No. ______

IN THE

Supreme Court of the United States

UNIVERSITY OF NOTRE DAME,

Petitioner,

v.

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

Respondents,

and

JANE DOE 3,

Intervenor.

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

PETITION FOR WRIT OF CERTIORARI

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December 18, 2015

QUESTION PRESENTED

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

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

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, who was the Plaintiff below, is the University of Notre Dame. Petitioner does not have a parent corporation. No publicly held corporation owns any portion of the Petitioner, and the Petitioner is not a subsidiary or an affiliate of any publicly owned corporation.

Respondents, who were Defendants below, are Sylvia Mathews Burwell, in her official capacity as Secretary of the United States Department of Health and Human Services; the United States Department of Health and Human Services; Thomas E. Perez, in his official capacity as Secretary of the United States Department of Labor; the United States Department of Labor; Jacob J. Lew, in his official capacity as Secretary of the United States Department of the Treasury; and the United States Department of the Treasury.

Intervenor, who was initially permitted to intervene by the appellate court, is proceeding anonymously as Jane Doe 3.

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PETITION FOR WRIT OF CERTIORARI

This case involves a challenge to regulations that force the University of Notre Dame to violate its religious beliefs by offering health insurance to its students and employees through a company that will provide or procure coverage for abortifacients, contraceptives, and sterilization. In February 2014, a panel of the Seventh Circuit held (over a dissent by Judge Flaum) that the regulations do not "substantially burden" Notre Dame's religious exercise under the Religious Freedom Restoration Act ("RFRA"). This Court then granted certiorari, vacated the panel's decision, and remanded ("GVR'd") with instructions to apply its decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). *See Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015).

The reason for that GVR was clear: this Court held in *Hobby Lobby* that the Government substantially burdens religious exercise whenever it forces plaintiffs to "engage in conduct that seriously violates their religious beliefs" on pain of "substantial" penalties. 134 S. Ct. at 2775-76. And the challenged regulations do exactly that: they threaten to impose massive penalties unless Notre Dame seriously violates its religious beliefs by (1) submitting objectionable documentation and (2) offering health insurance to its students and employees through a company that will procure or provide them with abortifacient and contraceptive coverage.

Instead of faithfully applying *Hobby Lobby* on remand, however, the panel once again held (over another dissent by Judge Flaum) that the regulations

do not substantially burden Notre Dame's religious exercise. To make matters worse, the panel also suggested that even if the regulations did impose a substantial burden, they would nonetheless pass muster under RFRA because they are the "least restrictive means" of providing free contraceptive coverage.

This Court has now granted certiorari in *Zubik v. Burwell*, No. 14-1418, and six related petitions to resolve the exact question presented by this case: whether the regulatory scheme at issue in this litigation can survive scrutiny under RFRA. Accordingly, consistent with its usual practice, this Court should hold this petition pending resolution of *Zubik et al*. If this Court correctly determines that the regulations violate RFRA, it should grant this petition, vacate the judgment below, and remand for further proceedings consistent with its opinion.

OPINIONS BELOW

The district court's opinion and order denying Petitioner's motion for a preliminary injunction (Pet. App. 1a-47a) is reported at 988 F. Supp. 2d 912. The district court's subsequent denial of Petitioner's motion for an injunction pending appeal (Pet. App. 48a-50a), as well as the Seventh Circuit's refusal to grant similar relief (Pet. App. 51a-53a) are unreported. The Seventh Circuit's initial opinion affirming the district court (Pet. App. 54a-99a) is reported at 743 F.3d 547. The Seventh Circuit's initial order denying Notre Dame's petition for rehearing en banc (Pet. App. 100a-01a) is unreported.

This court granted certiorari, vacated the Seventh Circuit's initial opinion, and remanded this case for

further consideration in light of this Court's decision in *Hobby Lobby*. *See Notre Dame*, 135 S. Ct. 1528. The Seventh Circuit's opinion on remand (Pet. App. 102a-54a) is reported at 786 F.3d 606. Its order denying Notre Dame's second petition for rehearing en banc (Pet. App. 155a-56a) is unreported.

JURISDICTION

The judgment of the Seventh Circuit was entered on May 19, 2015. Pet. App. 102a-54a. That court denied rehearing en banc on July 24, 2015. Pet. App. 155a-56a. This Court issued an order extending the time to file a petition for certiorari until December 21, 2015, on October 6, 2015. Jurisdiction is proper under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following provisions are reproduced in Appendix I (Pet. App. 180a-235a): 42 U.S.C. §§ 2000bb-1, 2000bb-2, 2000cc-5, 300gg-13; 26 U.S.C. §§ 4980D, 4980H; 26 C.F.R. §§ 54.9815-2713, 54.9815-2713A, 54.9815-2713AT; 29 C.F.R. §§ 2510.3-16, 2590.715-2713, 2590.715-2713A; 45 C.F.R. §§ 147.130, 147.131.

STATEMENT OF THE CASE

A. The Mandate

The Patient Protection and Affordable Care Act ("ACA") requires "group health plan[s]" and "health insurance issuer[s]" to cover women's "preventive care." 42 U.S.C. § 300gg-13(a)(4) (the "Mandate"). Employers that fail to include the required coverage are subject to penalties of $100 per day per affected beneficiary. 26 U.S.C. § 4980D(b). Dropping health coverage likewise subjects employers with more than

fifty employees to penalties of $2,000 per year per employee after the first thirty employees. *Id.* § 4980H(a), (c)(1).

Congress did not define women's "preventive care." The Department of Health and Human Services ("HHS") also declined to define the term and instead outsourced the definition to a private nonprofit, the Institute of Medicine ("IOM"). 75 Fed. Reg. 41,726, 41,731 (July 19, 2010). The IOM then determined that "preventive care" should include "all [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," HRSA, Women's Preventive Services Guidelines, www.hrsa.gov/womensguidelines (last visited December 16, 2015), and HHS subsequently adopted that definition, 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv). Some FDA-approved contraceptive methods (such as Plan B and ella) can induce an abortion. *Hobby Lobby*, 134 S. Ct. at 2762-63 & n.7.

1. Full Exemptions from the Mandate

From its inception, the Mandate exempted numerous health plans covering millions of people. For example, certain plans in existence at the time of the ACA's adoption are "grandfathered" and exempt from the Mandate as long as they do not make certain changes. 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g). As of November 2015, the Government estimated that roughly 37 percent of firms in the country offer at least one grandfathered health plan, and 26 percent of employees nationwide

are enrolled in a grandfathered plan. In total, roughly 33.9 million people are on ERISA-covered grandfathered plans, and 10.7 million people are on State and local government grandfathered plans. *See* 80 Fed. Reg. 72,192, 72,218 (Nov. 18, 2015).

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

At the same time, the "religious employer" exemption does *not* apply to many devoutly religious nonprofit groups that *do* object to contraceptive coverage. According to the Government, these nonprofit religious groups do not merit an exemption because they are not as "likely" as "[h]ouses of worship and their integrated auxiliaries" "to employ people of the same faith who share the same objection" to "contraceptive services." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). The administrative record contains no evidence in support of this assertion.

2. The Nonprofit Mandate

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

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

payments for contraceptive coverage are available to beneficiaries only "so long as [they] are enrolled in [the religious organization's] health plan." 29 C.F.R. § 2590.715-2713A(d).

The Nonprofit Mandate has additional implications for organizations that offer self-insured health plans. The Government concedes that in the self-insured context, "'the contraceptive coverage is part of the [self-insured organization's health] plan.'" *Roman Catholic Archbishop of Wash. v. Sebelius*, 19 F. Supp. 3d 48, 80 (D.D.C. 2013) (citation and alteration omitted); *see also* Br. for the Respondents in Opp. at 19, *Houston Baptist Univ. v. Burwell*, No. 15-35 (U.S. Sept. 8, 2015), 2015 WL 5265293 (conceding that in the self-insured context, "the contraceptive coverage provided by [the] TPA is . . . part of the same ERISA plan as the coverage provided by the employer"). Both the self-certification and the notification provided by the Government upon receipt of the eligible organization's submission are deemed to be "instrument[s] under which the plan is operated," 29 C.F.R. § 2510.3-16(b), and serve as the "designation of the [organization's TPA] as plan administrator and claims administrator for contraceptive benefits," 78 Fed. Reg. at 39,879. Consequently, the TPA of a self-insured health plan is *barred* from providing contraceptive benefits to the plan beneficiaries *unless* the sponsoring organization provides the self-certification or notification.[1]

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[1] *See* 29 U.S.C. § 1002(16)(A) (limiting the definition of a plan administrator to "the person specifically so designated by the terms of the instrument under which the plan is operated"); *id.* § 1102(a)(1), (b)(3) (providing that self-insured plans must be "established and maintained pursuant to a

In addition, the Nonprofit Mandate provides a unique incentive for objecting organizations' TPAs to provide the objectionable coverage. If an eligible organization complies with the Nonprofit Mandate, its TPA becomes eligible to be reimbursed for the full cost of providing the objectionable coverage, plus at least 10 percent. 45 C.F.R. § 156.50(d). TPAs receive this incentive, however, only if the self-insured organization submits the required self-certification or notification.

Finally, the Nonprofit Mandate requires self-insured religious groups to "contract[] with one or more" TPAs, 26 C.F.R. § 54.9815-2713A(b)(1)(i), but TPAs are under no obligation "to enter into or remain in a contract with the eligible organization," *id.* § 54.9815-2713A(b)(2). Consequently, self-insured organizations must either maintain a contractual relationship with a TPA that will provide the objectionable coverage to their plan beneficiaries, or find and contract with a TPA willing to do so.

B. Notre Dame

Notre Dame is an academic community of higher learning, organized as an independent, national Catholic research university. Pet. App. 158a-60a. Despite the University's avowedly religious mission, the Government does not consider the University an exempt "religious employer."

(continued…)

written instrument," which must include "a procedure for amending [the] plan, and for identifying the persons who have authority to amend the plan"); 79 Fed. Reg. 51,092, 51,095 n.8 (Aug. 27, 2014).

Notre Dame offers health coverage to eligible employees through a series of self-insured health plans. Pet. App. 163a-65a. Notre Dame's self-insured health plans are administered by a TPA, Meritain Health, Inc. Pet. App. 163a. Notre Dame also offers health insurance to its students through a fully insured student health plan provided by Aetna, Inc. Pet. App. 164a.

Notre Dame strives to provide health coverage for its students and employees in a manner consistent with its Catholic faith. Among other things, Notre Dame's religious beliefs prohibit it from impermissibly facilitating immoral conduct and require it to avoid "scandal," which in the theological context is defined as encouraging by words or example other persons to engage in wrongdoing. Pet. App. 160a-63a. In particular, Notre Dame believes that it may not pay for, facilitate access to, and/or become entangled in the provision of coverage for abortion-inducing products, contraception, and sterilization, including by contracting with a third party that is obligated, authorized, or incentivized to provide or procure the objectionable coverage for its plan beneficiaries. *See* Pet. App. 160a-63a, 165a-74a.

Left with no alternative to avoid violating its beliefs, Notre Dame filed suit on December 3, 2013. On December 20, 2013, the district court denied the University's request for a preliminary injunction. Notre Dame sought an injunction pending appeal the same day, which the district court also denied. Notre Dame immediately filed a notice of interlocutory appeal, and sought an injunction pending appeal from the Seventh Circuit on December 23, 2013. That motion was denied on December 30, 2013. With its

employer plan set to begin on January 1, 2014, Notre Dame was forced to choose between potentially ruinous fines and compliance with the Mandate. On December 31, 2013 Notre Dame submitted the self-certification (while noting on the form that it did so under protest), thereby violating its religious beliefs under duress. The Seventh Circuit affirmed the district court's order on February 21, 2014, over the dissent of Judge Flaum, and joined three intervenors as parties (two have since withdrawn). Notre Dame sought rehearing en banc, but its petition was denied on May 7, 2014.

