i> , 733 F.3d 1208 (D.C. Cir. 2013)	26, 43
<i>Gillette v. United States</i> , 401 U.S. 437 (1971)	54

<i>Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal</i> , 546 U.S. 418 (2006).....	17, 38
<i>Heckler v. Mathews</i> , 465 U.S. 728 (1984)	43
<i>Henderson v. Kennedy</i> , 253 F.3d 12 (D.C. Cir. 2001)	18
<i>Hobby Lobby Stores, Inc. v. Sebelius</i> , 723 F.3d 1114 (10th Cir. 2013), <i>cert. granted</i> , 134 S.Ct. 678 (Nov. 26, 2013).....	26
<i>Hootor v. USDA</i> , 82 F.3d 165 (7th Cir. 1996).....	59
<i>Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC</i> , 132 S. Ct. 694 (2012)	41
<i>Kaemmerling v. Lappin</i> , 553 F.3d 669 (D.C. Cir. 2008).....	11, 32, 33, 34
<i>Korte v. Sebelius</i> , 735 F.3d 654 (7th Cir. 2013)	26, 27, 37, 38, 41
<i>Larson v. Valente</i> , 456 U.S. 228 (1982).....	15, 54
<i>Lyng v. Northwest Indian Cemetery Protective Ass’n</i> , 485 U.S. 439 (1998).....	32
<i>Mahoney v. Doe</i> , 642 F.3d 1112 (D.C. Cir. 2011).....	32
<i>Nat’l Ass’n of Farmworkers Orgs. v. Marshall</i> , 628 F.2d 606, 606-07 (D.C. Cir. 1980).....	59
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969).....	52
<i>Ohralik v. Ohio State Bar Ass’n</i> , 436 U.S. 447 (1978)	52

<i>Priests for Life v. U.S. Dep't of Health & Human Servs.</i> , ___ F. Supp. 2d ___, No. 13-cv-1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013)	26
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	39
<i>Roman Catholic Archdiocese of N.Y. v. Sebelius</i> , No. 12-cv-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013)	32
<i>Rumsfeld v. Forum for Academic & Inst. Rights, Inc.</i> , 547 U.S. 47 (2006)	14, 15, 51
<i>S. Nazarene Univ. v. Sebelius</i> , No. 13-cv-1015, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013)	25
<i>Shaw v. Delta Air Lines, Inc.</i> , 463 U.S. 85 (1983)	37
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	29, 30, 37
<i>Steward Mach. Co. v. Davis</i> , 301 U.S. 548 (1937)	45
<i>Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.</i> , 450 U.S. 707 (1981)	11, 27, 34, 35
<i>Tilton v. Richardson</i> , 403 U.S. 672 (1971)	27, 28
<i>Tony & Susan Alamo Found. v. Sec'y of Labor</i> , 471 U.S. 290 (1985)	25
<i>Trans World Airlines, Inc. v. Hardison</i> , 432 U.S. 63 (1977)	31
<i>United States v. Lee</i> , 455 U.S. 252 (1982)	30, 36, 37, 42, 44, 49

<i>University of Notre Dame v. Sebelius</i> , ___ F. Supp. 2d ___, No. 13-cv-1276, 2013 WL 6804773 (N.D. Ind. Dec. 20, 2013).....	19, 27
<i>Walz v. Tax Comm’n of the City of New York</i> , 397 U.S. 664 (1970)	54
<i>Wheaton College v. Sebelius</i> , 703 F.3d 551 (D.C. Cir. 2012).....	5
<i>Winter v. Natural Res. Def. Council, Inc.</i> , 555 U.S. 7 (2008)	16
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972).....	29, 30, 37

Statutes:

5 U.S.C. § 553(b).....	58
7 U.S.C. § 2151.....	58
26 U.S.C. § 36B.....	45
26 U.S.C. § 410(d)	28
26 U.S.C. § 4980H.....	44
26 U.S.C. § 4980H(c)(2)(A)	44
26 U.S.C. § 5000A	43, 45
26 U.S.C. § 6033(a)(3)(A)(i) and (iii).....	5, 19
28 U.S.C. § 1292(a)(1)	3
28 U.S.C. § 1331	2
29 U.S.C. § 1001(a).....	37

29 U.S.C. § 1001(b).....	37
29 U.S.C. § 1002(33)	28
29 U.S.C. § 1003(b)(2)	28
42 U.S.C. § 300a-6	56
42 U.S.C. § 300gg(a)(1)	44
42 U.S.C. § 300gg-1	44
42 U.S.C. § 300gg-1(b)(3)	58
42 U.S.C. § 300gg-3.....	44
42 U.S.C. § 300gg-4(a).....	44
42 U.S.C. § 300gg-4(b)	44
42 U.S.C. § 300gg-13.....	4, 44
42 U.S.C. § 300gg-13(a)	59
42 U.S.C. § 300gg-13(a)(4).....	4
42 U.S.C. § 2000bb et seq.,	10
42 U.S.C. § 2000bb(a)(4) and (5)	17
42 U.S.C. § 2000bb(b)(1)	17, 29
42 U.S.C. § 2000bb-1	32
42 U.S.C. § 2000bb-1(a).....	18
42 U.S.C. § 2000bb-2(4)	27
42 U.S.C. § 2000cc-5(7)(A)	27
42 U.S.C. § 18011	43

Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786 (2011)	55
---	----

Regulations:

26 C.F.R. § 54.9815-2713(a)(1)(iv)	5
26 C.F.R. § 54.9815-2713A(a).....	6
29 C.F.R. § 2510.3-16	24
29 C.F.R. § 2590.715-2713(a)(1)(iv)	5
29 C.F.R. § 2590.715-2713A(a).....	6, 19
29 C.F.R. § 2590.715-2713A(a)(4)	6, 19
29 C.F.R. § 2590.715-2713A(b)(1).....	6, 19
29 C.F.R. § 2590.715- 2713A(b)(1)(ii)(A)	8, 20, 24
29 C.F.R. § 2590.715- 2713A(b)(1)(ii)(B)	24
29 C.F.R. § 2590.715-2713A(b)(1)(iii).....	51
29 C.F.R. § 2590.715- 2713A(b)(2).....	8
29 C.F.R. § 2590.715-2713A(b)(2)(i).....	20, 21
29 C.F.R. § 2590.715-2713A(b)(2)(ii).....	20, 21
29 C.F.R. § 2590.715-2713A(b)(3)	1, 8
29 C.F.R. § 2590.715-2713A(c)(1)	6, 19
29 C.F.R. § 2590.715-2713A(d)	9, 21, 22, 23
45 C.F.R. § 46.202(f)	56

45 C.F.R. § 147.130	45
45 C.F.R. § 147.130(a)(1)(iv)	5, 6
45 C.F.R. § 147.131(a)	5, 9, 10, 15, 19, 41, 53
45 C.F.R. § 147.131(b)	6, 19
45 C.F.R. § 147.131(c)(1)	19
45 C.F.R. § 147.131(c)(2)	7, 21
45 C.F.R. § 147.131(c)(2)(i)(B)	1
45 C.F.R. § 147.131(c)(2)(ii)	1, 7, 8, 20
45 C.F.R. § 147.131(c)(2)(i)(A)	7, 20
45 C.F.R. § 147.131(d)	9, 21, 22, 23
45 C.F.R. § 147.131(f)	7
45 C.F.R. § 147.140(g)	43
45 C.F.R. § 156.50(d)	8
62 Fed. Reg. 8610 (Feb. 25, 1997)	56
77 Fed. Reg. 16,501 (Mar. 21, 2012)	57
77 Fed. Reg. 8725 (Feb. 15, 2012)	4, 5, 50, 55
78 Fed. Reg. 39,870 (July 2, 2013)	1, 6, 11, 19, 20, 23, 24, 25, 26, 38, 39, 41, 48, 51, 52
78 Fed. Reg. 8456 (Feb. 6, 2013)	57
 Legislative Materials:	
139 Cong. Rec. E1234-01 (daily ed. May 11, 1993)	30

139 Cong. Rec. S14350-01 (daily ed. Oct. 26, 1993)	18
139 Cong. Rec. S14350-01 (daily ed. Oct. 26, 1993).....	30
146 Cong. Rec. S6062-01 (daily ed. June 29, 2000).....	57
148 Cong. Rec. H6566, H6580 (daily ed. Sept. 25, 2002).....	57
155 Cong. Rec. 29,070 (2009)	40
155 Cong. Rec. S11985 (daily ed. Nov. 30, 2009)	48
155 Cong. Rec. S12021-02 (daily ed. Dec. 1, 2009).....	49
155 Cong. Rec. S12265 (daily ed. Dec. 3, 2009)	48
H.R. Rep. No. 88, 103d Cong., 1st Sess. (1993)	18
S. Rep. No. 111, 103d Cong., 1st Sess. (1993)	18

Other Authorities:

Congressional Budget Office, <i>Key Issues in Analyzing Major Health Insurance Proposals</i> 6 (2008).....	7
FDA-Approved Label for Plan B (levonorgestrel) tablets, 0.75mg, 4 (July 10, 2009), http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/ 021045s015lbl.pdf	56
FDA-Approved Label for Ella (ulipristal acetate) tablet § 12.1 (May 2, 2012), http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/ 021045s015lbl.pdf	56
HHS, Office of Population Affairs, Memorandum (Apr. 23, 1997), http://www.hhs.gov/opa/title-x-family-planning/ initiatives-and-resources/documents-and-tools/opa-97-02.html	57
Kaiser Family Found. & Health Research & Educ. Trust, <i>Employer Health Benefits 2013 Annual Survey</i>	43

Institute of Medicine, *Clinical Preventive Services for Women:*
Closing the Gaps (2011) (IOM Report) 4, 38, 39, 40

INTRODUCTION

Plaintiffs challenge regulations that establish minimum health coverage requirements under the Affordable Care Act insofar as they include contraceptive coverage as part of women's preventive health coverage. Plaintiffs acknowledge, however, that either they are automatically exempt from this requirement because they are houses of worship, or they may opt out of the coverage requirement by informing their insurance issuer or third-party administrator that they are eligible for the religious accommodations set out in the regulations and therefore are not required "to contract, arrange, pay, or refer for contraceptive coverage," 78 Fed. Reg. 39,870-01, 39,874 (July 2, 2013). And they do not object to informing insurance issuers or third party administrators of their decision not to provide contraceptive coverage.