Notre Dame then filed a petition for certiorari, asking this Court to grant certiorari, vacate the judgment below, and remand for further consideration in light of its recent decision in *Hobby Lobby*. On March 9, 2015, this Court granted that request. *See Notre Dame*, 135 S. Ct. 1528.

Despite this Court's GVR, the panel majority on remand barely mentioned *Hobby Lobby*'s substantial-burden analysis. Instead, over another dissent from Judge Flaum, it engaged in another round of second-guessing Notre Dame's religious beliefs, speculating that the challenged regulations might not "actually force[] Notre Dame to act in a way that would violate [its] beliefs." Pet. App. 113a. The panel majority did not deny that the regulations force the University to submit the objectionable documentation and offer health insurance through a company that would provide or procure the objectionable coverage for Notre Dame's plan beneficiaries. Instead, the panel majority mused at length about why those required actions might not *really* violate the University's religious beliefs—despite the University's express

protestations to the contrary. Pet. App. 113a-22a. Moreover, the panel majority further suggested that even if the regulations did impose a substantial burden, they would pass muster under RFRA because they are the "least restrictive means" of providing free contraceptive coverage. Pet. App. 122a-27a.

Notre Dame's subsequent petition for rehearing en banc was again unsuccessful; its petition was denied on July 24, 2015. Pet. App. 155a-56a.

REASONS FOR GRANTING THE WRIT

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

A. It is axiomatic that like cases should receive like treatment. To implement that principle, this Court routinely holds petitions for certiorari presenting the same question at issue in other cases pending in this Court, and, once the related case is

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

As the leading treatise on Supreme Court practice explains, "a petition for certiorari may be held, without the Court's taking any action, until some event takes place that will aid or control the determination of the matter," such as "a decision . . . by the Court in a pending case raising identical or similar issues." Shapiro, *et al.*, *Supreme Court Practice* § 5.I.9, at 340 (10th ed. 2013) (emphasis added). Indeed, when "an issue is pending before the Court in a case to be decided on the merits, the Court will typically 'hold' petitions presenting questions that will be—or might be—affected by its ruling in that case, deferring further consideration of such petitions until the related issue is decided." *Id.* § 6.XIV.31(e), at 485-486 (stating that this Court may defer action on a petition "pending some anticipated legal event (such as further proceedings below or the

rendition of an opinion in a related case) that may affect the appropriateness of certiorari"). This practice makes good sense, as it would offend basic "interests of justice" for similar cases to be treated differently, based on nothing more than the vagaries of "timing of litigation in different courts." *Id.* § 15.I.3(b), at 833.

B. This petition presents the same question presented in *Zubik v. Burwell,* No. 14-1418; *Priests for Life v. U.S. Department of Health & Human Services*, No. 14-1453; *Roman Catholic Archbishop of Washington v. Burwell*, No. 14-1505; *East Texas Baptist University v. Burwell*, No. 15-35; *Little Sisters of the Poor v. Burwell*, No. 15-105; *Southern Nazarene University v. Burwell*, No. 15-119; and *Geneva College v. Burwell*, No. 15-191. The question is whether RFRA allows the Government to force objecting religious nonprofit organizations to violate their beliefs by offering health plans with "seamless" access to coverage for contraceptives, abortifacients, and sterilization.

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

First, *Hobby Lobby* held that the Government substantially burdens religious exercise whenever it forces plaintiffs to "engage in conduct that seriously violates their religious beliefs" on pain of

"substantial" penalties. 134 S. Ct. at 2775-76. Under *Hobby Lobby*'s simple test, the regulations at issue here impose a clear substantial burden on Notre Dame's religious exercise. Just as in *Hobby Lobby*, Notre Dame believes that if it "compl[ies] with the [regulations]"—here, by submitting objectionable documentation and offering health insurance through an insurance company or TPA that provides or procures the objectionable coverage—it "will be facilitating" wrongdoing in violation of its Catholic religious beliefs. *Id.* at 2759. And just as in *Hobby Lobby*, if Notre Dame "do[es] not comply, [it] will pay a very heavy price." *Id.* Thus, because the regulations "force[] [Notre Dame] to pay an enormous sum of money . . . if [it] insist[s] on providing insurance coverage in accordance with [its] religious beliefs, the [Government has] clearly impose[d] a substantial burden" on the University's religious exercise. *Id.* at 2779.

Rather than apply this straightforward analysis, the panel majority did exactly what *Hobby Lobby* said courts may not do: it "dodge[d] the question that RFRA presents (whether the [regulations] impose[] a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresse[d] a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)." *Id.* at 2778; *see also* Pet. App. 148a (Flaum, J., dissenting) (noting that the panel majority's analysis "is precluded by the Supreme Court's decision in *Hobby Lobby*" because it improperly "minimize[s] the significance" of Notre Dame's religious objection). Indeed, the

panel majority's opinion is rife with examples of questioning the reasonableness of Notre Dame's religious objection, instead of assessing whether the Government has imposed substantial pressure on Notre Dame to act in violation of its beliefs. This judicial second-guessing of private religious beliefs cannot be squared with *Hobby Lobby*.

Second, the lower court's abbreviated (and unnecessary) discussion of strict-scrutiny also conflicts with this Court's precedent. As an initial matter, though the Government plainly bears the burden of proof to show that its regulatory scheme is the least restrictive means of furthering a compelling government interest, *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 429 (2006), the panel majority seemed to believe that Notre Dame was required to justify its proposed less-restrictive alternatives. Pet. App. 122a-27a. It proceeded to uphold the challenged regulations despite the Government's failure to offer *any evidence* that it must use the University's health plans as the conduit to deliver the objectionable coverage. *Hobby Lobby*, 134 S. Ct. at 2779-83; *see also Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015) (stating that the Government must "prove" that its preferred method "is the least restrictive means of furthering a compelling governmental interest"—"mere[] . . . expla[nations]" do not suffice). Indeed, it concluded that the Government has no less restrictive way to provide free abortifacient and contraceptive coverage, because it would be "a bother" for women to sign up for the coverage separately from their employer-based health plans. Pet. App. 123a. In other words, the panel majority concluded that the Government

can force objectors to violate their sincerely held religious beliefs for the sake of making it marginally more convenient for their employees to receive the objectionable coverage without any extra paperwork. That analysis cannot reflect "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), and contradicts the basic rule that the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced," *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 n.9 (2011).

These issues, however, will be resolved by this Court's disposition of *Zubik* and the related petitions listed above. Just as in *Zubik et al.*, this case turns on whether compliance with the Government's so-called "accommodation" imposes a substantial burden on religious exercise. And just as in *Zubik et al.*, if the answer to that initial question is yes, the Court will have to decide whether the government's regulatory scheme is the least restrictive means of advancing a compelling government interest.

Accordingly, Petitioner respectfully requests that the Court hold this case pending the outcome of *Zubik et al.*, and then dispose of the petition as appropriate in light of the Court's decision in those cases. If this Court correctly determines that the regulations violate RFRA, it should grant this petition, vacate the judgment below, and remand for further proceedings consistent with its opinion.

CONCLUSION

The petition for certiorari should be held pending this Court's disposition of *Zubik et al.* Should this

Court conclude that the regulatory scheme violates RFRA, it should grant this petition, vacate the decision of the Seventh Circuit, and remand this case for further consideration in light of its decision.

Respectfully submitted,

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December 18, 2015

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA SOUTH BEND DIVISION

UNIVERSITY OF NOTRE DAME,	)	
Plaintiff,	)	
vs.	)	**3:13-cv-01276-PPS**
KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, *et al.*,	)	
Defendants.	)	

OPINION AND ORDER

DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Notre Dame seeks a preliminary injunction against enforcement of the part of the Affordable Care Act that requires employers to provide employees with health insurance that covers contraceptive services. Notre Dame objects to providing contraceptive care on religious grounds, and that of course is its prerogative. But the law provides religious employers like Notre Dame an out by allowing it to

file a certification saying it refuses to provide such services. If Notre Dame takes that tack, someone else provides the coverage, and not on Notre Dame's dime. Notre Dame nonetheless claims that by formally opting out, it would trigger, or authorize, a third party's provision of contraception, and it objects to that.

Notre Dame wants to eat its cake, and have it still, at the expense of Congress, administrative agencies, and the employees who will be affected. Notre Dame is free to opt out of providing the coverage itself, but it can't stop anyone else from providing it. But that is essentially what Notre Dame is requesting. Notre Dame is not being asked to do or say anything it doesn't already do, and wouldn't do regardless of the outcome of this case; the only thing that changes under the healthcare law is the actions of third parties. Notre Dame can't claim to be "pressured" to do something it has done, will do, and would do regardless of the contraception requirement. If Notre Dame opts out of providing contraceptive coverage, as it always has and likely would going forward, it is *the government* who will authorize the third party to pay for contraception. The government isn't violating Notre Dame's right to free exercise of religion by letting it opt out, or by arranging for third party contraception coverage.

For these reasons and as outlined more fully below, because I find that Notre Dame is not likely to succeed on the merits, a preliminary injunction is not warranted.

FACTUAL and LEGAL BACKGROUND

Notre Dame is a nonprofit Catholic university, and the largest employer in St. Joseph County, Indiana. Compl. ¶¶ 9, 21, 24. Notre Dame views its Catholic faith as integral to its educational mission. *Id.* ¶¶ 27-29. It adheres to the Catholic Church's document governing Catholic universities, known as *Ex Corde Ecclesiae*. Affidavit of John Affleck-Graves ¶ 12. It subscribes to the Catholic beliefs "that life begins at conception and that artificial interference with life and conception is immoral." And so it opposes any artificial impediment to conception. Memo. ISO Motion for Preliminary Injunction at 1; Compl. ¶¶ 32-33. Notre Dame is therefore opposed to "pay[ing] for, [facilitate[ing] access to, and/or becom[ing] entangled in the provision of products, services, practices and speech" that propound contraception. Memo. ISO Motion for Preliminary Injunction at 1. It also believes that it must avoid giving anyone the impression that it condones the use of contraception, which would constitute "scandal," defined as "encouraging by words or example other persons to engage in wrongdoing." Compl. ¶ 34.

Notre Dame's employee healthcare is self-insured, meaning that Notre Dame underwrites its employees' medical expenses itself. Although Notre Dame is financially responsible, it contracts with a third party administrator (a "TPA") to administer the health plan. *Id.* ¶¶ 36-37. Notre Dame offers its students the option of purchasing health insurance through Aetna. *Id.* ¶ 39. Neither plan covers contraceptive services due to Notre Dame's religious objections. *Id.* ¶ 41.

1. Background on the Affordable Care Act

Congress enacted the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) (the "ACA") in 2010, substantially overhauling the nation's healthcare legal and regulatory framework. The ACA requires health insurance to cover certain preventive services without cost to the insured. 42 U.S.C. § 300gg-13. Insurance plans that don't include the required coverage face stiff penalties: $100 per affected individual per day of noncompliance, 26 U.S.C. § 4980D(a), (b), or $2,000 per year per employee if an employer who is required to provide insurance decides not to, 26 U.S.C. § 4980H(a), (c)(1). But certain healthcare plans are grandfathered, which essentially means that if they remain as they were before the ACA was enacted, they don't have to comply with the preventive services requirements. *See* 42 U.S.C. § 18011(a)(2). It is undisputed that Notre Dame's plan isn't grandfathered. Compl. ¶ 42.