Plaintiffs object, instead, to requirements imposed not on themselves, but on insurance issuers and third party administrators. When an eligible organization elects not to provide coverage for religious reasons, the insurance company that issues policies for that organization's employees is required to provide or arrange separate payments for contraceptive services for the employees. *See* 45 C.F.R.

§ 147.131(c)(2)(i)(B) and (ii). In the case of a self-insured plan, these requirements generally must be met by the third-party administrator that operates the plan. *See* 29 C.F.R. § 2590.715-2713A(b)(3). In all cases, the organization eligible for a religious accommodation does not administer this coverage and does not bear any direct or

indirect costs of this coverage, which is provided separately from its own health coverage.

Although plaintiffs are thus free not to provide contraceptive coverage, they nevertheless claim that the challenged regulations impermissibly burden their exercise of religion in violation of the Religious Freedom Restoration Act (“RFRA”). But plaintiffs cannot transform their right, as eligible organizations, *not* to provide coverage into a substantial burden by characterizing their decision to opt out as “a permission slip” for third parties to provide the contraceptive coverage. Br. 11. Eligible organizations do not provide insurance issuers or third part administrators with “permission” to provide coverage. These third parties provide coverage as a result of legal obligations imposed on themselves, not on the plaintiffs. As the district court in *Michigan Catholic Conference* explained, “[t]he fact that the scheme will continue to operate without them may offend Plaintiffs’ religious beliefs, but it does not substantially burden the exercise of those beliefs.” MCC-R.40, at Page ID #1341.

The district courts in these cases correctly held that plaintiffs have failed to demonstrate a likelihood of success on the merits and are not entitled to preliminary relief.

STATEMENT OF JURISDICTION

Plaintiffs in these consolidated cases invoked the district courts’ jurisdiction under 28 U.S.C. § 1331. The district court in *Catholic Diocese of Nashville* denied a preliminary injunction on December 26, 2013, CDN-R.65 at Page ID #1339-1358,

and plaintiffs filed a notice of appeal the same day, CDN-R.67 at Page ID #1360. The district court in *Michigan Catholic Conference* denied a preliminary injunction on December 27, 2013, MCC-R.40 at Page ID #1329-1350, and plaintiffs filed a notice of appeal the same day, MCC-R.42 at Page ID #1352. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether regulations that allow plaintiffs to opt out of providing contraceptive coverage “substantially burden” their exercise of religion under the Religious Freedom Restoration Act.
2. Whether such regulations violate plaintiffs’ rights under the First Amendment.
3. Whether such regulations violate the Administrative Procedure Act.

STATEMENT OF THE CASE

A. Regulatory Background

1. Congress has long regulated employer-sponsored group health plans. In 2010, the Patient Protection and Affordable Care Act established certain additional minimum standards for group health plans as well as health insurance issuers that offer coverage in the group and the individual 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 recommended preventive-health services without cost sharing, that is, without

requiring plan participants and beneficiaries to make copayments or pay deductibles or coinsurance. 42 U.S.C. § 300gg-13. As relevant here, these services include preventive care and screenings for women as provided for in comprehensive guidelines supported by the Health Resources and Services Administration (“HRSA”) (a component of the Department of Health and Human Services (“HHS”)). *Id.* § 300gg-13(a)(4).

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

Consistent with those recommendations, the HRSA guidelines include coverage of “[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 (quoting the guidelines). The relevant regulations adopted by the three Departments implementing this portion of the Act (HHS, Labor, and Treasury) require coverage of, among other preventive services, the contraceptive services recommended in the HRSA guidelines. 45 C.F.R. § 147.130(a)(1)(iv) (HHS); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. § 54.9815-2713(a)(1)(iv) (Treasury).

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

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

After notice and comment rulemaking, the Departments published the current regulations, challenged here, in July 2013. *See* 78 Fed. Reg. 39,874-39,886; 45 C.F.R. § 147.131(b) (HHS); 29 C.F.R. § 2590.715-2713A(a) (Labor); 26 C.F.R. § 54.9815-2713A(a) (Treasury). The regulations provide religion-related accommodations for group health plans established or maintained by “eligible organizations” (and group health insurance coverage provided in connection with such plans). An “eligible organization” is an organization that satisfies the following criteria:

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

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

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

If an eligible organization chooses not to provide contraceptive coverage, the plan's participants and beneficiaries will generally have access to contraceptive coverage without cost sharing through alternative mechanisms established by the regulations.

Where an eligible organization that chooses not to provide contraceptive coverage has an "insured" plan, the health insurance company that issues the policies for that organization is required by regulation to provide separate payments for contraceptive services to plan participants and beneficiaries. *See* 45 C.F.R.

§ 147.131(c)(2).¹ The insurance issuer may not impose any premium, fee, or other charge, directly or indirectly, on the eligible organization or the group health plan with respect to the issuer's payments for contraceptive services. *See id.* § 147.131(c)(2)(ii), (f). The insurance issuer must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the . . . plan," *id.* § 147.131(c)(2)(i)(A), and "segregate premium revenue collected from the eligible

¹ An employer is said to have an "insured" plan if it contracts with an insurance company that bears the financial risk of paying health insurance claims. An employer is said to have a "self-insured" plan if it bears the financial risk of paying claims. Self-insured employers use insurance companies to administer their plans, performing functions such as developing networks of providers, negotiating payment rates, and processing claims. In that context, the insurance company is called a third party administrator or TPA. Employers may be regarded as self-insured even if they purchase a separate insurance policy (known as reinsurance or "stop loss" coverage), which is not a form of health insurance, to protect themselves against unusually high claims costs. *See generally* Congressional Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 6 (2008).

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

When an eligible organization that chooses not to provide contraceptive coverage has a “self-insured” plan, the regulations generally require the third party administrator to provide or arrange separate payments for contraceptive services to plan participants and beneficiaries. 29 C.F.R. § 2590.715- 2713A(b)(2). (As discussed below, these requirements do not apply, however, when the third party administrator is administering a “church plan” as defined in ERISA. Plaintiffs state that the only self-insured plan at issue here is such a church plan. MCC-R.1, at Page ID #7.) “The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services.” 29 C.F.R. § 2590.715- 2713A(b)(1)(ii)(A). The regulations bar the third party administrator from imposing any premium, fee, or other charge, directly or indirectly, on the eligible organization or the group health plan with respect to payments for contraceptive services. *Id.* § 2590.715-2713A(b)(2). The third party administrator may seek reimbursement for payments for contraceptive services from the federal government through an adjustment to Federally-facilitated Exchange user fees. *Id.* § 2590.715-2713A(b)(3); *see* 45 C.F.R. § 156.50(d).

Regardless of the type of plan, an eligible organization that opts out of providing contraceptive coverage has no obligation to inform plan participants and beneficiaries of the availability of these separate payments made by third parties.

Instead, the 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). That notice must make clear that the eligible organization is neither administering nor funding the contraceptive benefits. *Ibid.*

B. Factual Background and Prior Proceedings

1. This appeal involves two cases that have been consolidated for appeal.

The plaintiffs in *Michigan Catholic Conference* are the Michigan Catholic Conference, which is exempt from the contraceptive coverage requirement under 45 C.F.R. § 147.131(a), and Catholic Family Services d/b/a/ Catholic Charities Diocese of Kalamazoo (“Catholic Charities”), which manages two non-profit housing corporations, and has stated it is eligible for a religious accommodation. MCC-R.1, at Page ID #7, 9-15 (complaint). Catholic Charities provides health coverage to its employees through the Michigan Catholic Conference’s self-insured plan, which is “administered by separate third party administrators, Blue Cross Blue Shield of Michigan and Express Scripts.” *Id.* at Page ID #13, 15. Plaintiffs state that this health plan is a self-insured church plan that is not subject to regulation under ERISA. *Id.* at Page ID #7. Accordingly, the third party administrator of that plan is not required to provide or arrange separate payments for contraceptive services.

The plaintiffs in *Catholic Diocese of Nashville* are the Catholic Diocese of Nashville and Dominican Sisters of St. Cecilia Congregation, both of which are

“religious employers” that are exempt from the contraceptive coverage requirement under 45 C.F.R. § 147.131(a), as well as several employers that have stated they are eligible to opt out under the accommodation. CDN-R.1, at Page ID #7, 9-30 (complaint). Collectively, these plaintiffs employ over 1,600 people. *See ibid.* These plaintiffs all offer group health coverage through health insurance plans, many of which are issued by Blue Cross Blue Shield of Tennessee. *Id.* at Page ID #13, 19-20, 25, 30.

Plaintiffs claimed that the regulations violate the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, which provides that the government “shall not substantially burden a person’s exercise of religion” unless the application of that burden is the least restrictive means to advance a compelling governmental interest. Plaintiffs argued that opting out of the coverage requirement substantially burdens their religious exercise because doing so “automatically triggers an obligation on the part of the insurance provider[.]” MCC-R.1 at Page ID #29; *accord* CDN-R.1, at Page ID #6 (same). Plaintiffs also raised a number of claims under the First Amendment and Administrative Procedure Act.