Initially, the preventive care coverage requirements did not include various services specific to women's needs. *See* 155 Cong. Rec. S11985, S11986 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski). But the ACA was later amended to add preventive care specific to women. § 2713(a)(4), 124 Stat. at 131 (codified at 42 U.S.C. § 300gg-13(a)(4)). The law doesn't list the specifics, instead leaving that to "comprehensive guidelines supported by the Health Resources and Services Administration." *Id.*

The problem was that there weren't guidelines for preventive care and screening for women, so the Department of Health and Human Services asked the

Institute of Medicine ("IOM") to make recommendations. Inst. of Med., Committee on Preventive Services for Women, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS, 2 (2011), available at http://www.nap.edu/catalog.php?record_id=13181. The IOM convened a committee of specialists that recommended that the guidelines include support and counseling addressing a battery of issues including, of primary relevance here, "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id.* at 10. (This is the requirement Notre Dame opposes, and for the sake of convenience I will refer to the requirement using the shorthand "contraception" or "contraceptive.") These approved methods include options that are prescription-only (oral contraceptives and intrauterine devices) and non-prescription (condoms, spermicides and emergency contraceptives). *Id.* at 105. The government adopted guidelines consistent with the IOM's recommendations on an interim basis in 2011, albeit subject to an exemption for religious employers. *See* 76 Fed. Reg. 46,621 (Dep'ts of Treas., Labor, Health & Human Svcs. Aug. 3, 2011).

2. Rulemaking Under the ACA

The adoption of guidelines with a narrow religious exemption was perhaps the moment that the contours of this controversy began to take shape. An organization qualified for exemption from the contraception requirement as a religious employer if: (1) its purpose was the inculcation of religious values; (2) it primarily employed people who shared its

religious tenets; (3) it primarily served people who shares its religious tenets; *and* (4) it was a nonprofit under sections 6033(a)(1) and 6033(a)(3)(A)(I) or (iii) of the Internal Revenue Code of 1986. 76 Fed. Reg. 46,621, 46,626. But the final (and current) regulations reduced the definition to just number (4) above; the first three requirements were discarded. *See* 45 C.F.R. § 147.131(a). What that means is that the exemption applies to "churches, their integrated auxiliaries, and conventions or associations of churches" and "the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A)(i) and (iii). The upshot of all this was that, as originally drafted, employees covered under exempt organizations' health insurance as defined in the tax code – *i.e.* church employees – could not receive cost-free contraceptive services. But the "religious employer" exemption didn't apply to religious based non-profits like Notre Dame. That was the balance originally struck by the drafters of the regulations.

A tremendous outcry over this perceived disparity in the regulations ensued. Why would churches be exempt but not church affiliated entities? So in 2012 the government said that it would forego enforcement against non-profits with religious objections to contraception, like Notre Dame, for a year while it considered developing an accommodation that would apply to those entities. *See* 77 Fed. Reg. 8725, 8728-29 (Feb. 15, 2012).

At this point, in mid-2012, Notre Dame filed a case on similar grounds to its current one. But that case was dismissed without prejudice because Notre Dame lacked standing then, and the case wasn't yet ripe.

See Univ. of Notre Dame v. Sebelius, 2012 U.S. Dist. LEXIS 183267 (N.D. Ind. Dec. 31, 2012).

In July 2013 the government published the final regulations, which now include accommodation for an "eligible organization," meaning an organization that "(1) [o]pposes providing coverage for some or all. . . contraceptive services. . . on account of religious objections; (2) is organized and operates as a nonprofit entity; (3) holds itself out as a religious organization; and (4) self-certifies that it satisfies the first three criteria." 78 Fed. Reg. 39,870, 39,874 (Jul. 2, 2013); *see also* 26 C.F.R. § 54.9815-2713A(a). When I refer to "the accommodation" in this Opinion, this is what I'm referring to. There is no dispute that this accommodation applies to Notre Dame. To take advantage of the accommodation, an organization need only complete an opt-out form (available at http://www.dol.gov/ebsa/pdf/preventiveservi ceseligibleorganizationcertificationform.pdf) with the name of the organization and certifying individual and contact information, then sign and date it. The form need only be completed once, with a copy provided to any health insurer or third party administrator ("TPA") of the insurance plan. *See* 78 Fed. Reg. 39,870, 39,875. The form lists the criteria for eligible organizations, and on the back it tells the TPA that the certifying eligible organization is opting out of covering contraceptive services and refers the TPA to relevant code sections outlining its obligations. *See* 78 Fed. Reg. 39,870, 39,879.

The explanation of the accommodation wouldn't be complete without discussing how contraceptive services are paid for. The employer and its health insurance plan don't pay a dime. Notre Dame self-

insures its employee healthcare, Compl. ¶¶ 36-37, so I'll focus on the mechanics relevant to that setup. As far as Notre Dame's involvement, they fill out the form stating they are opposed to contraceptive services on religious grounds, and their work is done. At that point the ball is in the court of the TPA to pay for contraceptive services or arrange for payments through an insurer or other entity. Contraception costs are recouped by an insurance company that participates in a federally-run health insurance exchange – the insurer gets a fee adjustment. That money doesn't just cover the money paid out for contraception, but "include[s] an allowance for administrative costs and margin." 78 Fed. Reg. 39,870, 39,880-81; *see also* 26 C.F.R. § 54.9815-2713A(b)(2); 45 C.F.R. § 156.50 (d). So to summarize: the TPA doesn't rely on the opted-out organization for any amount of money related to contraception – its contraception coverage, administrative costs, and even a profit margin are covered by the government-run healthcare marketplace.

The regulations say that eligible organizations may not interfere with the TPA's efforts to arrange contraception payments, nor seek to influence the TPA's decision to provide such payments. 78 Fed. Reg. 39,870, 39,879-80. However, the prohibited behavior evidently requires something more than expression of opinion, because its description is immediately followed by footnote 41: "Nothing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." *Id*. at 39,880 n.41.

The Seventh Circuit has not addressed the situation posed by this case. It addressed similar

issues involving private employers' religious objections to the contraception requirements in *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013). However, that case, like many of the others making their way through courts around the country, *see*, *e.g.*, *Sebelius v. Hobby Lobby Stores, Inc.*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 82 U.S.L.W. 3328 (U.S. Nov. 26, 2013) (No. 13-354), has as its plaintiffs closely held corporations and their individual owners, so the accommodation doesn't apply to them. The Seventh Circuit must have thought that difference to be important because early on in its opinion it discussed the religious exemption and accommodation at length, even though they were not at issue in that case. I can only assume that they did it to show the contrast between how religious employers are treated under the regulations – they are given an accommodation – while for-profit employers with conscientious religious objections are not. It is this distinction that *Korte* found to be "notabl[e]." *Korte*, 735 F.3d at 662. More on *Korte* in a moment, but suffice it to say that Notre Dame is in an entirely different position than the plaintiffs in *Korte*.

3. The Procedural Posture of this Case

Finally, before diving into the merits of the legal arguments, I would be remiss if I did not take a moment to discuss Notre Dame's litigation tactics in this case. The offending regulations were published in July 2013 and are set to go into effect on January 1, 2014. *See* 78 Fed. Reg. at 39,870 (Jul. 2, 2013). Yet Notre Dame chose to wait until December to file this lawsuit, although it certainly saw the case coming down the pike many months earlier. It then waited another six days – until December 9 – to ask for a

preliminary injunction. The government promptly responded and then Notre Dame filed its oversized reply brief on December 16, and a hearing on the motion was set for December 19. Notre Dame told me they needed an answer on their request for an injunction within 24 hours of the hearing – meaning by today. All of which raises a question of Notre Dame's own view of the injury it faces under the accommodation. Notre Dame certainly knew about the proposed regulations long ago, as evidenced by its premature filing of a case on the same basis as the current matter. *See Univ. of Notre Dame v. Sebelius*, 2012 U.S. Dist. LEXIS 183267 (N.D. Ind. Dec. 31, 2012).

Notre Dame tells me that the urgency is due to the TPA's internal deadlines to prepare coverage and contact beneficiaries. Affleck-Graves Affidavit ¶ 64; Suppl. Affleck-Graves Affidavit ¶ 14. It filed a supplemental declaration explaining its tardiness three days before oral argument, and four days before what the TPA says is its final deadline. *See* Suppl. Affleck-Graves Affidavit; Meritain Affidavit. The affidavit detailing excuses for the late filing of this lawsuit are frankly a little hard to swallow. It states that Notre Dame needed over five months to analyze the final regulations and the accommodation. Suppl. Affleck-Graves Affidavit ¶¶ 6-9. Yet Exhibit D attached to Notre Dame's motion is a letter from the Office of the General Counsel of the United States Conference of Catholic Bishops, and is dated March 20, 2013. The letter raises exactly the grounds of Notre Dame's complaint with respect to the accommodation for self-insured religious nonprofits, citing a description of the accommodation as proposed.

See Plaintiff's Memo. ISO Preliminary Injunction, Ex. D. at 20-22. Notre Dame also claims that it didn't get details on how its TPA would handle contraceptive coverage until December. Suppl. Affleck-Graves Affidavit ¶ 11. But it seems clear to me that Notre Dame could have certainly pressed its TPA sooner if it needed information. In sum, Notre Dame has in many ways created its own emergency, and I am left to wonder why.

In any event, and despite the time crunch, I have given full consideration to Notre Dame's motion. In doing so I have reviewed extensive briefing and exhibits from the parties, statutes and legislative records, voluminous regulations, and opinions addressing related issues from courts around the country. As mentioned, I heard oral argument yesterday, December 19, 2013. Finally, I received and have considered a brief filed by the American Civil Liberties Union as *amicus curiae*.[1]

DISCUSSION

Notre Dame seeks a preliminary injunction claiming that its rights under the Constitution and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 *et seq* ("RFRA"), are being violated. To prevail it must show "a likelihood of success on the merits, that it has no adequate remedy at law, and

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[1] I also received late in the day yesterday a motion to intervene in this lawsuit filed by three Notre Dame students which largely supports the government's position but makes additional arguments as well. [Docket Entries ("DE") 33, 34]. Given the press of time, and since Notre Dame has not had an opportunity to respond to the arguments, I have not considered the motion to intervene.

that it will suffer irreparable harm if preliminary relief is denied." *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 461 (7th Cir. 2000) (citations omitted). If it meets that burden, I must then analyze the balance of equities, taking into account irreparable harm that would result to the nonmoving party and the consequences to nonparties. As the Seventh Circuit has stated: "These considerations are interdependent: the greater the likelihood of success on the merits, the less net harm the injunction must prevent in order for preliminary relief to be warranted." *Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010). This is the "sliding scale" approach as some Seventh Circuit cases refer to it. *See e.g. Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001).

The first element, the likelihood of success on the merits, is the key inquiry in this case and is dispositive here on both the RFRA claim and the constitutional claims.[2]

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[2] My jurisdiction to decide this matter is not in question. The contraception coverage requirement, the opt-out accommodation, and the penalties Notre Dame faces for noncompliance are an imminent potential injury which confers Article III standing. *Korte v. Sebelius*, 735 F.3d 654, 667 (7th Cir. 2013); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Nor does the government challenge Notre Dame's standing to assert rights of speech and religious freedom, although Notre Dame is not a natural person. *Korte* forecloses those arguments, *see Korte*, 735 F.3d at 682, as well as any argument under the Anti-Injunction Act. *Id.* at 669.

I. Notre Dame is not likely to succeed on the merits

The sincerity of Notre Dame's religious beliefs is of course essential to its religious freedom claims. While I am not permitted to question the centrality of a belief to a plaintiff's religion, I am permitted to consider the issue of sincerity. *Nelson v. Miller*, 570 F.3d 868, 878 n.7 (7th Cir. 2009) (citing *Koger v. Bryan*, 523 F.3d 789 (7th Cir. 2008) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005))). Notre Dame opposes contraception, and also opposes the funding, encouragement or facilitation of its use, or being perceived as doing so. But whether opting out via the ACA accommodation constitutes a modification of behavior or qualifies as funding, encouraging, facilitating or endorsing the use of contraception are questions of fact and law, not of faith. With this thought in mind, I turn to the individual claims being pressed here by Notre Dame.

A. Religious Freedom Restoration Act

The Religious Freedom Restoration Act ("RFRA") is Congress's response to the Supreme Court's holding in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 883-90, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), "that the religious freedom guaranteed by the Free Exercise Clause of the First Amendment does not require religious exemptions from facially neutral laws of general applicability." *Korte*, 735 F.3d at 671. Under RFRA, the government may not substantially burden a person's exercise of religion, even if the rule in question is one of general applicability, unless the

government shows that the rule "is in furtherance of a compelling governmental interest" and "is the least restrictive means of" doing so. *Id*. at 672 (quoting 42 U.S.C. § 2000bb-1). In RFRA claims, as in First Amendment claims, the preliminary injunction burdens track those borne at trial. *Id*. at 673. So the plaintiff must first show that his religious exercise is burdened substantially, then the burden shifts to the government to justify its actions under strict scrutiny. *See id*. at 673; *Daly v. Davis*, 2009 U.S. App. LEXIS 6222, at *5-6 (7th Cir. Mar. 25, 2009).

1. Substantial Burden Inquiry

In any RFRA case, the starting point is the plaintiff offering proof that the government action in question actually substantially burdens religious exercise. *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 760 (7th Cir. 2003) [hereinafter "*CLUB*"]. What this means is that the burden must really be *substantial*; a minimal burden won't suffice. *CLUB*, 342 F.3d at 761. To read RFRA otherwise would be to read the term "substantial" out of the statute. To do so would mean that even the "slightest obstacle to religious exercise. . . —however minor the burden it were to impose—could then constitute a burden sufficient to trigger" strict scrutiny. *Id*.

The Seventh Circuit recently reiterated that the term "substantial burden" as used in RFRA means to exert "substantial pressure on an adherent to *modify his behavior* and to violate his beliefs." *Korte*, 735 F.3d at 682 (emphasis added and internal quotations omitted). The language "substantial pressure on an adherent to modify his behavior" comes from the

Supreme Court in the pre-RFRA case of *Thomas v. Review Bd.*, 450 U.S. 707, 718, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981). *See also Nelson v. Miller*, 570 F.3d 868, 878, (7th Cir. 2009); *Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008).

So the inquiry focuses on whether the government is leaning on Notre Dame to modify *Notre Dame's own actions*, not on whether government action is offending the plaintiff's religious sensibilities. This much the Supreme Court has made clear: "A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988).

To break this down, if the government exerts pressure on the plaintiff to change his actions so as to violate his beliefs, I can't analyze the substantiality of the actions, or the centrality of the violated belief to his religion—it's the substantiality of the pressure that counts. But this skips over the threshold question of whether the government is actually requiring the plaintiff to modify his behavior so as to violate his beliefs.

So here's the question as I see it: under the ACA accommodation, is the government exerting substantial pressure on Notre Dame to change its own actions in a way that violates Notre Dame's sincerely held religious beliefs? Courts have used different language to try to define and describe "substantial burden," but it's such a fact-dependent question that I think the clearest way to approach it is to dive into other cases that have and haven't met the RFRA standard.

When I say "RFRA standard," I mean the "substantial burden" standard as it has been applied in cases brought under RFRA as well as under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and the Free Exercise Clause of the First Amendment to the Constitution. "When the significance of a religious belief is not at issue, the same definition of 'substantial burden' applies under the Free Exercise Clause, RFRA and RLUIPA." *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008); *see also Korte*, 735 F.3d at 682-83; *CLUB*, 342 F.3d at 760-61; *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1071 n.13 (9th Cir. 2008) ("That *Lyng* was a Free Exercise Clause, not RFRA, challenge is of no material consequence. Congress expressly instructed the courts to look to pre-*Smith* Free Exercise Clause cases, which include *Lyng*, to interpret RFRA.")

To set the stage for comparison, I'll reiterate what Notre Dame claims is its substantial burden. In order to opt out of the contraceptive mandate, Notre Dame must complete a certification requesting the accommodation. Notre Dame claims that completing the form "authorizes" its TPA and the government to

provide contraceptive coverage, the taint of which can be attributed to Notre Dame. Its critical to note at this point that if Notre Dame opts out of providing contraception, it will have *nothing to do with providing contraception*. It won't pay actual or administrative costs, and the TPA won't be looking to Notre Dame's fees to make a profit on the contraceptive program. Notre Dame obfuscates this point in its briefing, but as best I can tell by my review of the regulations, there is simply no financial burden on Notre Dame if it opts out.

Boiled to its essence, what Notre Dame essentially claims is that the government's action *after Notre Dame opts out*, in requiring the TPA to cover contraception, offends Notre Dame's religious sensibilities. And while I accept that the government's and TPA's actions do offend Notre Dame's religious views, it's not Notre Dame's prerogative to dictate what healthcare services third parties may provide. As Notre Dame admitted at the hearing, Notre Dame had already instructed its TPA in past years to not include contraception in its plan. If the preventive care requirements didn't exist, Notre Dame would continue to instruct its TPA not to cover contraception. And *even if* Notre Dame were completely exempt from the contraception requirement, it would have to certify to the TPA and the government that it is exempt to avoid being fined for noncompliance. In fact, there is no conceivable set of facts under which Notre Dame would not instruct its TPA not to include contraception on Notre Dame's plan. So Notre Dame isn't modifying its behavior in the least. The only thing that is modified, then, under the accommodation, is that

when Notre Dame tells the TPA not to provide contraception on Notre Dame's plan *the government and the TPA pay for contraception*.

In *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), the Seventh Circuit found that the ACA—as applied to for-profit closely-held corporations and their owners—was coercive in threatening substantial fines for failure to modify their health insurance to cover contraception. The court focused on plaintiffs' choice—modifying their healthcare plans to pay for contraception for employees who wanted it and whose doctors prescribed it, versus paying stiff fines for balking. The burden found to be substantial in *Korte* was the plaintiff "being forced to provide insurance coverage for these drugs and services in violation of their faith." *Id*. at 684-85. In other words, unlike this case, the government was coercing the plaintiff to change its health plan to cover and pay for something that it objected to on religious grounds.

Notre Dame seems to think that *Korte* is essentially dispositive of this case. I fail to see why. *Korte* wasn't dealing with the ACA's religious exemption and accommodation in any way. Perhaps upon review of this case, *Korte* will be extended by the Seventh Circuit to say that the filing of a certification is an alteration in Notre Dame's behavior such that it constitutes a substantial burden under RFRA. But contrary to Notre Dame's view of it, *Korte* certainly doesn't *compel* such a finding. In my mind, this case differs greatly from *Korte* because the accommodation removes the coercion facing private for-profit companies by offering a different choice. As pointed out earlier, *Korte* itself recognized this important distinction when it stated that the lack of

an exemption or accommodation for the for-profit plaintiffs was "notabl[e]," suggesting that the case might well have come out differently had the *Korte* plaintiffs had access to the accommodation now available to Notre Dame. *Id*. at 662.

The Supreme Court has held that the "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988). *Lyng* held that the federal government did not violate plaintiffs' free exercise of religion by building a road through plaintiffs' sacred areas. In so holding the Court noted that the concept of religious freedom does not give one "a veto over public programs that do not prohibit the free exercise of religion." *Id.* Similarly, Notre Dame need only step aside from contraception coverage, as it has always done and most assuredly would always do. By opting out it is not condoning or supporting the government's provision of access to contraception. But by refusing to formally opt out, Notre Dame would exercise a veto on the ACA's contraception requirement.

What's more, case law makes clear that a third party's objectionable use of a plaintiff's information doesn't make a viable RFRA claim. The D.C. Circuit held in *Kaemmerling v. Lappin* that a prisoner could not state a claim under RFRA based on the federal government's extraction and storage of his DNA from samples he provided. 553 F.3d 669, 679 (D.C. Cir. 2008). Plaintiff did not object to his provision of the tissue samples in itself, but to the government's actions afterwards in analyzing and storing the samples. Still, much the same as Notre Dame's

argument in this case, the provision of the samples triggered the government's objectionable actions. The court pointed out that the objectionable course of action that occurs after plaintiff provided the sample "does not call for [plaintiff] to modify his religious behavior in any way—it involves no action or forbearance on his part, nor does it otherwise interfere with any religious act in which he engages. Although the government's activities. . . may offend [plaintiff's] religious beliefs, they cannot be said to hamper his religious exercise **because they do not pressure him to modify his behavior** and to violate his beliefs." *Id.* (emphasis added, but internal quotation marks and citation omitted). Similarly, Notre Dame doesn't object to the content of the certification form. How could it? The certification says that Notre Dame *opposes* contraception on religious grounds. Notre Dame's objection is to the consequence of the certification and what third parties do with it down the line.

The *Kaemmerling* opinion discussed its similarity to one of the bases for the *Lyng* decision, *Bowen v. Roy*, 476 U.S. 693, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986), "where the Supreme Court held that the state's use of a Native American child's Social Security number in determining eligibility for federal welfare benefit programs did not impair her parents' freedom to exercise their religious beliefs, a tenet of which was that use of the number beyond her control would 'rob [her] spirit.'" *Kaemmerling*, 553 F.3d at 680. The state's administrative use of Social Security numbers did not restrict plaintiffs' beliefs or actions. This opinion was pre-RFRA, but as noted above, the substantial burden standard is the same. The

Court's language makes it clear that the government's generally applicable administrative tools do not pose a substantial burden on plaintiff's religious exercise. "[Plaintiff] may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets. The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Bowen v. Roy*, 476 U.S. 693, 700, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986).

The self-certification form is just such an administrative tool, used to relieve Notre Dame of liability for not providing contraceptive payments. It tells the government and the TPA that Notre Dame is opting out, and it certifies that Notre Dame is eligible to do so. In sum, the certification merely denotes Notre Dame's refusal to provide contraceptive care – a statement that is entirely consistent with what Notre Dame has told its TPA in the past.

Also instructive is the Ninth Circuit's en banc examination of the substantial burden showing in *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc), *cert. den'd*, 556 U.S. 1281, 129 S. Ct. 2763 (2009). It confirms that *Roy* and *Lyng* are relevant to the substantial burden analysis in the RFRA era. Plaintiff American Indians objected to the blowing of artificial snow made from recycled wastewater onto a part of a ski mountain that was also a sacred place in plaintiffs' religion. The Ninth Circuit upheld the district court's

finding that the government's actions were not a substantial burden to religion under RFRA. The use of recycled wastewater did "not force the Plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit," nor did it "coerce the Plaintiffs to act contrary to their religion." *Id.* "The only effect of the proposed upgrades is on the Plaintiffs' subjective, emotional religious experience. That is, the presence of recycled wastewater on the Peaks is offensive to the Plaintiffs' religious sensibilities. . . . [U]nder Supreme Court precedent, the diminishment of spiritual fulfillment—serious though it may be—is not a 'substantial burden' on the free exercise of religion." *Id.*

Similarly, while Notre Dame may disagree with the actions of the government and other third parties, its own actions and speech are not required under the ACA to change in a manner contrary to its sincerely held religious beliefs. Notre Dame may be unhappy with the outcome of opting out, and find that action less spiritually fulfilling than it would otherwise, but it is not being required to modify its own behavior.

Nothing in the body of cases involving prisoner meal requests based on religious beliefs commands a different result. Indeed, they counsel against issuing an injunction. This is because, like this case, those cases turn on whether the plaintiff is being forced to modify his behavior or risk violating his sincerely held religious beliefs. For example, in *Nelson v. Miller*, 570 F.3d 868 (7th Cir. 2009), a prison refused to provide the plaintiff a non-meat diet during Lent. In trying to comply with his religious convictions, the plaintiff "lost so much weight that he had to be

hospitalized." *Id.* at 880. This coerced modification of behavior was a substantial burden. The same was true in *Koger v. Bryan*, 523 F.3d 789 (7th Cir. 2008), where the court held that the government imposes a substantial burden on an inmate when it puts pressure him to "'modify his behavior and violate his beliefs.'" *Id.* at 799 (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981)). In other words, it violates RLUIPA to give a prisoner the Hobson's choice of either starving himself or observing his religion. *See also Love v. Reed*, 216 F.3d 682, 689-90 (8th Cir. 2000) (prison's failure to accommodate religious diet substantially burdens a plaintiff; fasting is not an option); *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 814-15 (8th Cir. 2008) (no substantial burden where prisoner could purchase halal [food prepared per Muslim law] vegetarian food on meat days and request other accommodations to avoid contamination of vegetarian food by meat).