2. The district courts denied plaintiffs motions for preliminary injunctions.

The district court in *Michigan Catholic Conference* held that the plaintiffs there had not demonstrated a substantial burden on their exercise of religion under RFRA. The court explained that “the accommodation in this case requires Catholic Charities to attest to its religious beliefs and step aside.” MCC-R.40, at Page ID #1339. The

regulations thus “require[] Catholic Charities to do what it has always done,” *i.e.*, “notify the [third-party administrator] that it objects to providing contraceptive coverage.” *Id.* at Page ID #1340. “It is true,” the court noted, “that, once it steps aside, another person may step in and provide coverage of contraceptive services for Catholic Charities’ employees.” *Id.* at Page ID #1339. But the regulations do not require plaintiffs “to ‘modify [their] behavior.’” *Id.* at Page ID #1340 (quoting *Thomas v. Rev. Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 718 (1981)). “Rather, it is the [third party administrator] that [may] modify *its* behavior and take action by providing contraceptive services—without the assistance of Catholic Charities.” *Ibid.* (court’s emphasis) (citing 78 Fed. Reg. at 39,874 (eligible organizations may not be required to “contract, arrange, pay, or refer” for contraceptive coverage)).

The court explained that it is not a “substantial burden” on the exercise of plaintiffs’ religion that, after some action by plaintiffs, third parties may take action to which the plaintiffs object. *Id.* at Page ID #1340-1341 (citing *Bowen v. Roy*, 476 U.S. 693 (1986), and *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008)). “An objection to the activities of third parties—no matter how sincere or deeply felt—does not constitute a substantial burden.” *Id.* at Page ID #1341. The court noted that, “although Plaintiffs assert that the accommodation requires them to participate in a scheme to provide contraceptives, in fact, it [] does the opposite. It provides a mechanism for employers with religious objections to contraceptives, like Catholic Charities, to opt out of that scheme.” *Ibid.* “This mechanism simply requires

[Catholic Charities] to state that [it] choose[s] to opt out based on [its] religious beliefs.” *Ibid.* “The fact that the scheme will continue to operate without them may offend Plaintiffs’ religious beliefs, but it does not substantially burden the exercise of those beliefs.” *Ibid.* The court also rejected the plaintiffs’ constitutional claims and claims under the Administrative Procedure Act. *Id.* at Page ID #1342-49.

The district court in *Catholic Diocese of Nashville* also denied those plaintiffs’ motion for a preliminary injunction. The court rejected plaintiffs’ contention that “the act of self-certification ‘facilitates’ the receipt of contraceptive services by their employees such that it imposes a substantial burden on their religious beliefs.” CDN-R.65, at Page ID #1346. The court emphasized that “the regulation prohibits any costs of those services, directly or indirectly, to be imposed on the Plaintiffs.” *Id.* at Page ID #1347. The district court was likewise “not persuaded that requiring insurers to provide contraception services substantially burdens the Plaintiffs’ religious beliefs simply because Plaintiffs have a contractual relationship with the insurers.” *Id.* at Page ID #1347-48. The district court explained that plaintiffs “remain free to voice their opposition to the use of contraception services, and to discourage their use. But plaintiffs’ inability to prevent others from acting in contravention of Plaintiffs’ religious beliefs does not constitute a substantial burden on those beliefs.” *Id.* at Page ID #1347. The court also found that plaintiffs were unlikely to succeed on their constitutional claims. *Id.* at Page ID #1348-57.

SUMMARY OF ARGUMENT

I. Plaintiffs are either already exempt from the requirement to provide contraceptive coverage or can opt out of that requirement by completing a form and providing copies to their health insurance issuers or, in the case of Catholic Charities, to its third party administrator. They object to opting out on the ground that, once they have opted out, third parties will separately provide payments for contraceptive services without cost to or involvement by the plaintiffs.

The requirements placed on these third parties do not “substantially burden” plaintiffs’ exercise of religion under the Religious Freedom Restoration Act. The only entities required to provide contraceptive coverage are insurance companies (such as Blue Cross Blue Shield) and third party administrators (which include companies like Blue Cross) of self-insured plans that are not church plans. Plaintiffs cannot convert their opt-out right into a substantial burden within the meaning of RFRA by characterizing it as a “permission slip” (Br. 11) for the provision of contraceptive coverage by others. Although plaintiffs insist that the Court must defer to their determination that the religious accommodation imposes a substantial burden, it is for the Court to determine whether, as a matter of law, plaintiffs’ right to opt out of providing contraceptive coverage constitutes a substantial burden under the statute. Were that not the case, every regulation and every provision of the U.S. Code would be subject to strict scrutiny review whenever challenged on the basis of a sincere religious belief.

Even if the religious accommodation were deemed to be a substantial burden, moreover, it should be sustained because the regulations, and the broader framework of which they are part, advance the government's compelling interests in providing uniform insurance benefits, protecting the public health, and providing equal access for women to health-care services. And it is difficult to conceive of a regulation that would achieve these compelling interests that is less restrictive than an opt-out option.

II. Plaintiffs' First Amendment and Administrative Procedure Act claims are similarly without merit.

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

B. Plaintiffs' assertion that the regulations unconstitutionally compel speech largely reprises their RFRA claim and fails for the same reasons. Even if they could not opt out of providing contraceptive coverage, moreover, covering medical services that involve speech does not entangle plaintiffs with such speech or endorse any medical advice that is given. See *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* ("FAIR"), 547 U.S. 47, 61-62 (2006).

Plaintiffs' contention that the regulations include a "gag order," fares no better. "The regulation does not prohibit Plaintiffs from expressing their views. Rather, it precludes Plaintiffs from interfering with a TPA's [third party administrator's] decision or efforts to provide contraceptive services once Plaintiffs have provided a certification." MCC-R.40 at Page ID #1346. "Plaintiffs may still convey their views about contraception, but they may not do so in a way that threatens or interferes with employees' attempts to obtain coverage from a third party." *Ibid.*

C. 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 (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.131(a). The fact that some religiously affiliated organizations, regardless of their denomination, are exempt from the contraceptive coverage requirement, while other 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 (1982), on which plaintiffs rely, 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.

D. The regulations are not invalid under the Administrative Procedure Act. Although plaintiffs may believe that certain forms of contraception constitute

abortion, the statutory prohibition on conditioning federal funds on providing abortions is based on the long-established federal definition of the term. That definition does not include the contraceptives to which plaintiffs object.

Similarly, plaintiffs are mistaken in asserting that the government failed to conduct notice and comment rulemaking. The challenged regulations were the subject of several rounds of notice and comment. And the Administrative Procedure Act does not require that the scientific guidelines referenced explicitly in the statute also be subject to notice and comment.

STANDARD OF REVIEW

“This court reviews the denial of a preliminary injunction for an abuse of discretion, examining findings of fact for clear error and legal conclusions *de novo*.” *Autocam Corp. v. Sebelius*, 730 F.3d 618, 624 (6th Cir. 2013).

ARGUMENT

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

The plaintiffs’ asserted harms here turn on a likelihood of success on the merits, *see Autocam Corp. v. Sebelius*, 730 F.3d 618, 624 (6th Cir. 2013), which plaintiffs

cannot demonstrate for the reasons discussed by the district courts. Moreover, the balance of equities and public interest strongly militate against granting the requested relief. The religious accommodation established by the regulations allows eligible organizations to opt out of providing contraceptive coverage while ensuring that women will have access to contraceptive coverage. The requested injunction would prevent thousands of employees, and their covered dependents, from obtaining contraceptive coverage, thus impairing their ability to make independent choices about their medical treatment.

I. The Challenged Regulations Do Not Impermissibly Burden Plaintiffs' Exercise of Religion Under RFRA.

A. The Challenged Accommodation, Which Allows Plaintiffs to Opt Out of Providing Contraceptive Coverage, is Not a Substantial Burden Under RFRA.

1. Plaintiffs are either exempt or permitted to opt out of providing contraceptive coverage.

Congress enacted RFRA “‘to restore the compelling interest test’ for free-exercise cases that prevailed prior to” *Employment Division v. Smith*, 494 U.S. 872 (1990). *Autocam Corp.*, 730 F.3d at 625 (quoting 42 U.S.C. § 2000bb(b)(1)); *see* 42 U.S.C. § 2000bb(a)(4) and (5). In *Smith*, the Supreme Court held that the Free Exercise Clause does not require religion-based exemptions from neutral laws of general applicability. *See* 494 U.S. at 876-90. RFRA later “adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006). “To that end, RFRA requires that

government action ‘not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.’” *Autocam Corp.*, 730 F.3d at 625 (quoting 42 U.S.C. § 2000bb-1(a)); *see id.* at 626 (interpreting RFRA in light of its “relevant context” such as “Free Exercise Clause claims of the sort articulated in” pre-*Smith* cases).

The initial version of RFRA prohibited the government from imposing any “burden” on free 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 pre-*Smith* case law. 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); *see ibid.* (statement of Sen. Hatch). *See also Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001) (“[O]nly *substantial* burdens on the exercise of religion trigger the compelling interest requirement.”) (emphasis added). 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).

None of the plaintiffs here is required to provide contraceptive coverage. Three of the plaintiffs are exempt from the contraceptive coverage requirement because they fall into the long-established category in the Internal Revenue Code for churches, their integrated auxiliaries, conventions or associations of churches, and the

exclusively religious activities of any religious order. *See* 45 C.F.R. § 147.131(a) (cross-referencing 26 U.S.C. § 6033(a)(3)(A)(i) and (iii)).

The remaining plaintiffs concede that they satisfy the criteria for the additional religious accommodations under which they do not have to provide contraceptive coverage. *See* 45 C.F.R. § 147.131(b) and (c)(1); 29 C.F.R. § 2590.715-2713A(a), (b)(1). To opt out of this coverage requirement, these plaintiffs need only complete a form stating that they are eligible and provide a copy to their insurance issuer or third party administrator. *See* 78 Fed. Reg. 39,870-01, 39,874-75 (July 2, 2013); *see, e.g.*, 29 C.F.R. § 2590.715-2713A(a)(4), (b)(1), (c)(1).