As far as I know, only three courts have reached the merits of the contraception opt-out. One has upheld the accommodation. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-1261-EGS (D.D.C. Dec. 19, 2013). Two others have struck it down. *See Roman Catholic Archdiocese of New York v. Sebelius*, No. 12 Civ. 2542, 2013 U.S. Dist. LEXIS 176432 (E.D.N.Y. Dec. 13, 2013) [hereinafter "*RCANY*"]; *Zubik v. Sebelius*, Nos. 13-cv-1459, 13-cv-0303, 2013 U.S. Dist. LEXIS 165922 (W.D. Pa. Nov. 21, 2013).

In *Priests for Life*, decided just yesterday, the court held—similar to this case—that the accommodations "simply do not require Plaintiffs to modify their

religious behavior." No. 1:13- cv-01261-EGS, slip op. at 24. Instead, it "is entirely the activity of a third party" to provide the offending services, "and Priests for Life plays no role in that activity." *Id.* at 24-25. For that reason, the court held that there was no substantial burden being placed on the plaintiff, and so the court dismissed the RFRA claim.[3]

The *RCANY* opinion relies on the same body of case law that I do, but in my view misses a few key points. First, some necessary background: *RCANY* involves several plaintiffs, some which are "religious employers" wholly exempt from the contraception requirement and some of which are non-exempt organizations eligible for the accommodation. *See RCANY*, 2013 U.S. Dist. LEXIS 176432, at *2, 15-16. In some cases the two types of organizations are affiliated, and share a healthcare plan, but nonetheless the non-exempt organizations would be

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[3] The government filed the *Priests for Life* opinion as supplemental authority. (DE 28.) Notre Dame responded, attempting to distinguish *Priests for Life* on the basis that the opinion noted that plaintiffs "have no religious objection to filling out the self-certification." (DE 32 at 1 (quoting *Priests for Life*, slip op. at 3-4).) Notre Dame argues that it has a religious objection to filling out the form itself. This is a distinction without a difference. As I've said, Notre Dame hasn't, and can't, object to the *content* of the form, it's only the effect of opting out that Notre Dame objects to, which it ties to the form. The *Priests for Life* plaintiffs argued, as Notre Dame does, that the contraception requirements and accommodation have "no logical or moral distinction." *Priests for Life*, No. 1:13-cv-01261-EGS, slip op. at 9. The opinion noted that form of argument, and rejects it, as I do, because it "cast[s] as a factual allegation" "the legal conclusion. . . that [] religious exercise is substantially burdened." *Id.* at 24 n.5.

required to self-certify under the accommodation. *Id.* at *48-49. *RCANY* granted summary judgment and an injunction for the non-exempt plaintiffs based on RFRA, but not for the exempt plaintiffs. *See id.* at *3-4, 63-64. *RCANY* noted that the plaintiffs in that case believe that the very act of completing the opt-out form "authorizes" third parties to provide the services to which plaintiffs object. *Id.* at *21-22. The *RCANY* court agrees with my view that it is the compulsion to act contrary to religious beliefs that creates a substantial burden. *Id.* at *35-36, 46-47. But *RCANY* sees the government as compelling plaintiffs to *act* by *opting out*, in completing the self-certification. The *RCANY* court isn't persuaded by the fact that plaintiffs would instruct, and have in the past instructed, their TPAs not to cover contraception even without the ACA because "the self-certification would still transform a voluntary act that plaintiffs believe to be consistent with their religious beliefs into a compelled act that they believe forbidden." *Id.* at *46.

But as I see it, the act isn't changing, it's the consequence of the act that is. In other words, it's not the self-certification form that "transforms" Notre Dame's action into one it objects to. Instead, it's what the government and the TPA do, and Notre Dame can't exercise its RFRA rights to control the actions of others. Notre Dame isn't being required to do anything new or different – its action is the same, although, granted, the result is different due to the actions of the TPA and the government. As I've said, Notre Dame may find the act of opting out less spiritually fulfilling now, but that doesn't make it a new action.

There is also something perplexing in *RCANY*. The court agreed with the non-exempt plaintiffs that their opt-out through the self-certification form is compelled because plaintiffs object to what will happen as a result. But that logic falls apart when the court moves on to the exempt plaintiffs' claim. They say their RFRA rights would be substantially burdened by pressure to separate the health care plans for exempt and non-exempt organizations because doing so would result in the non-exempt organization self-certifying, which in turn would result in the provision of contraceptive coverage. Without much explanation the court dismisses that argument:

> [T]heir claim is that expelling the non-exempt organizations could force those affiliates to provide coverage or self-certify, which in turn could mean that the [exempt] Diocesan plaintiffs' prior act of expulsion facilitated the provision of contraception. **This religious objection — which is not to the act itself, but instead is entirely dependent on the conduct of third parties occurring after that act** — is quite similar to the claim rejected in *Kaemmerling*. 553 F.3d at 678. The [exempt] Diocesan plaintiffs have **therefore failed to demonstrate that the [contraception requirement] Mandate imposes a substantial burden on their religious exercise**, and defendants are entitled to summary judgment on the [exempt] Diocesan plaintiffs' RFRA claims.

Id. at *49-50 (emphasis added).

The upshot of all of this is that *RCANY* essentially says that somehow adding another degree of

separation results in the alleviation of the substantial burden. I fail to see the logic in this. What *RCANY* says about the exempt plaintiffs' claims applies with equal force to a non-exempt plaintiff's claim, as well, and as I noted previously, I agree that the claims are similar to that in *Kaemmerling*.

The *Zubik* court, too, accepts plaintiffs' characterization of opting out via the self-certification form as "facilitate[ing]/initiat[ing] the provision of contraceptive products, services and counseling." *Zubik*, 2013 U.S. Dist. LEXIS 165922, at *80. When cast in that light, finding a substantial burden is assured. But as I've said, while I accept that facilitating contraception is sincerely odious to the plaintiff entities in these cases, I don't have to accept without analysis that opting out of providing contraception is a modification of behavior. The *Zubik* court even says that it's not plaintiffs' action that has changed, but the result, through the actions of third parties: "In all prior instances where the Government, an insurer, or a TPA has requested employee names or other information from Plaintiffs, the reason the information was sought was of no moment to Plaintiffs. Now, under the 'accommodation,' the reason the documentation is required is so that contraceptive products, services, and counseling can be provided in direct contravention of Plaintiffs' sincerely-held religious beliefs." *Id.* at *82. Under *Zubik*, religious nonprofits get to veto third party action when it reduces the nonprofits' spiritual satisfaction in a particular action.

To the extent that Notre Dame claims a burden imposed by having to find a TPA that will cover contraception and enter a contract with that third party, the argument lacks factual support. Notre Dame's existing TPA is covering contraception. Notre Dame didn't have to search for a new TPA, or enter a new contract with the accommodation in mind. There's no indication that any TPAs in similar cases are refusing to pay for contraception. In fact, Notre Dame's argument is belied by the actions of its own TPA. It is the TPA's deadline to send out the appropriate paperwork that Notre Dame claims sets the December 20 deadline for this preliminary injunction decision, rather than the law's January 1, 2014 compliance deadline. *See* Meritain Affidavit ¶ 4; Suppl. Affleck-Graves Affidavit ¶ 64; *see also RCANY*, 2013 U.S. Dist. LEXIS 176432, at *40-41 (calling this argument "somewhat speculative" but not issuing a holding on it because the self-certification ruling rendered it moot).

Notre Dame also throws in an argument about the government's cost-neutrality assumption. Memo. ISO Motion for Preliminary Injunction at 24-25. This is irrelevant to Notre Dame's position, because Notre Dame bears *none* of the cost under the accommodation – not for the contraceptive care, the administration of that service, or providing the profit margin. Notre Dame seems to be suggesting, disingenuously if it has reviewed the regulations on funding for TPA-provided contraceptive services, that the government's position is that the provision of contraception will just pay for itself on the individual TPA's balance sheet. The government makes no such claim. The services will be paid for out of the federal

insurance exchange, by discounting the monthly fees insurers pay to participate in the exchange.

The final issue raised by Notre Dame relates to the effect of the contraception requirements on their on-campus pharmacy. They do this by including a single, nearly identical paragraph in their Complaint (¶ 76), Affleck-Graves Affidavit (¶ 53) and Memorandum in Support of Motion for Preliminary Injunction (at 25). Notre Dame claims that it pays up front for prescriptions dispensed from its on-campus pharmacy, which is run by Walgreens, and later gets reimbursed by appropriate third parties. Notre Dame then claims that, under the contraception requirement, it would have to pay for contraceptive products dispensed from its on-campus pharmacy, and then get reimbursed later thus forcing it to "float" the cost. Missing in all this is any allegation that Notre Dame's pharmacy even sells contraception. Notre Dame offered nothing to suggest that the contraception requirement will force them to carry contraception on campus. And the government confirmed during oral argument that the ACA doesn't require pharmacies to carry contraception. Notre Dame's confused and unsupported argument doesn't come close to meeting the plaintiff's burden in seeking a preliminary injunction.

To sum up: In my view, Notre Dame isn't being compelled to do anything it hasn't done before and won't do in the future regardless of the outcome of this case, but it still seeks to enjoin third parties from acting in a way Notre Dame finds objectionable. In other words, it isn't being asked to "modify its behavior." *Korte v. Sebelius*, 735 F.3d 654, 682 (7th Cir. 2013). But Notre Dame can't be compelled to do

something it would do anyway, like instruct its TPA not to cover contraception on Notre Dame's plan. To be clear, my holding isn't that a compelled action is *de minimis*. It's that no action is being compelled at all because the action would be taken even if no contraception requirement applied. And if there's no compelled action that violates Notre Dame's religious beliefs, then there's no substantial burden.

2. Strict Scrutiny

Because I've held that Notre Dame is not likely to succeed in showing that the ACA with accommodation imposes a substantial burden on its religious exercise, the RFRA claim is unlikely to succeed. An exception to the substantial burden prohibition isn't necessary, so I don't need to reach an analysis of whether the law furthers a compelling government interest and is the least restrictive means the government could use. *See Korte v. Sebelius*, 735 F.3d 654, 672 (7th Cir. 2013).

B. The Free Exercise Claim

The First Amendment provides that Congress shall make no law "prohibiting the free exercise" of religion. "The Free Exercise Clause absolutely protects the freedom to believe and profess whatever religious doctrine one desires. It also provides considerable, though not absolute, protection for the ability to practice (through the performance or non-performance of certain actions) one's religion." *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 629 (7th Cir. 2000) (citations omitted). In interpreting the Free Exercise Clause, the Supreme Court has made it clear that their "cases establish the general proposition that a law that is neutral and

of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Neutrality and general applicability are interrelated. . . ." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (citations omitted). But general applicability, for Free Exercise purposes, "does not mean absolute universality." *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008).

A law is not neutral under Free Exercise analysis if its object "is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. 520, 533. Put another way, "inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* At 542-43. The analysis need not end with the text of the statute; the court is permitted to look for evidence of non-neutrality. *Id.* at 533-34.

Congress enacted RFRA specifically to be more restrictive on government action than the Free Exercise Clause. So failure under RFRA means failure under the Free Exercise Clause. *See e.g.*, *Indianapolis Baptist Temple*, 224 F.3d at 629; *Fernandez v. Mukasey*, 520 F.3d 965, 966 n.1 (9th Cir. 2008) ("Petitioners' failure to demonstrate a substantial burden under RFRA necessarily means that they have failed to establish a violation of the Free Exercise Clause, as RFRA's prohibition on statutes that burden religion is stricter than that contained in the Free Exercise Clause."); *see also Gonzales v. O Centro Espirita Beneficente Uniao do*

Vegetal, 546 U.S. 418, 424, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006) ("In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), this Court held that the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws. . . . [We] held that the Constitution does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws. *Id.*, at 883-890, 110 S. Ct. 1595, 108 L. Ed. 2d 876. Congress responded by enacting the Religious Freedom Restoration Act of 1993 (RFRA)").