They need only “attest to [their] religious beliefs and step aside.” MCC-R.40, at Page ID #1339. Indeed, these plaintiffs would need to inform their insurance insurers or third party administrators of their objection even if they “were completely exempt from the contraception requirement” to ensure that they would not be responsible for contracting, arranging, paying, or referring for such coverage. *University of Notre Dame v. Sebelius*, ___ F. Supp. 2d ___, No. 13-cv-1276, 2013 WL 6804773, at *8 (N.D. Ind. Dec. 20, 2013). As the court in *Michigan Catholic Conference* observed, “the accommodation in this case . . . requires Catholic Charities to do what it has always done,” *i.e.*, “notify the [third party administrator] that it objects to providing contraceptive coverage.” MCC-R.40, at Page ID #1339-40.

2. After an eligible organization opts out, contraceptive coverage is provided independently, by law, without cost to or involvement by the eligible organization.

The responsibilities that the regulations place on insurance issuers and third party administrators require no action by any plaintiff. The plaintiffs will not “contract, arrange, pay, or refer” for such coverage. 78 Fed. Reg. 39,870-01, 39,874 (July 2, 2013), and the regulations bar insurance issuers and third party administrators from passing along any costs, directly or indirectly, with respect to payments for contraceptive services. *See* 45 C.F.R. § 147.131(c)(2)(ii) (insured plans) (“With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.”); 29 C.F.R. § 2590.715-2713A(b)(2)(i) and (ii) (same for self-insured plans); *see also* 45 C.F.R. § 147.131(c)(2)(i)(A) (separate coverage would be “[e]xpressly exclude[d] . . . from the group health insurance coverage provided in connection with [plaintiffs] group health plan[s]”); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(A) (“Obligations of the third party administrator” are imposed by regulation, and the employer does “not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services.”).

Insurance issuers and third party administrators—rather than the employers—must notify plan participants and beneficiaries of the availability of separate payments for

contraceptive services, and “[t]he notice must specify that the [employers] do[] 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).

Although plaintiffs repeatedly describe themselves as directing, permitting, or facilitating the provision of contraceptive coverage, the five specific “actions or forbearances” itemized at page 29 of their brief confirm that the eligible organizations do no more than provide their insurance issuer or third party administrator with a form stating that the organizations are not required to provide contraceptive coverage and are choosing not to do so.

(1) Plaintiffs state that they must “[p]ay premiums or fees to a third party authorized to provide their employees with the objectionable [coverage],” but they do not contend that the regulations require them to pay premiums or claims for contraceptive coverage or to administer such coverage. As discussed above, the regulations prohibit insurance issuers and third party administrators from imposing on an eligible organization any premium, fee, or other charge, directly or indirectly, with respect to payments for contraceptive services. *See* 45 C.F.R. § 147.131(c)(2) (insured plans); 29 C.F.R. § 2590.715-2713A(b)(2)(i) and (ii) (self-insured plans). Plaintiffs object only to the legal obligations of these third parties: the fact that the insurance issuer (Blue Cross Blue Shield of Tennessee) must separately make payments for contraceptives available, and that the church plan’s third party administrators (Blue

Cross Blue Shield of Michigan and Express Scripts) may do so with costs reimbursed by the government.

(2) Plaintiffs state that they will have to “[o]ffer enrollment paperwork for employees to enroll in the plan overseen by a third party authorized to provide the objectionable coverage,” but they do not contend that the regulations require them to offer paperwork for contraceptive coverage. The regulations make the insurance issuer and the third party administrator responsible for all paperwork required in connection with claims for contraceptive coverage. *See* 45 C.F.R. 147.131(d) (insurance plans); 29 C.F.R. § 2590.715-2713A(d) (self-insured plans). The challenged regulations do not require plaintiffs to offer any additional or different “enrollment paperwork.” If plaintiffs choose not to provide contraceptive coverage, they will not offer any different paperwork than they would if the regulations did not exist, if they were exempt religious employers, or if they obtained the relief that they seek here.

(3) Plaintiffs state that they will be required to “[s]end health-plan-enrollment paperwork (or tell employees where to send it) if the plan is overseen by a third party that is authorized to provide the objectionable coverage.” This assertion is a variation of the previous contention that plaintiffs would have to provide employees with paperwork in connection with their own health plans. It fails for the same reason. It is the obligation of the health insurance issuer or third party administrator to provide notice that contraceptive coverage is being made available “separate from” materials that are distributed in connection with the eligible organization’s group health

coverage, and that notice must make clear that the eligible organization is neither administering nor funding the contraceptive benefits. 45 C.F.R. § 147.131(d); 29 C.F.R. § 2590.715-2713A(d).

(4) Plaintiffs state that they must “[i]dentify for a third party which of their employees will participate in the plan, if the third party is authorized to provide the objectionable coverage to those participating employees.” This assertion is another variation of the paperwork argument. The insurance issuer and third party administrator already have the information they need to make separate payments for contraceptive services. The regulations impose no additional requirement on plaintiffs.

(5) Plaintiffs state that they must “[r]efrain from canceling their insurance arrangement with a third party authorized to provide the objectionable products and services.” This assertion again highlights the nature of plaintiffs’ objection. The regulations do not impose any obligation on plaintiffs other than to state that they meet the regulatory criteria for opting out and notify any third parties that run their group health plans that they are exercising their right not to provide contraceptive coverage.

Plaintiffs do not advance their argument by declaring that the form provided to a third party administrator of a self-insured plan “‘designat[es]’ [its] ‘third party administrator[] as plan administrator[] and claims administrator[] for contraceptive benefits,’ 78 Fed. Reg. at 39,879, and serves as ‘the instrument under which [its] plan

[is] operated,’ 29 C.F.R. § 2510.3–16.” Br. 38; *accord* Br. 27. The section of the preamble cited by plaintiffs, which discusses the interaction of ERISA provisions, makes clear that the import of its self-certification is precisely that described by the district court. It explains that the self-certification is “a document notifying the third party administrator(s) that the eligible organization will not provide, fund, or administer payments for contraceptive services,” and therefore is “one of the instruments under which the employer’s plan is operated under ERISA section 3(16)(A)(i).” 78 Fed. Reg. at 39,879. The form directs third party administrators to their own “obligations set forth in the[] final regulations” and makes clear that the eligible organization has no such obligations. *Ibid.*; *see also* 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(A) and (B) (form “shall include notice” that “[t]he eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services” and that “[o]bligations of the third party administrator are set forth in [Department of Labor regulations]”). The preamble explains that the third party administrator’s legal obligations derive from ERISA section 3(16). Insofar as the result of an eligible organization’s opting out is that the third party administrator has its own legal obligations under applicable regulations 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.*²

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

3. Plaintiffs object to requirements imposed on third parties, not on themselves.

The theme of plaintiffs’ argument is encapsulated by their assertion that the act of opting out of providing coverage “in effect” gives a third party “a permission slip . . . to enable the plan beneficiary to get access, free of charge, from the institution’s insurer or third party administrator, to the products to which the institution objects.” Br. 11 (quoting *S. Nazarene Univ. v. Sebelius*, No. 13-cv-1015, 2013 WL 6804265, at *8-9 (W.D. Okla. Dec. 23, 2013)).

² As discussed below, the only eligible organization in this case that provides coverage through a self-insured plan is Catholic Charities. Because plaintiffs state that the self-insured plan is a church plan, its third party administrator is not required to provide contraceptive coverage. *See infra* pp. 28-29.

But plaintiffs' effort to collapse the provision of contraceptive coverage by third parties with their own decision *not* to provide such coverage fails. Plaintiffs are not providing "permission" to third parties to perform duties established by federal law any more than they are providing "permission" to the United States to reimburse the third party administrator for its payments on behalf of individuals availing themselves of contraceptive services without cost-sharing. Employees and covered dependents will receive coverage for contraceptive services despite plaintiffs' religious objections, not because of them.

Plaintiffs are thus wrong to declare that they face "the exact choice, and the exact penalties, facing plaintiffs in the for-profit cases" from other circuits. Br. 32. *See Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), *cert. petn. pending*, No. 13-937; *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), *cert. petn. pending*, No. 13-567; *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S.Ct. 678 (Nov. 26, 2013).³ Unlike the plaintiffs in those cases, the plaintiffs here need not "contract, arrange, pay, or refer for contraceptive coverage" to which they have religious objections. 78 Fed. Reg. at 39,874. They "need not place contraceptive coverage into 'the basket of goods and services that constitute [their]

³ This Court has rejected challenges brought by for-profit corporations in *Autocam, Inc. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013), and *Eden Foods, Inc. v. Sebelius*, 733 F.3d 626 (6th Cir. 2013).

healthcare plan[s].” *Priests for Life v. U.S. Dep’t of Health & Human Servs.* __ F. Supp. 2d __, No. 13-cv-1261, 2013 WL 6672400, at *10 (D.D.C. Dec. 19, 2013) (quoting *Gilardi*, 733 F.3d at 1217). Indeed, a district court in another case has noted that “*Korte* itself recognized this important distinction when it stated that the lack of an exemption or accommodation for the for-profit plaintiffs was ‘notabl[e],’ suggesting that the case might well have come out differently had the *Korte* plaintiffs had access to the accommodation now available to [eligible organizations].” *University of Notre Dame*, __ F. Supp. 2d __, No. 13-cv-1276, 2013 WL 6804773, at *9 (quoting *Korte*, 735 F.3d at 662).

Plaintiffs declare, however, that “[w]hile this religious exercise is slightly different from the religious exercise at issue in the for-profit cases (i.e., *Hobby Lobby*, *Gilardi*, and *Korte*), any attempt to distinguish this case is wholly unavailing because RFRA protects ‘any exercise of religion.’ 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A).” Br. 30. In plaintiffs’ view, it is thus immaterial whether they are required to offer and pay for contraceptive coverage or whether they may decline to do so.