Notre Dame posits generally that both the contraception requirement and the accommodation that lets Notre Dame opt out violate its Free Exercise rights. I disagree with both theories. With respect to the requirement itself, the opt-out removes any burden the requirement may impose by allowing Notre Dame to refuse to provide contraception as it's always done. That solution would be inadequate if the accommodation were itself a burden, but as I held with respect to RFRA, it's not. Because RFRA has the stricter standard, I need not further examine the burden of the accommodation here.

More specifically, Notre Dame makes three arguments: *First*, it claims that the requirement isn't neutral because, essentially, most healthcare plans already cover contraception and adding it to the others wouldn't cost anything, so the only reason a plan wouldn't cover contraception is due to religious objection. Memo. ISO Motion for Preliminary Injunction at 37. *Second*, Notre Dame argues that

the contraception requirement isn't generally applicable because the ACA provides exemptions, but not to religious nonprofits. *Id*. at 36-37. *Third*, Notre Dame claims that, with respect to the requirement, Free Exercise serves to reinforce other Constitutional protections, "implicat[ing] the 'hybrid' rights of religious believers." *Id*. at 37. This last argument seems to be that education is a part of the Catholic religion, and the requirement makes it impossible for Notre Dame to run an educational institution without being involved with contraception. This pressure on religious belief in turn puts pressure on Notre Dame to consider not running an educational institution, which violates its rights to freedom of association and speech. *Id*. at 37-38. I will take up each of these arguments in turn.

Notre Dame first claims, supported only by inference, is that the contraceptive requirement is aimed at religious objectors, and so is not neutral in application. But frankly there is nothing to support this inference. And all of the evidence is decidedly to contrary. First, while Notre Dame takes issue with the contraceptive requirements, which may be widely covered already and cost-neutral to add where they're not covered, I note that the women's preventive health care requirements include many services completely unrelated to contraception, many of which Notre Dame does not appear to contest. *See* Inst. of Med., Committee on Preventive Services for Women, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS (2011), available at http://www.nap.edu/_ catalog.php?record id=13181. Apart from women's preventive healthcare, the broader section of the ACA on "Coverage of Preventive Health Services" also

requires free coverage of immunizations and breast cancer screenings. *See* ACA § 2713. As discussed previously, the ACA is meant to be a comprehensive overhaul of the nation's healthcare system, so it isn't surprising that it lays out many types of coverage that must be included in health insurance; it would be surprising if it didn't. Describing what coverage healthcare plans should include seems reasonable, given all of the other changes set out in the ACA. For example, everyone must henceforth have health insurance. Large employers must provide it and smaller employers need not, but individuals are required to get it if their employer doesn't offer it. *See* ACA §§ 1501 (requirement on individuals), 1511 (requirement on employers). If the ACA didn't lay out a battery of services that must be covered, insurers could offer cut-rate plans that cover almost nothing to individuals buying insurance only to meet the requirement on individuals. The fact that contraceptive services are included among a bevy of other services that must be offered is not evidence that the government is targeting those who object to contraception on religious grounds. On the contrary, the comprehensive approach to women's health issues laid out in the ACA proves the precise opposite.

The laws and regulations in question, as well as the legislative history, further show that the ACA and related regulations were enacted for reasons neutral to religion. The Congressional record indicates that the purpose of the women's preventive healthcare requirements were not related to religion. As articulated by its sponsor, the purpose of the women's health requirements is to "guarantee[] women access to lifesaving preventive services and

screenings," and remedying gender discrimination in health insurance and the fact that "[w]omen are more likely than men to neglect care or treatment because of cost." 155 CONG. REC. S11985, S11986 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski). "Often those things unique to women have not been included in health care reform. Today we guarantee it and we assure it and we make it affordable by dealing with copayments and deductibles." *Id.* at S11988.

What's more, the relevant regulations were enacted based on the expert recommendations of the Institute of Medicine ("IOM"), without religious motive. Inst. of Med., Committee on Preventive Services for Women, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS, 2 (2011), available at http://www.nap.edu/catalog.php?record_id=13181. The IOM "was established in 1970 by the National Academy of Sciences to secure the services of eminent members of appropriate professions in the examination of policy matters pertaining to the health of the public. The [IOM] acts under the responsibility given to the National Academy of Sciences by its congressional charter to be an adviser to the federal government. . . ." *Id.* at iv. The IOM recommended that the guidelines include support and counseling addressing a battery of issues including, of primary relevance here, "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id.* at 10. It is therefore abundantly clear that the women's health requirements in the ACA are entirely neutral and not intended to target religion.

Notre Dame next argues that the contraception requirement isn't generally applicable because there are secular exemptions, specifically, rules applying to small businesses and to grandfathered plans. But as the *Priests for Life* court noted, "[t]he existence of categorical exemptions does not mean that the law does not apply generally." *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-01261-EGS (D.D.C. Dec. 19, 2013), slip op. at 34. The Supreme Court made that point in *United States v. Lee*, 455 U.S. 252, 260-61, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982), when it held that the social security tax requirements are generally applicable despite the fact that the system contains categorical exemptions. The categories that the ACA creates and of which Notre Dame complains are objectively delineated, without reference to religion. They do not make the law not neutral.

Notre Dame's final argument – its "hybrid" claim – all depends on its Free Exercise argument, which I've explained doesn't hold water. The accommodation doesn't implicate Notre Dame's religious exercise, so there's no resulting pressure on Notre Dame's Free Speech and Free Association rights to operate its university. None of Notre Dame's constitutional claims are likely to succeed. And because of this Notre Dame can't reasonably argue that, although none of its Constitutional rights is violated individually, the fact that it alleges more than one violation somehow leads to a viable claim. Such a theory has been widely discredited, and for good reason. Two losing claims don't equal a winning one. *See Mahoney v. District of Columbia*, 662 F. Supp. 2d 74, 95 n.12 (D.D.C. 2009); *Henderson v. Kennedy*, 253

F.3d 12, 19 (D.C. Cir. 2001) ("For this argument to prevail, one would have to conclude that although the regulation does not violate the Free Exercise Clause, and although they have no viable First Amendment claim against the regulation, the combination of two untenable claims equals a tenable one. But in law as in mathematics zero plus zero equals zero." (citations omitted.)).

Based on the foregoing, I find that Notre Dame is unlikely to succeed on its Free Exercise claim.

C. The Establishment Clause Claim

The Constitution's First Amendment says that Congress can "make no law respecting an establishment of religion." "The Establishment Clause prohibits government sponsorship of, financial support for, and active involvement in religious activities." *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 630 (7th Cir. 2000). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982). Under the "Lemon Test," the law in question has to have a secular legislative purpose, the primary purpose must neither advance nor inhibit religion, and the government must avoid excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971); *see also Indianapolis Baptist Temple*, 224 F.3d at 630. This doesn't mean that government has to cross the street when it sees religion coming; indeed, complete avoidance of religion is often not possible. "The course of constitutional neutrality in

this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz v. Tax Com. of New York*, 397 U.S. 664, 669, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970).

Specifically, "the Supreme Court has held that the sorts of generally applicable administrative and record keeping requirements imposed by tax laws may be imposed on religious organizations without violating the Establishment Clause. The normal incidents of collecting federal employment taxes simply do not involve the intrusive government participation in, supervision of, or inquiry into religious affairs that is necessary to find excessive entanglement." *Indianapolis Baptist Temple*, 224 F.3d at 631 (collecting cases regarding state sales and use tax, federal income tax, workers' compensation program and social security tax).

In *Walz*, a real estate owner "sought an injunction in the New York courts to prevent the New York City Tax Commission from granting property tax exemptions to religious organizations for religious properties *used solely for religious worship*." 397 U.S. at 666 (emphasis added). The tax exemption differentiated between religious organizations and the way they used their property. The Supreme Court found the exemption constitutional, holding the government "has not singled out one particular church or religious group. . . ." *Id*. at 673. The exemption also applied to certain secular properties the government considered conducive to "moral or mental improvement," and still the exemption of only

certain religious properties was constitutional. *Id.* at 672-73.

Notre Dame argues that this case is governed by *Larson*, but I fail to see why. Reply ISO Motion for Preliminary Injunction at 21. In *Larson*, the Supreme Court found that a Minnesota law that specifically targeted less established churches was unconstitutional under *Lemon*. 456 U.S. at 254-55. But that is not at all what the ACA does. It doesn't favor one religion over another by creating exemptions for certain categories of employers and accommodations for others.

Moreover, limited religious exemptions from generally applicable laws can take into account considerations beyond the content of one's religious beliefs. In *Droz v. Comm'r*, plaintiff objected to a law exempting from social security taxes members of organized religions that objected to social security taxes on religious grounds *and* that would provide for members who needed assistance. 48 F.3d 1120, 1124-25 (9th Cir. 1995). Plaintiff argued that his beliefs could mirror those of an exempt person, but he would still have to pay into social security because he wasn't a member of an eligible sect. *Id.* at 1124. The court found the law constitutional. It declined to apply strict scrutiny because the law did not discriminate among religions and applied a condition that had a secular purpose and did not advance or inhibit religion. *Id.* at 1124-25.

Notre Dame alleges violation of the Establishment Clause by the grant of an exemption only to a particular category of "religious employers," and because identifying what groups are in that category

will excessively entangle the government with religion. Memo. ISO Motion for Preliminary Injunction at 40. Notre Dame does not claim that the ACA discriminates among faiths, but among institutions of the same faith that have different organizational structures. Nor does Notre Dame argue here that the law does not have a secular legislative purpose, or that it advances or inhibits religion. Nor could it. As I addressed above, the law has a secular purpose, and the purpose does not involve advancing or inhibiting religion.

So my application of the *Lemon* test comes down to whether there is excessive entanglement. While Notre Dame is unhappy with the distinction the law draws, I think the argument that the distinction can't be drawn without excessive government entanglement rings hollow. An organization is exempt if it's "organized and operates as a nonprofit entity and is referred to in sections 6033(a)(1) and 6033(a)(3)(A)(I) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.131(a). The distinction is based on the tax code, and the Supreme Court has upheld federal tax laws applied neutrally to religious and secular entities alike. In this case, Notre Dame had no problem determining that it's not exempt, and there is no suggestion that the government was involved in that determination. Compl. ¶ 43. Furthermore, an ACA determination based on corporate organization and tax code is surely less entangling than the one the court found constitutional in *Droz* based on membership in a religious group and specific tenets of that group's faith.

Notre Dame is therefore unlikely to be able to demonstrate that the ACA and the contraception opt-out violate its rights under the Establishment Clause.

D. The Free Speech Claim

The concept of freedom of speech includes the right to be free from Congress telling people what they must say. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) [hereinafter "*FAIR*"] ("Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."); *Hill v. Colo.*, 530 U.S. 703, 714-15, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000). However, to violate the right to free speech, naturally a law must actually regulate speech. Even when a law conditioned federal funding on schools allowing military recruiters on campus, there was no free speech violation because letting the recruiters on campus didn't mean that the schools were voicing their support for the recruiters' message. The law in question was constitutional because it "neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have. . . ." *FAIR*, 547 U.S. at 60 (citation omitted).

Notre Dame alleges two separate free speech violations: *first*, that the government compels it to speak contrary to its beliefs, and *second*, that the regulations contain a "gag order" prohibiting Notre Dame from speaking as it wishes. Reply ISO Motion

for Preliminary Injunction at 18-20. Neither argument is persuasive.

Notre Dame claims that the accommodation compels speech by requiring Notre Dame to facilitate contraception and counseling that may support contraception, and by requiring the completion of the certification form. I've explained at length my view that the government isn't forcing Notre Dame to do *or say* anything it wouldn't do or say otherwise. Long before the ACA Notre Dame told its TPA not to cover contraception, and it will continue to do so with or without the ACA. It can't be called compulsion for Notre Dame to do what it has done, does, and will do anyway.

Furthermore, as the government points out, not a single court has upheld a Free Speech challenge to the contraceptive-coverage regulations because most recognize that the certification requirement regulates conduct, not speech. Opp. to Preliminary Injunction at 20 (citing, e.g., *MK Chambers Co. v. U.S. Dep't of Health & Human Servs.*, No. 13-cv-11379, 2013 WL 1340719, at *6 (E.D. Mich. Apr. 3, 2013); *Conestoga Wood Specialities Corp. v. Sebelius*, 917 F. Supp. 2d 394, 418 (E.D. Pa. 2013)).

With respect to whether the ACA imposes a gag order on speech, Notre Dame points to the prohibition against "directly or indirectly, seek[ing] 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." 26 C.F.R.

54.9815-2713A(b)(iii). Notre Dame does not include in its brief the text that immediately follows this prohibition in the final reporting of the rules, which states "[n]othing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." 78 Fed. Reg. 39,870, 39,880 n.41.

The text accompanying the final rules could not be clearer that Notre Dame is free to speak all it wants. The prohibition on influencing the TPA must involve something more than expressing Notre Dame's views. As the government put it, the regulations don't prohibit speech, but instead prevents "an employer's improper attempt to interfere with its employees' ability to obtain contraceptive coverage from a third party by, for example, threatening the TPA with a termination of its relationship because of the TPA's" coverage of contraception. Opp. to Preliminary Injunction at 22. Prohibiting this type of behavior is just as permissible as prohibiting an employer from threatening employees regarding unionization, which is speech that falls clearly outside the protection of the First Amendment. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969).

In sum, because the regulations do not force Notre Dame to say anything, nor do they prevent Notre Dame from forthrightly expressing its views regarding the topic of contraception, Notre Dame's free speech rights are not being infringed. Consequently, Notre Dame is unlikely to succeed on its Free Speech claim.

II. Balancing the Equities

The Supreme Court has held that a "plaintiff seeking a preliminary injunction 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." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). These requirements appear to be conjunctive, requiring the party seeking injunction to show all of them. However, the Seventh Circuit's sliding scale analysis referenced earlier in this opinion requires me to consider and balance the harms to Notre Dame, the government, and the public unless I find that Notre Dame has less than a "negligible chance of success." *Lineback v. Spurlino Materials*, 546 F.3d 491, 502 (7th Cir. 2008); *Kiel v. City of Kenosha*, 236 F.3d 814, 815-16 (7th Cir. 2000). This simply means that a greater harm can make up for a lesser likelihood of success. *See*, *e.g.*, *AM Gen. Corp. v. Daimlerchrysler Corp.*, 311 F.3d 796, 804 (7th Cir. 2002); *Green River Bottling Co. v. Green River Corp.*, 997 F.2d 359, 361 (7th Cir. 1993).

As an aside, the government noted in its Opposition to Preliminary Injunction its objection to the sliding scale approach as inconsistent with the Supreme Court's holding in *Winter*. Opp. to Preliminary Injunction at 8 n.4. But the government also recognizes that I am nonetheless bound to apply the sliding scale, although ultimately in this case I do not find that it slides my decision to a grant of the preliminary injunction.

An injunction is an extraordinary remedy not to be issued lightly. "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction. Thus, the Court has noted that '[t]he award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff,' and that 'where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.'" *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13, 102 S. Ct. 1798 (1982) (citing *Yakus v. United States*, 321 U.S. 414, 440 (1944) (footnote omitted)).

As this opinion demonstrates, in my view of things Notre Dame has a low likelihood of success on the merits. Still, I can't say that it has *no chance*, particularly given the differing outcomes in other courts. Turning to interests and harms, Notre Dame and the government are basically in equipoise.[4] In

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[4] *Korte* touches on the government's interests when it addresses RFRA's strict scrutiny analysis, but there it focuses on whether the government's interest is compelling enough to meet strict scrutiny muster. The Seventh Circuit accepts as legitimate the government's interest in "broaden[ing] access to free contraception and sterilization so that women might acheive greater control over their reproductive health," although the court questions whether it is of "surpassing importance." *Korte v. Sebelius*, 735 F.3d 654, 686.

my mind the low likelihood of success necessarily bears on the likelihood of irreparable injury – if it's unlikely there will ultimately be a showing of a violation of rights, then it's unlikely that there will be a violation while the case is pending. I nonetheless fully recognize that if I am incorrect and Notre Dame should ultimately prevail, then certainly the violation of its religious rights in the interim is a substantial harm. But the government also has strong interests in opposing the injunction. Congress has an interest in seeing a duly enacted law legislating its intent put into effect. And administrative agencies have an interest in enforcing carefully drafted regulations in their bailiwicks. As for the public interest, it is equally split. The public – however one chooses to define that vague term – certainly has an interest in the vindication of First Amendment rights. But it also has an interest in the full enforcement of duly enacted laws. More specifically, the women who work for Notre Dame, as a subset of the public, also have a very real stake in receiving the health care that the ACA affords to them.[5] And finally, I can't ignore Notre Dame's waiting to file its case until mere weeks before the wheels of the requirements were going to start to turn. Had Notre Dame acted more expeditiously the harm that they now fear could have been avoided altogether. That put the government and other interested third parties in the position of defending a case on the fly. That would be

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[5] I note again the pending motion to intervene in this case filed by three Notre Dame students. *See supra*, n.1. While I have not yet had an opportunity to fully consider the appropriateness of intervention here, the motion demonstrates that the interest of affected women is not hypothetical.

fine if it was by necessity, but it wasn't here. And the Seventh Circuit has noted that "[d]elay in pursuing a preliminary injunction may raise questions regarding the plaintiff's claim that he or she will suffer irreparable harm if a preliminary injunction is not entered." *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 903 (7th Cir. 2001).

So while the interests for and against injunction are very closely balanced, I find that the low likelihood of Notre Dame's success on the merits tips the sliding scale towards denial of the preliminary injunction that Notre Dame seeks.

CONCLUSION

For the foregoing reasons, plaintiff University of Notre Dame's Motion for a Preliminary Injunction (DE 9) is **DENIED**.

SO ORDERED.

ENTERED: December 20, 2013

/s/ Philip P. Simon

Philip P. Simon, Chief Judge
United States District Court

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA SOUTH BEND DIVISION

<table>
<tr><td>UNIVERSITY OF NOTRE DAME,

Plaintiff,

vs.

KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, et al.,
Defendants.</td><td>)
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<u>OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL</u>

On Friday, December 20, 2013, I entered an order denying Notre Dame's motion for a preliminary injunction against enforcement of the part of the Affordable Care Act that requires employers to provide employees with health insurance that covers contraceptive services. (DE 40.) Within an hour, Notre Dame had filed its notice of interlocutory

appeal pursuant to 28 U.S.C. § 1292(a)(1) and a motion for a preliminary injunction pending appeal. (DE 43, 41.) Nothing had changed within that short span of time. I remain persuaded of my analysis of the issues.

Fed.R.Civ.P. 62(c) authorizes the trial court to grant an injunction pending an appeal of the denial of an injunction. The appellate court has the same power under Rule 62(g). "[A]n application with regard to an injunction ordinarily must be made in the first instance to the district court under Rule 62(c) and it is only if relief is not obtained there that the appellate court will consider acting under Rule 62(g)." Wright, Miller, et al., 11 Fed. Prac. & Proc. Civ. § 2904 (3d ed. 2013).

Notre Dame's cursory motion offers no new arguments, relying entirely on its briefing and oral argument in support of its earlier request for a preliminary injunction. (DE 42 at 2.) The same standard for preliminary injunctive relief is cited. *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 461 (7th Cir. 2000). I have already concluded, after as thorough an analysis as I was able to muster, that the "low likelihood of Notre Dame's success on the merits tips the sliding scale towards denial of the preliminary injunction that Notre Dame seeks." (DE 40 at 39.) The same conclusion precludes my issuance of the requested preliminary injunction pending appeal. I will deny Notre Dame's motion, and the university is of course free to request the same relief from the Seventh Circuit.

CONCLUSION

Plaintiff University of Notre Dame's Motion for a Preliminary Injunction Pending Appeal (DE 41) is **DENIED**.

SO ORDERED.

ENTERED: December 23, 2013

/s/ Philip P. Simon

Philip P. Simon, Chief Judge
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

December 30, 2013

Before

RICHARD A. POSNER, Circuit Judge
JOEL M. FLAUM, Circuit Judge
DAVID F. HAMILTON, Circuit Judge

UNIVERSITY OF NOTRE DAME, Plaintiff-Appellant, No. 13-3853 v. KATHLEEN SEBELIUS, et al., Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division. No. 3:13-cv-01276-PPS-CAN Philip P. Simon, Chief Judge.

The following are before the court:

1. **APPELLANT UNIVERSITY OF NOTRE DAME'S EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL**, filed on December 23, 2013, by counsel for the appellant;

2. **OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL**, filed on December 27, 2013, by counsel for the appellees.

IT IS ORDERED that the emergency motion for an injunction pending appeal is **DENIED**.

IT IS FURTHER ORDERED that briefing in the appeal is **EXPEDITED** and will proceed as follows:

1. The brief and required short appendix of the appellant are due by January 13, 2014.
2. The brief of the appellees is due by January 27, 2014.
3. The reply brief of the appellant, if any, is due by February 3, 2014.

No extensions of time to file the briefs will be granted. Paper copies of the reply brief, if any, must be submitted to the clerk's office on the due date.

Oral argument in the appeal will be scheduled during mid-February.

Important Scheduling Notice !

> Notices of hearing for particular appeals are mailed shortly before the date of oral argument. Criminal appeals are scheduled shortly after the filing of the appellant's main brief; civil appeals after the filing of the appellee's brief. If you foresee that you will be unavailable during a period in which your particular appeal might be scheduled, please write the clerk advising him of the time period and the reason for such unavailability. Session data is located at http://www.ca7.uscourts.gov/

cal/calendar.pdf. Once an appeal is formally scheduled for a certain date, it is very difficult to have the setting changed. See Circuit Rule 34(e).

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13-3853
UNIVERSITY OF NOTRE DAME,
Plaintiff-Appellant,
v.
KATHLEEN SEBELIUS, SECRETARY OF U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, *et al.*,
Defendants-Appellees,
and
JANE DOE 1, *et al.*,
Intervening-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 3:13-cv-01276-PPS-CAN – **Philip P. Simon**, *Chief Judge.*

ARGUED FEBRUARY 12, 2014 — DECIDED FEBRUARY 21, 2014

Before POSNER, FLAUM, and HAMILTON, *Circuit Judges.*

POSNER, *Circuit Judge*. The Affordable Care Act requires providers of health insurance (including companies that administer self-insured employer health plans) to cover certain preventive services without cost to the insured, including, "with respect to women, such additional preventive care and screenings ... as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg-13(a)(4); see also 45 C.F.R. § 147.130(a)(iv), 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011). Guidelines specifying such preventive care have now been promulgated, and they include "all Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." Health Resources & Services Administration, "Women's Preventive Services Guidelines," www.hrsa.gov/womensguidelines (visited Feb. 21, 2014, as were the other websites cited in this opinion). To simplify exposition, we'll refer to all methods of female prevention of pregnancy as "contraceptives." (Male contraceptives are not covered by the guideline.)