Nothing in the out-of-circuit, for-profit cases on which plaintiffs rely, or in the pre-*Smith* case law that RFRA restored, supports that contention. See, e.g., *Korte* at 735 F.3d at 687 (plaintiff corporations “are asking for relief from a regulatory mandate that coerces *them* to pay for something—insurance coverage for contraception”) (court’s emphasis); *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 710-712 (1981) (explaining that the plaintiff was not able to opt out of the job in which he was

“engaged directly in the production of weapons”); *see also Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (plurality opinion) (rejecting plaintiffs’ claim that “the Free Exercise Clause is violated because they are compelled to pay taxes, the proceeds of which in part finance grants” to religiously-affiliated colleges to which they objected, on the ground that the plaintiffs were “unable to identify any coercion directed at the practice or exercise of their religious beliefs”); Senate Report 12 (expressly stating that RFRA was not intended to “change the law” as articulated in *Tilton*).⁴

Plaintiffs’ substantial burden analysis is without discernible limits, as underscored by the objections advanced by the *MCC* plaintiffs. The plaintiffs in that case are exempt institutions and Catholic Charities, which states that it provides health coverage through a self-insured “church plan.” Group health plans that are “church plan[s]” as defined in the statute are exempt from regulation under ERISA (unless they elect to be covered). *See* 29 U.S.C. § 1003(b)(2); *see also* 29 U.S.C. § 1002(33) (definition of church plan); 26 U.S.C. § 410(d) (election provision). In the absence of an election to be covered, ERISA provides no authority to regulate either the church

⁴ Likewise, in *Board of Education v. Allen*, 392 U.S. 236 (1968), plaintiffs challenging a state program providing textbooks to religious schools contended that the program violated the Free Exercise Clause because, “[t]o the extent books are furnished for use in a sectarian school operated by members of one faith, members of other faiths and non-believers are thereby forced to contribute to the propagation of opinions which they disbelieve” and that this was “no less an interference with religious liberty than forcing a man to attend a church.” Br. of Appellants 35, *Allen*, *supra* (No. 660). The Court rejected that contention, holding that such a claim of indirect financial support did not constitute coercion of plaintiffs “as individuals in the practice of their religion.” *Allen*, 392 U.S. at 249.

plan or the third party administrator of a church plan. Thus, once Catholic Charities informs the third party administrator that Catholic Charities will not provide contraceptive coverage, the third party administrator is under no legal compulsion to provide that coverage. Catholic Charities has not alleged that this third party administrator would voluntarily provide such coverage. And, in any event, a voluntary undertaking by a private third party to provide contraceptive coverage cannot substantially burden the plaintiff's exercise of religion.

4. Plaintiffs' analysis disregards the burdens placed on plan participants and beneficiaries if plaintiffs' position were accepted.

Plaintiffs' analysis also erroneously assumes that the RFRA inquiry should evaluate the nature of the asserted burden placed on their practice of religion without regard to the burden on third parties that would result from accepting their position. That approach is at odds with the pre-*Smith* jurisprudence incorporated by RFRA and with both of the free-exercise decisions cited in RFRA itself, *see* 42 U.S.C. § 2000bb(b)(1), which emphasized the importance of third-party interests to the free-exercise analysis. In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court accepted the free exercise claim only after stressing that "recognition of the [employee's] right to unemployment benefits under the state statute" did not "serve to abridge any other person's religious liberties." *Id.* at 409. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held that the Free Exercise Clause required an exemption from compulsory education laws for Amish parents only after determining that the parents had

“carried” the “difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education,” thus establishing that there was only a “minimal difference between what the State would require and what the Amish already accept.” *Id.* at 235-36; *see id.* at 222. Moreover, the Court in *Yoder* emphasized that its holding would not extend to a case in which an Amish child affirmatively wanted to attend school over his parents’ objection. *See id.* at 231-32. And in *United States v. Lee*, 455 U.S. 252 (1982), the Court’s rejection of the employer’s free exercise claim relied on the fact that exempting the employer from the obligation to pay Social Security taxes would “operate[] to impose the employer’s religious faith on the employees,” who would be denied the benefits to which they were entitled by federal law. *Id.* at 261.

RFRA is not properly interpreted to create tension with the approach of these pre-*Smith* cases. *See Autocam*, 750 F.3d at 626 (interpreting RFRA in light of its “relevant context” such as “Free Exercise Clause claims of the sort articulated in *Sherbert* and *Yoder*”).⁵ Indeed, the Supreme Court has stressed that in “[p]roperly

⁵ The type of accommodations cited in the debates prior to enactment of RFRA did not impose substantial costs or burdens on third parties. *See, e.g.*, 139 Cong. Rec. E1234-01 (daily ed. May 11, 1993) (statement of Rep. Cardin) (citing as examples of contemplated accommodations ensuring burial of veterans in “veterans’ cemeteries on Saturday and Sunday . . . if their religious beliefs required it” and precluding autopsies “on individuals whose religious beliefs prohibit autopsies”); 139 Cong. Rec. S14350-01 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (contemplated accommodations include allowing parents to home school their children, allowing individuals to volunteer at nursing homes, and allowing families to decline autopsies).

Continued on next page.

applying” the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), which was modeled on RFRA, “courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries[.]” *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).⁶ *Cf. Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 80 (1977) (Title VII’s reasonable-accommodation requirement does not entitle employee to a religious accommodation that would burden other employees).

5. It is the province of this Court to consider whether regulations that allow plaintiffs to decline to provide contraceptive coverage substantially burden their exercise of religion.

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

Such accommodations do not require third parties to forfeit federal protections or benefits to which they are otherwise entitled.

⁶ For this reason, *Cutter* rejected an Establishment Clause challenge to RLUIPA. The Supreme Court has held that, under certain circumstances, an accommodation that imposes burdens on employees can violate the Establishment Clause. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708-11 (1985) (holding that statute requiring employers to accommodate an employee’s Sabbath observance without regard to the burden such an accommodation would impose on the employer or other employees violated the Establishment Clause).

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

Nevertheless, plaintiffs are clear that they believe that a court is bound to accept their position that the opt-out provision “substantially burden[s] [their] exercise of religion.” 42 U.S.C. § 2000bb-1. Accordingly, plaintiffs assert that, “[w]hile the Government, and the courts below, may ‘feel[] that the accommodation sufficiently insulates [appellants] from the objectionable services, . . . it is not the Court’s role to say that plaintiffs are wrong about their religious beliefs.” Br. 21 (*quoting Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12-cv-2542, 2013 WL 6579764, at *14 (E.D.N.Y. Dec. 16, 2013)) (alterations in original).

Plaintiffs’ proposition does not accord with settled law. Whether a burden is “substantial” under RFRA is a question of law, not a “question[] of fact, proven by the credibility of the claimant.” *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011); *see, e.g., Bowen v. Roy*, 476 U.S. 693, 701 n.6 (1986) (“Roy’s religious views may not accept this distinction between individual and governmental conduct” but the law “recognize[s] such a distinction”); *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 448 (1998) (similar); *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (“[a]ccepting as true the factual allegations that Kaemmerling’s beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened”).

Plaintiffs’ attempt to distinguish *Kaemmerling* as a case where a plaintiff was not required to take any act is unavailing. They assert that the plaintiff in that case “did not object to any action he was forced to take, but only ‘to the government extracting DNA information from . . . specimen[s]’ *it already had*.” Br. 39-40 (quoting *Kaemmerling*, 553 F.3d at 679) (plaintiffs’ emphasis). That is not an accurate account of the decision. *Kaemmerling* was required to give a sample and filed suit before he had done so. The law at issue in that case required *Kaemmerling* to give “‘a tissue, fluid, or other bodily sample . . . on which a[n] . . . analysis of the [DNA] identification information’ can be carried out[.]” 553 F.3d at 673. That sample was to be used by the FBI to “creat[e] the donor’s unique DNA profile” and “record[] a copy of the profile in the CODIS [database].” *Ibid.* *Kaemmerling* “alleged that . . . *submitting to* DNA ‘sampling, collection and storage with no clear limitations of use’ is repugnant to his strongly held religious beliefs” against “the collection and retention of his DNA information.” 553 F.3d at 674 (emphasis added); *see also id.* at 678. He was required to “submit[] to DNA ‘sampling, collection and storage’” because he had not already given a sample. The government did not “*already ha[ve]*” (Br. 39-40), a specimen.⁷

⁷ *Kaemmerling* had sought a preliminary injunction and temporary restraining order before a sample was collected. *See, e.g.,* Opening Brief of Appointed *Amicus Curiae*, 2008 WL 2520867, at * at *8, *51-*52 (discussing motion for TRO and risk that *Kaemmerling* would be forced to give a sample). Before the court, he posited that he would be forced “either [to] comply with the Act or . . . to violate a sincerely held religious belief,” and that “forced participation in the seizure of blood for storage, [and] DNA sampling” was a substantial burden. Brief of Appellant, 2008

Continued on next page.

The Court examined Kaemmerling's claims that he did not object, in and of itself, to the act of giving a tissue sample or any similar "bodily violation" but rather "to collection of the DNA information contained within any sample." 553 F.3d at 678. In the full sentence that plaintiffs truncate in their brief, the court explained that "[g]iven these representations, we understand Kaemmerling's objection to 'DNA sampling and collection' not to be an objection to the BOP collecting any bodily specimen that contains DNA material such as blood, saliva, skin, or hair, but rather an objection to the government extracting DNA information from the specimen." *Id.* at 679. Concluding that Kaemmerling had failed to allege a "substantial burden" under RFRA, the D.C. Circuit explained that "[t]he extraction and storage of DNA information are entirely activities of the FBI, in which Kaemmerling plays no role" and "which occur after" he has given a tissue sample. *Ibid.* "The government's extraction, analysis, and storage of Kaemmerling's DNA information does not call for Kaemmerling to modify his religious behavior in any way[.]" *Ibid.*

Plaintiffs' discussion of other case law is wide of the mark. In *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981), for example, the plaintiff's "religious

WL 2520866, at *19, *21. A court-appointed *amicus curiae* supporting the *pro se* plaintiff explained, based on the complaint and record, that Kaemmerling objected to taking an active role in the process of DNA analysis by "'submitting to DNA sampling, collection and storage.'" Opening Brief of Appointed *Amicus Curiae*, 2008 WL 2520867, at *41 (quoting App. 14-15) (emphasis added); *see also id.* at *40-*41 (urging that Act "'forc[es] [him] to provide DNA samples'" and stating that his "religious beliefs do not allow [him] to consent to DNA sampling.") (quoting App. 72) (emphasis added).

beliefs prevented him from participating in the production of war materials.” *Id.* at 709. When his employer placed him in “a department that fabricated turrets for military tanks,” the plaintiff looked for openings in departments not “engaged directly in the production of weapons,” and, when he could not find one, quit his job. *Id.* at 710. He was denied unemployment compensation on the ground that “a termination motivated by religion is not for ‘good cause’ objectively related to the work.” *Id.* at 711-13.

But the Supreme Court disagreed and held that the state could not deny unemployment compensation “because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs[.]” *Id.* at 717-18. Notably, Thomas objected to *his* “fabricat[ing] turrets for military tanks.” *Id.* at 710; *see id.* at 711 (finding that he objected to “producing or directly aiding in the manufacture of items used in warfare”). He did not object to *opting out* of doing so. Indeed, Thomas looked in the same company for jobs not “engaged directly in the production of weapons.” *Id.* at 710; *see also id.* at 711-12 (“Claimant continually searched for a transfer to another department which would not be so armament related”). The burden in *Thomas* thus resulted from the absence of the type of opt-out mechanism available in this case. Thomas did not suggest that his religious rights would be burdened if, as a consequence of his actions, *another employee* was assigned to work on armaments manufacture.

In short, while this Court does not scrutinize the sincerity of plaintiffs' religious beliefs, it properly determines whether the challenged regulations impose a substantial burden on those beliefs as provided for by RFRA and pre-*Smith* free exercise law. Plaintiffs may decline to provide contraceptive coverage without facing any penalties. RFRA does not allow plaintiffs to block the government and third parties from making payments for contraceptive services.

B. Plaintiffs' Challenges Would Fail Even if the Regulations Were Subject to RFRA's Compelling Interest Test.

Plaintiffs' challenge to the regulations here would fail even if the regulations were subject to the compelling-interest test under RFRA. The contraceptive-coverage provisions, including the religious accommodations at issue here, advance compelling governmental interests and are the least restrictive means to achieve them.

1. The contraceptive coverage provision advances compelling governmental interests.

The Affordable Care Act and its preventive-services coverage provision, including the contraceptive-coverage provision, advance a number of compelling interests.

a. The Affordable Care Act and its preventive-services coverage provision advance the compelling interest of ensuring a "comprehensive insurance system with a variety of benefits available to all participants." *Lee*, 455 U.S. at 258. "While [RFRA] adopts a 'compelling governmental interest' standard, [c]ontext matters' in the application of that standard." *Cutter*, 544 U.S. at 722-23 (citation omitted; brackets

in original). That context here includes not only the Affordable Care Act but also ERISA, “a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans,” *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). In enacting ERISA, Congress found “that the continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit] plans,” which “are affected with a national public interest.” 29 U.S.C. § 1001(a). Congress “declared” that ERISA’s “policy” was in part to “protect . . . the interests of participants in employee benefit plans and their beneficiaries.” 29 U.S.C. § 1001(b).

When evaluating a claim under RFRA, a court must consider the impact of granting relief on third parties, a task that is particularly imperative when the requested relief would deprive third parties of right and benefits secured by federal law. *Compare Sherbert*, 374 U.S. at 409 (“recognition of the [employee’s] right to unemployment benefits under the state statute” did not “serve to abridge any other person’s religious liberties”), and *Yoder*, 406 U.S. at 222, 231-32, 235-36 (parents had “carried” the “difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education” and emphasizing that the holding would not extend to a case in which an Amish child affirmatively wanted to attend school over his parents’ objection), *with Lee*, 455 U.S. at 261 (refusing to exempt employer from paying Social Security taxes because that would “operate[] to impose

the employer's religious faith on the employees," who would be denied the benefits to which they were entitled by federal law). *See also Cutter*, 544 U.S. at 720, 722-23

The impact on third parties that would result from plaintiffs' position, moreover, undermines comprehensive efforts to protect the public health, which is unquestionably a compelling governmental interest. "A woman's ability to control whether and when she will become pregnant has highly significant impacts on her health, her child's health, and the economic well-being of herself and her family." *Korte*, 735 F.3d at 725 (Rovner, J., dissenting). 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," *O Centro*, 546 U.S. at 431, 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 102-03. 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." 78 Fed. Reg. at 39,872; *see* IOM Report 103. A woman who does not know she is pregnant is also more likely to engage in "behaviors during pregnancy, such as smoking and consumption of alcohol, 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; *see* IOM Report 103. And because contraceptives reduce the number of unintended pregnancies, they “reduce the number of women seeking abortions.” 78 Fed. Reg. at 39,872.

Contraceptive use also “helps women improve birth spacing and therefore avoid the increased risk of adverse pregnancy outcomes that comes with pregnancies that are too closely spaced.” 78 Fed. Reg. at 39,872; *see* IOM Report 103. In particular, short intervals between pregnancies “have been associated with low birth weight, prematurity, and small-for-gestational age births.” 78 Fed. Reg. at 39,872. “[P]regnancy may be contraindicated for women with serious medical conditions such as pulmonary hypertension . . . and cyanotic heart disease, and for women with the Marfan Syndrome.” IOM Report 103-04; *see* 78 Fed. Reg. at 39,872. And “there are demonstrated preventive health benefits from contraceptives relating to conditions other than pregnancy.” 78 Fed. Reg. at 39,872. For example, contraceptives can prevent certain cancers, menstrual disorders, and pelvic pain. *Ibid.*; *see* IOM Report 107.

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; *see Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984) (discussing the fundamental “importance, both to the individual and to society, of

removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women,” and noting that “[a]ssuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests”).

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. “Women of childbearing age spend 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*, (“Females 19-44 years old spent 73 percent more per capita [on health care expenses] than did males of the same age.”). These disproportionately high costs have a tangible impact: women often find that copayments and other cost sharing for important preventive services “are so high that they avoid getting [the services] in the first place.” 155 Cong. Rec. at 29,302 (statement of Sen. Mikulski); *see* IOM Report 19 (“[W]omen are consistently more likely than men to report a wide range of cost-related barriers to receiving or delaying medical tests and treatments and to filling prescriptions for themselves and their families.”). Studies have demonstrated that “even moderate copayments for preventive services” can “deter patients from receiving those services.” IOM Report 19.

b. Plaintiffs opine that these interests “cannot be compelling” because many people can already obtain at least some kinds of contraception. *See* Br. 49. This ignores the extensive scientific evidence about the need for insurance coverage of a wide range of contraceptive services. And by plaintiffs’ logic, there would be no basis for requiring a group health plan to cover any particular item or service. Plaintiffs’ reasoning is flatly at odds with Congress’s objective to increase access to recommended preventive services by eliminating associated out-of-pocket costs. And it ignores the fact that women deprived of coverage may not be able to afford to pay for the relevant services on their own.

Plaintiffs were mistaken when they asserted in district court that the government’s compelling interests are undermined by other features of the Act and its implementing regulations regarding the religious employer exemption.

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*, 735 F.3d at 677 (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.

It would be perverse to hold that the government’s provision of a religious exemption for churches and houses of worship eliminates the compelling interests in the underlying regulations, thus effectively extending the same exemption, through RFRA, to anyone else who wants it. Such a reading of RFRA would discourage the government from accommodating religion, the opposite of what Congress intended in enacting the statute.

Indeed, *Lee* rejected a Free Exercise claim on the ground that it would undermine the comprehensive and mandatory nature of Social Security, 455 U.S. at 258, even as it emphasized that Congress had provided religion-based exemptions for self-employed individuals, *id.* at 260-61. “Confining [the exemption] to the self-employed provided for a narrow category which was readily identifiable,” *ibid.*, and Congress’s inclusion of such an exemption did not undermine the government’s interest in enforcing the law outside the exemption’s confines.

Plaintiffs are also mistaken that the government’s asserted interests cannot be compelling because of the Affordable Care Act’s grandfathering provision. *See* 42

U.S.C. § 18011; 45 C.F.R. § 147.140(g). That provision has the effect of allowing a transition period for compliance with a number of the Act's requirements (not just the contraceptive-coverage and other preventive-services provisions) until a health plan makes one or more specified changes, such as an increase in cost-sharing requirements above a certain threshold, a decrease in employer contributions beyond a certain threshold, or the elimination of certain benefits. The impact of this grandfathering provision is thus "temporary, intended to be a means for gradually transitioning employers into mandatory coverage." *Gilardi*, 733 F.3d at 1241 (Edwards, J., concurring in part and dissenting in part). Consistent with that purpose, the percentage of employees in grandfathered plans is steadily declining, having dropped from 56% in 2011 to 48% in 2012 to 36% in 2013. Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits 2013 Annual Survey* 7, 196.

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, 746-48 (1984) (noting that "protection of reasonable reliance interests is . . . a legitimate governmental objective" that Congress may permissibly advance through phased implementation of regulatory requirements). Congress specified that various crucial Affordable Care Act provisions would not be immediately effective. For example, the minimum coverage provision, 26 U.S.C. § 5000A, as well as the guaranteed-issue and community-rating insurance market reforms at the heart of the Act, did not take effect until 2014, four years after

enactment. *Id.* at 2580; *see* 42 U.S.C. §§ 300gg-1, 300gg-3, 300gg-4(a) (guaranteed-issue provision); *see also* 42 U.S.C. §§ 300gg(a)(1), 300gg-4(b) (community-rating provision). These post-2010 effective dates do not in any way call into question the compelling nature of the interests that these key provisions advance.

Plaintiffs are similarly mistaken in positing that, because 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 tax if they fail to offer full-time employees (and their dependents) adequate health coverage, 26 U.S.C. § 4980H(c)(2)(A), therefore the interests are not compelling. The preventive-services requirements apply without regard to the size of the employer. 42 U.S.C. § 300gg-13. Small employers that provide coverage to their employees must comply with the preventive-services coverage provision.

By plaintiffs' logic, none of the Act's provisions regulating group health plans would be supported by a compelling interest, given that small employers face no penalty for failing to offer a plan in the first place. Yet federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by those statutes. For example, when Title VII was first enacted, the statute's prohibitions on employment discrimination did not apply to employers with fewer than 25 employees, and even now, those prohibitions do not apply to employers with fewer than 15 employees. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 504-05 & n.2 (2006). This exception for small employers does not call into

question the government's compelling interests in eradicating employment discrimination. Similarly, the Social Security Act originally did not cover agricultural or domestic workers. *See Steward Mach. Co. v. Davis*, 301 U.S. 548, 584 (1937); *Lee*, 455 U.S. at 258 n.7 (noting additional ways in which Social Security Act's coverage was "broadened" over the years). Yet those initial exemptions for large categories of employees did not undermine the compelling interests underlying the statute.

Plaintiffs' argument also overlooks the fact that Congress expected the employees of small businesses that choose not to offer group health coverage to receive the required preventive services coverage through other means. Such employees may obtain coverage on a health insurance exchange, and all policies offered on exchanges will provide contraceptive coverage without cost sharing. *See* 45 C.F.R. § 147.130; *see also* 26 U.S.C. § 36B (providing tax credits for eligible individuals for insurance purchased on exchanges); 26 U.S.C. § 5000A (minimum coverage provision).

2. Plaintiffs' alternative proposals are not less restrictive means.

Plaintiffs contend that the government has a less restrictive means of advancing its interests, urging that the government could provide contraceptive coverage itself "or work with third parties . . . to do so without requiring plaintiffs' active participation." *See* Br. 50-51.

The government *has* worked with third parties to provide contraceptive coverage. Plaintiffs do not "actively participate" and only declare that they are *not*

providing coverage. Under plaintiffs' theory, any scheme in which coverage is provided after an organization opts out would be infirm. Many people have religious objections to many practices. These persons may object to different features of a requirement or, in this case, of a religious accommodation. But national systems of health and welfare cannot vary from point to point or be based around what, if any, method of provision can be agreed upon by all objecting parties. The challenged accommodations provide an administrable way for organizations to state that they object and opt out, and for the government and other third parties to provide contraceptive coverage.

It should also be clear that RFRA does not require Congress to create or expand federal programs. In the Affordable Care Act generally, and in the preventive-services coverage provision in particular, Congress chose to build on the existing system of workplace-based health coverage and private insurance, rather than replace that system with a government-run one. Plaintiffs' contention that the contraceptive-coverage provision is invalid because the government could instead itself provide contraceptive coverage to employees is also impossible to reconcile with *Lee*. On plaintiffs' theory, the government itself should have financed Social Security benefits directly to *Lee's* employees, as a less restrictive alternative to requiring that Lee pay Social Security taxes. The Court did not find such a government-funded scheme to be a less restrictive alternative in *Lee*.

II. Plaintiffs Have Not Identified Any Violation of Their Rights Under the Constitution or Administrative Procedure Act.

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 (1990). It prohibits only laws with “the unconstitutional object of targeting religious beliefs and practices.” *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997); *see id.* at 530 (Free Exercise clause prohibits “laws passed because of religious bigotry”); *id.* at 535 (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 (1993). A law is not neutral “if the object of the law is to infringe upon or restrict practices because of their religious motivation.” *Id.* at 533. A law is not generally applicable if it “in a selective manner impose[s] burdens only on conduct motivated by religious belief.” *Id.* at 543.

Even assuming *arguendo* that the contraceptive-coverage provision burdens plaintiffs’ 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.

Plaintiffs incorrectly assert that the challenged regulation “is not ‘neutral’ because it is specifically targeted at [their] religious practice of refusing to facilitate

access to or participate in the Government's scheme to provide the objectionable products and services." Br. 54. They urge that the government "was acutely aware that any gap in coverage for contraception was due primarily to the religious beliefs and practices of employers such as the Catholic Church," and they then infer that the coverage requirement was therefore aimed at these religious beliefs. *Ibid.*

Although plaintiffs focus on the contraceptive-coverage provision, the women's preventive health care requirements include many services unrelated to contraception, many of which plaintiffs do not appear to contest. The comprehensive approach to women's health issues laid out in the ACA demonstrates that there is no intent to regulate religion or target religious exercise. Moreover, even with respect to contraceptive provisions, the district courts correctly observed that those provisions were not "specifically targeted at the Plaintiffs' or anyone else's religious practices." MCC-R.40 at Page ID #1343. Rather, those requirements were passed "to advance the goals of safeguarding public health and ensur[e] that women have equal access to health care." CDN-R.65, at Page ID #1349-50 (citing 78 Fed. Reg., at 39,872); *see, e.g.*, 155 Cong. Rec. S11985, S11986 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski) (sponsor explaining that purpose is to "guarantee[] women access to lifesaving preventive services and screenings," and to remedy the fact that "[w]omen are more likely than men to neglect care or treatment because of cost"); 155 Cong. Rec. S12265, S12271 (daily ed. Dec. 3, 2009) (statement of Sen. Franken) ("The problem [with the current bill] is, several crucial women's health services are omitted. [The

Women’s Health Amendment] closes this gap.”); 155 Cong. Rec. S12021-02, S12027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand) (“... in general women of childbearing age spend 68 percent more in out-of-pocket health care costs than men. . . . This fundamental inequity in the current system is dangerous and discriminatory and we must act.”).

The district courts also rejected plaintiffs’ contention that the preventive services coverage regulations are not generally applicable because of statutory provisions that pertain to small businesses and grandfathered plans. *See* Br. 53-54. These are “secular” provisions that “apply to all employers, including religious employers” and “are not imposed selectively against conduct motivated by religious belief.” MCC-R.40 at Page ID #1342. And the fact that “categorical exemptions exist does not mean that the law does not apply generally.” *Ibid.* (citing *Lee*, 455 U.S. 252, 260-61 (finding that social security tax requirements were generally applicable although there were categorical exemptions)).

Plaintiffs’ reliance (Br. 52) on *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993), underscores the error in their reasoning. In that case, the legislature specifically targeted the religious exercise of members of a single church (Santeria) by enacting ordinances that used terms such as “sacrifice” and “ritual,” 508 U.S. at 533-34, and prohibited few, if any, animal killings other than Santeria sacrifices, *id.* at 535-36. The statute was drawn so “that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it

occurs during a ritual or ceremony and its primary purpose is to make an offering to the orishas, not food consumption.” *Id.* at 536. “Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.” *Ibid.* *Lukumi* does not remotely suggest that an exemption from the contraceptive-coverage provision for plans offered by churches and other houses of worship is evidence that the government targeted the religious practices of any church or denomination.

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

Plaintiffs have alleged two free speech violations. The district courts correctly held that neither claim has merit.

1. Plaintiffs’ “compelled speech” argument has two prongs. See Br. 57-58.

First, plaintiffs argue that the regulations “require[] [them] to provide, pay for, and/or facilitate access to the provision of coverage for ‘counseling’ related to the objectionable products and services for their employees.” Br. 57. Among the incorrect premises underlying this assertion is that plaintiffs must provide, pay for, or facilitate counseling at all.

Moreover, even if plaintiffs could not opt out, this argument would fail because the challenged provisions regulate the terms of group health plans, not the content of communications between patients and their healthcare providers. The regulations require coverage of “education and counseling for all women with reproductive

capacity’ as prescribed by a provider,” 77 Fed. Reg. at 8725 (quoting HRSA Guidelines), and do not require that this counseling encourage any particular service. Receiving medical care often involves a conversation between a patient and a doctor or a patient and a pharmacist. That does not, however, transform any required healthcare into a compelled speech case. *See Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* (“FAIR”), 547 U.S. 47, 61-62 (2006).

The second prong of plaintiffs’ “compelled speech” argument urges that the act of opting out of providing contraceptive coverage is itself speech and “triggers an obligation on the part of [plaintiffs’] third parties to provide or procure the objectionable products and services” and “deprives [plaintiffs] of the freedom to speak on the issue of abortion and contraception on their own terms.” Br. 58. This assertion is inexplicable. The requirement to complete an opt-out form does not constrain plaintiffs’ speech on any topic; on the contrary, “Plaintiffs remain free to convey to their employees and others their vehement objections to the use of contraceptive services, and nothing in the self-certification process restricts that freedom.” CDN-R.65, at Page ID #1352. “Nothing 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. Moreover, by opting out, plaintiffs would explicitly proclaim their objection to contraception. “[A]ny speech in which Plaintiffs must engage in completing the certification is incidental to regulation of conduct.” MCC-R.40 at Page ID #1345-46; *see FAIR*, 547 U.S. at 62.

2. The MCC plaintiff's "gag order" claim (Br. 55-56) challenges the provision stating that eligible organizations shall not "directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements." 29 C.F.R. § 2590.715-2713A(b)(1)(iii). The district court observed that "[t]he regulation does not prohibit Plaintiffs from expressing their views. Rather, it precludes Plaintiffs from interfering with a TPA's [third party administrator's] decision or efforts to provide contraceptive services once Plaintiffs have provided a certification." MCC-R.40 at Page ID #1346. "Plaintiffs may still convey their views about contraception, but they may not do so in a way that threatens or interferes with employees' attempts to obtain coverage from a third party." *Ibid.* (citing 78 Fed. Reg. at 39,880 n.41 ("Nothing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives").

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

The district court correctly rejected plaintiff's attempt to characterize the regulation as an impermissible "gag order."

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

Plaintiffs assert that the regulations violate the Establishment Clause of the First Amendment by "creat[ing] an artificial, Government-favored category of 'religious employers,' which favors some types of religious organizations and denominations over others," and by "creat[ing] an excessive entanglement between government and religion." Br. 59.

Under the regulations, an organization is a "religious employer" if it "is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended[.]" 45 C.F.R. § 147.131(a). If it does, it qualifies for the exemption, without any government action whatsoever. This exemption does not impermissibly favor some religions over others. Although plaintiffs apparently believe that these provisions of the tax code are unconstitutional, they offer no plausible basis for this contention. As the district courts explained, "the Establishment Clause does not prohibit governmental line drawing when granting religious accommodations." MCC-R.40 at Page ID #1347-48; *see id.* at Page ID #1348. "Plaintiffs have not shown that this distinction was intended to prefer, or results in a preference for, one denomination over another." CDN-R.65, at Page ID #1354.

Plaintiffs' reliance (Br. 59-60) on cases such as *Larson v. Valente*, 456 U.S. 228, 244 (1982) is entirely misplaced. The statute held unconstitutional in that case was “drafted with the explicit intention” of requiring “particular religious denominations” to comply with registration and reporting requirements while excluding other religious denominations. *Id.* at 254; *see also id.* at 244 (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”). No similar circumstance exists here: the challenged exemption does not grant any denominational preference or otherwise discriminate among religions. *See Gillette v. United States*, 401 U.S. 437, 450-51 (1971) (upholding exemption from the draft); *Walz v. Tax Comm’n of the City of New York*, 397 U.S. 664, 666 (1970) (upholding property tax exemptions for real property owned by religious organizations and used exclusively for religious worship); *see also Larson*, 456 U.S. at 246 n.23 (“[C]onscientious objector status was available on an equal basis to both the Quaker and the Roman Catholic.”)

Nor does this exemption excessively entangle the government. Plaintiffs object to a longstanding, non-exhaustive, and non-binding list of factors that the IRS uses when determining whether an organization is a church. *See* Br. 61-64. But plaintiffs do not challenge any determination that has been made using those factors or explain how their objection to those factors bears on the regulation at issue here. The qualification for the religious employer exemption does not require the

government to make any determination, whether as a result of the application of the non-exhaustive, non-binding list or otherwise.

D. The Regulations Do Not Violate the Administrative Procedure Act.

The *MCC* plaintiffs additionally raise two objections under the Administrative Procedure Act. Both are without merit.

1. Plaintiffs contend that the requirement that group health plans cover “[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,’ as prescribed by a provider,” 77 Fed. Reg. 8725 (Feb. 15, 2012), conflicts with the Weldon Amendment, which states that “[n]one of the funds made available in this Act may be made available [to federal agencies] . . . if such agenc[ies] . . . subject[] any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.” Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011).

The regulations, however, do not require that any health plan cover abortion at all, much less as a preventive service. *Compare* Br. 64-65 (asserting that the prescription drugs “Plan B” and “Ella” “can cause an abortion”), *with* FDA-approved label for Plan B (levonorgestrel) tablets, 0.75mg, 4 (July 10, 2009) (emergency contraceptive in pill form works “principally by preventing ovulation or fertilization”

and “may inhibit implantation (by altering the endometrium)”⁸ and FDA-approved label for Ella (ulipristal acetate) tablet § 12.1 (May 2, 2012) (emergency contraceptive pill works through “inhibition or delay of ovulation” and “may also” work through “alterations to the endometrium that may affect implantation”).⁹

Plaintiffs wish to define the term “abortion” to include any method of contraception that has the potential to prevent the implantation of a fertilized egg in the uterus. *See* Br. 64-65. Plaintiffs are mistaken, however, that “the definition” of the Weldon Amendment’s funding prohibition “should be determined by [each] plan provider.” Br. 65. Congress legislated against the background of FDA’s longstanding determination that such “emergency contraceptive” drugs are contraceptives, not abortifacients, because they have no effect if a woman is pregnant. *See, e.g.*, 62 Fed. Reg. 8610, 8611 (Feb. 25, 1997) (“Emergency contraceptive pills are not effective if the woman is pregnant; they act by delaying or inhibiting ovulation, and/or altering tubal transport of sperm and/or ova (thereby inhibiting fertilization), and/or altering the endometrium (thereby inhibiting implantation).”); *see also* 45 C.F.R. § 46.202(f) (“Pregnancy encompasses the period of time from implantation until delivery”). And while FDA’s determination has remained unchanged, Congress has repeatedly reenacted the Weldon Amendment.

⁸ http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021045s015lbl.pdf.

⁹ http://www.accessdata.fda.gov/drugsatfda_docs/label/2012/022474s002lbl.pdf.

Indeed, although Title X of the Public Health Service Act generally bars the Secretary from providing funds “used in programs where abortion is a method of family planning.” 42 U.S.C. § 300a-6, HHS has long advised Title X grantees that they “should consider the availability of emergency contraception the same as any other method which has been established as safe and effective.” HHS, Office of Population Affairs, Memorandum (Apr. 23, 1997)¹⁰; *see also, e.g.*, 146 Cong. Rec. S6062-01, S6095 (daily ed. June 29, 2000) (Statement of Sen. Helms) (“[T]he Congressional Research Service confirmed to me that Federal law does, indeed, permit the distribution of the ‘morning-after pill’ at school-based health clinics receiving Federal funds designated for family planning services.”).

Representative Weldon, the sponsor of the Weldon Amendment, himself did not consider the word “abortion” in the statute to include FDA-approved emergency contraceptives. *See* 148 Cong. Rec. H6566, H6580 (daily ed. Sept. 25, 2002) (“The provision of contraceptive services has never been defined as abortion in Federal statute, nor has emergency contraception, what has commonly been interpreted as the morning-after pill. . . . [U]nder the current FDA policy[,] that is considered contraception, and it is not affected at all by this statute.”).

2. Plaintiffs also raise procedural objections, urging that the Departments did not receive notice and comment on the HRSA guidelines. Br. 66-68.

¹⁰ <http://www.hhs.gov/opa/title-x-family-planning/initiatives-and-resources/documents-and-tools/opa-97-02.html>.

As to the challenged regulations, however, the Departments issued an advanced notice of proposed rulemaking and solicited comments. 77 Fed. Reg. 16,501. And they issued a notice of proposed rulemaking and solicited comments. 78 Fed. Reg. 8456, 8457. The Departments received over 400,000 comments, and the preamble to the 2013 final rules contains a detailed discussion both of the comments received and the government's responses to those comments. *See* 78 Fed. Reg. 38,969, 39,871-39,888 (July 2, 2013).

As to the HRSA Guidelines, because there were no existing HRSA guidelines relating to preventive care and screening for women, HRSA sought the scientific and medical expertise of the IOM, which conducted a science-based review and made recommendations. Nothing in the APA, or any other statute, requires HRSA to have subjected IOM's recommendations to notice and comment procedures before adopting them in the guidelines. The APA's notice-and-comment requirements apply only to rulemaking, 5 U.S.C. § 553(b), and a "rule" is defined in the APA, in relevant part, as being "designed to implement, interpret, or prescribe law or policy," *id.* § 551(4). The guidelines, however, are simply the clinical recommendations of a scientific body as adopted by HRSA. The substantive obligations that are imposed on group health plans and health insurance issuers were imposed by Congress, in 42 U.S.C. § 300gg-13(a) and in corresponding provisions of ERISA and the Internal Revenue Code, which expressly and automatically imported the content of various guidelines (including the HRSA Guidelines), including new content after a specified

period of time. Indeed, in the same provision, Congress also imported by reference clinical recommendations of the United States Preventive Services Task Force and the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention. *Ibid.*¹¹ The clinical recommendations of these entities are not generally required to be subject to notice and comment, and there is no suggestion that Congress intended otherwise here for any of the referenced recommendations.

¹¹ The various cases cited by plaintiffs (Br. 67) addressed rules that had force of law of their own accord and that were promulgated pursuant to statutes that, for example, authorized the agency “to promulgate such rules, regulations, and orders as [it] may deem necessary in order to effectuate the purposes of [the Act].” *Hector v. USDA*, 82 F.3d 165, 167 (7th Cir. 1996) (quoting 7 U.S.C. § 2151); see *Nat’l Ass’n of Farmworkers Orgs. V. Marshall*, 628 F.2d 606, 606-07 (D.C. Cir. 1980) (quoting conditions the statute required the Secretary to find before promulgation of certain waivers). No such language appears in the statute here. Compare, e.g., 42 U.S.C. § 300gg-1(b)(3) (“The Secretary shall promulgate regulations with respect to enrollment periods under paragraphs (1) and (2).”).

CONCLUSION

The orders denying preliminary injunctions should be affirmed.

Respectfully submitted,

STUART F. DELERY

Assistant Attorney General

PATRICK A. MILES, JR.

DAVID RIVERA

United States Attorneys

BETH S. BRINKMANN

Deputy Assistant Attorney General

MARK. B. STERN

ALISA B. KLEIN

/s/ Adam C. Jed

ADAM C. JED

(202) 514-5089

Attorneys, Appellate Staff

Civil Division, Room 7531

U.S. Department of Justice

950 Pennsylvania Ave., N.W.

Washington, D.C. 20530

FEBRUARY 2014

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

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's order of January 13, 2014, because it contains 14,528 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Adam C. Jed
Adam C. Jed

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Adam C. Jed
Adam C. Jed

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Michigan Catholic Conference v. Sebelius, No. 13-cv-1247 (W.D. Mich.):

<u>Record Entry</u>	<u>Page ID# Range</u>	<u>Description</u>
R.1	1-53	Complaint
R.40	1329-1350	Opinion
R.41	1351	Order
R.42	1352-1354	Notice of Appeal

Catholic Diocese of Nashville v. Sebelius, No. 13-cv-1303 (M.D. Tenn.):

<u>Record Entry</u>	<u>Page ID# Range</u>	<u>Description</u>
R.1	1-70	Complaint
R.65	1339-1358	Opinion
R.66	1359	Order
R.67	1360-1362	Notice of Appeal