The health concerns that motivated the inclusion of contraception in the guidelines on needs of women for preventive care begin with the fact that about half of all pregnancies in the United States are unintended, and 40 percent of them end in abortion and many others in premature births or other birth problems. Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 102-03 (2011), www.nap.edu/catalog.php?record_id=13181; Lawrence B. Finer & Mia R. Zolna, "Shifts in

Intended and Unintended Pregnancies in the United States, 2001-2008," 104 *Am. J. Pub. Health* S43, S44 (2014). Many of the unintended pregnancies are teen pregnancies; contraceptive use has been found to be positively correlated with decreased teen pregnancy. John S. Santelli & Andrea J. Melnikas, "Teen Fertility in Transition: Recent and Historical Trends in the United States," 31 *Ann. Rev. Pub. Health* 371, 375-76, 379 (2010). Because out-of-pocket expenditures on female contraceptives can be substantial for many women, see Su-Ying Liang et al., "Women's Out-of-Pocket Expenditures and Dispensing Patterns for Oral Contraceptive Pills Between 1996 and 2006," 83 *Contraception* 528, 531 (2011), the provision of such contraceptives without cost to the user can be expected to increase contraceptive use and so reduce the number both of unintended pregnancies and of abortions. See Jeffrey F. Peipert et al., "Preventing Unintended Pregnancies by Providing No-Cost Contraceptives," 120 *Obstetrics & Gynecology* 1291, 1295-96 (2012). Furthermore, "women who can successfully delay a first birth and plan the subsequent timing and spacing of their children are more likely than others to enter or stay in school and to have more opportunities for employment and for full social or political participation in their community." Susan A. Cohen, "The Broad Benefits of Investing in Sexual and Reproductive Health," 7 *Guttmacher Rep. on Public Policy*, March 2004, pp. 5, 6; see also Martha J. Bailey et al., "The Opt-in Revolution? Contraception and the Gender Gap in Wages," pp. 19, 26 (National Bureau of Econ. Research Working Paper No. 17922, 2012), www.nber.org/papers/w1 7922.pdf.

Like other universities, the University of Notre Dame provides health benefits to both its employees and its students. It self-insures its employees' medical expenses, but has hired Meritain Health, Inc. to administer the employee health plan without providing any insurance coverage (Meritain is therefore what is called a "third-party administrator" of a health plan). To take care of its students' medical needs, Notre Dame has a contract with Aetna (which happens to be Meritain's parent) that gives the students the option of obtaining health insurance from Aetna. Meritain administers coverage for some 4600 employees of Notre Dame (out of a total of 5200) and 6400 dependents of employees. Aetna insures 2600 students and 100 dependents; Notre Dame has about 11,000 students. But many of them have coverage under their parents' health insurance policies.

Because Catholic doctrine forbids the use of contraceptives (the "rhythm" method of avoiding pregnancy, which is permitted, is a form of abstention, not of contraception), Notre Dame has never paid for contraceptives for its employees or permitted Aetna to insure, under the Aetna Notre Dame Health Plan, Notre Dame students for the expense of contraceptives. Cognizant of the religious objections of Catholic institutions to contraception, and mindful of the dictate of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-l(a), (b), that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling

governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest," the government, some months after the enactment of the Affordable Care Act, created by administrative regulation a religious exemption from the guidelines. See "Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services," 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011) (codified at 45 C.F.R. § 147.130(a)(l)(iv)); see also 77 Fed. Reg. 8725, 8727-29 (Feb. 15, 2012). But at first it was narrowly drafted and as a result excluded Catholic institutions that, like Notre Dame, are incorporated as nonprofit rather than religious institutions. That precipitated the filing in 2012 of a federal suit by Notre Dame against the government, claiming that the contraceptive regulations infringed rights conferred on the university by both the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. §2000bb-l. That suit was dismissed on standing and ripeness grounds, the government having promised that Notre Dame wouldn't have to comply with the regulations for one year, during which time new regulations would be issued. *University of Notre Dame v. Sebelius*, 2012 WL 6756332, at *3-4 (N.D. Ind. Dec. 31, 2012); see "Certain Preventive Services Under the Affordable Care Act," 77 Fed. Reg. 16501, 16502-03 (Mar. 21, 2012).

The new regulations were issued as promised—and, as expected, they enlarged the exemption. See "Coverage of Certain Preventive Services Under the Affordable Care Act," 78 Fed. Reg. 39870, 39875-90 (July 2, 2013); 29 C.F.R. § 2590.715-2713A(a); 45 C.F.R. § 147.131(b). As a result, Notre Dame now

came within its scope. To exercise its right thus conferred to opt out of having to pay for coverage for contraceptives, either directly or through a health insurer, such as Aetna, the university had to fill out "EBSA Form 700 — Certification." See 45 C.F.R. § 147.131(b)(4). The form (www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf) is short, its meat the following sentence: "I certify that, on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered; the organization is organized and operates as a nonprofit entity; and the organization holds itself out as a religious organization." The form states that "the organization or its plan must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement." So Notre Dame was required to give copies both to Aetna and to the employee plan's third-party administrator, Meritain.

The Affordable Care Act requires providers of health insurance (including third-party administrators of self-insured health plans, even though they are conduits rather than ultimate payors of plan benefits) to pay for contraceptives for women, see 45 C.F.R. §§ 147.131(c)(2)(i)(B), (ii); 29 C.F.R. § 2590.715-2713A(b)(3); the form alerts Aetna and Meritain that since Notre Dame is not going to pay, *they* will have to pay. The companies have neither religious objections to paying for contraception nor financial objections. The government will reimburse

at least 110 percent of the third-party administrator's (Meritain's) costs, 45 C.F.R. § 156.50(d)(3), and Aetna can expect to recoup its costs of contraceptive coverage from savings on pregnancy medical care, since there will be fewer pregnancies if contraception is more broadly available, at no cost, to Notre Dame's female employees and students, as well as from other regulatory offsets. See "Coverage of Certain Preventive Services Under the Affordable Care Act," *supra*, 78 Fed. Reg. at 39877-78.

The regulations require Aetna and Meritain, but not Notre Dame, to inform the university's female employees and students that those companies will be covering their contraceptive costs. See 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d). The companies may either "provide payments for contraceptive services" themselves or, alternatively, "arrange for an issuer or other entity to provide payments for" those services; either way, they may not "impos[e] any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impos[e] a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries." 29 C.F.R. §§2590.715-2713A(b)(2), (c)(2). The regulations thus seek an accommodation between the secular interests that motivate the mandate to provide contraceptive services to women free of charge and the interests of religious institutions that provide health services. Accommodation is consistent with the balancing act required by the Religious Freedom Restoration Act ("substantial burden," "compelling governmental interest," "least restrictive means").

When the new regulations were promulgated in July of last year, Notre Dame did not at first bring a new suit (remember that its previous suit, brought when the university was excluded from opting out of contraceptive coverage, had been dismissed on jurisdictional grounds, and those grounds are irrelevant to a suit challenging the new regulations). Months passed. Not until December did the university file the present suit. The delay in suing was awkward, since the regulations were to take effect with respect to the employee health plan—and did take effect—on January 1 of this year. "Coverage of Certain Preventive Services Under the Affordable Care Act," *supra*, 78 Fed. Reg. at 39889. (The student health plan, however, the Aetna plan, has until August of this year to comply. See *id.*; University of Notre Dame, 2013-2014 *Student Injury and Sickness Insurance Plan* 3, 5, http://uhs.nd.edu/assets/108455/nd_brochure_1314.pdf.)

With the January deadline for compliance with the regulations applicable to the employee plan looming, the university, less than a week after filing its second suit on December 3, moved for the entry of a preliminary injunction. The district court denied the motion on December 20, and Notre Dame filed its appeal from that denial the same day. On December 31, the last day before it would be penalized for violating the regulations, Notre Dame signed EBSA Form 700 and thereby opted out of paying for contraceptive coverage for its employees.

Because the appeal asks us to reverse the district court's denial of a preliminary injunction, we need to emphasize the limitations on our consideration of the

appeal that result from its interlocutory character (that is, from the fact that it was before completion of the litigation in the district court). The lawsuit was only a few weeks old when the district judge suspended all proceedings in his court pending our consideration of the appeal. The parties have thus had little opportunity to present evidence. So the question before us is not whether Notre Dame's rights have been violated but whether the district judge abused his discretion in refusing to grant a preliminary injunction. That depends on such considerations as whether Notre Dame will experience irreparable harm if denied preliminary relief—that is, harm that cannot be eliminated by a final judgment in favor of Notre Dame—as well as on the likelihood that the university will win its case when the case is finally tried in the district court. *Kraft Foods Group Brands LLC v. Cracker Barrel Old Country Store, Inc.*, 735 F.3d 735, 740-41 (7th Cir. 2013). We emphasize that with the evidentiary record virtually a blank, everything we say in this opinion about the merits of Notre Dame's claim and the government's (and intervenors') response is necessarily tentative, and should not be considered a forecast of the ultimate resolution of this still so young litigation.

An initial puzzle is that the university hasn't told us what exactly it wants enjoined at this stage in the litigation. It has gone ahead and signed the EBSA Form 700 and sent copies to Aetna and Meritain, and the latter has notified Notre Dame's employees of the contraceptive coverage that it is offering them. (Aetna has not notified the students; remember that it has until August to do so.) The university has thus

complied with the statute, albeit under duress. The penalties for violating the applicable regulations are indeed stiff: $100 per day for "each individual to whom such failure relates," 26 U.S.C. § 4980D(b)(l), which would cost Notre Dame roughly $685,000 per day, assuming plausibly that half the 13,700 covered employees, students, and dependents are women—thus $250 million per year. There is an annual cap on such penalties of $500,000, but it is applicable only to unintentional violations of the regulations. § 4980D(c)(3). If Notre Dame dropped its employee health plan, the penalty would be only $2,000 per full-time employee per year, 26 U.S.C. §§ 4980H(a), (c)(l), or roughly $10 million a year. That is well within Notre Dame's ability to pay but is still a number large enough to capture a university administrator's attention.

But we are left with the question: what does Notre Dame want *us* to do? Tell it that it can tear up the form without incurring a penalty for doing so, even though the government's regulations require the religious institution to retain it after signing it, 26 C.F.R. § 54.9815-2713A(a)(4), though not to submit it to the government? But what effect would that have—except to rescind the university's exemption from the requirement of paying for the contraceptive services that Meritain is now offering as a consequence of Notre Dame's choosing to exempt itself from the contraception regulations? No certification, no exemption. We imagine that what the university wants is an order forbidding Aetna and Meritain to provide any contraceptive coverage to Notre Dame staff or students pending final judgment in the district court. But we can't issue

such an order; neither Aetna nor Meritain is a defendant (the university's failure to join them as defendants puzzles us), so unless and until they are joined as defendants they can't be ordered by the district court or by this court to do anything. Furthermore, while a religious institution has a broad immunity from being required to engage in acts that violate the tenets of its faith, it has no right to prevent other institutions, whether the government or a health insurance company, from engaging in acts that merely offend the institution. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988); *Bowen v. Roy*, 476 U.S. 693, 699-700 (1986).

The regulation to which Notre Dame takes the sharpest exception states that "the copy of the self-certification [EBSA Form 700] provided by the eligible [to opt out] organization [Notre Dame] to a third party administrator [Meritain] (including notice of the eligible organization's refusal to administer or fund contraceptive benefits) ... shall be an instrument under which the plan is operated, [and] shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds." 29 C.F.R. § 2510.3-16. Notre Dame treats this regulation as making its mailing the certification form to its third-party administrator the *cause* of the provision of contraceptive services to its employees, in violation of its religious beliefs. Not so. Since there is now a federal right, unquestioned by Notre Dame, to female

contraceptive services, the effect of the university's exercise of its religious exemption is to throw the entire burden of administration of the right on the entities (Aetna and Meritain) that provide health services to Notre Dame's students and staff. The university is permitted to opt out of providing federally mandated contraceptive services, and the federal government determines (enlists, drafts, conscripts) substitute providers, and naturally they are the providers who are already providing health services to the university personnel.

Fearing the penalties for violating the contraceptive regulation, the university has complied and as a result Aetna and Meritain have been designated to provide the Notre Dame staff and students with female contraceptive services. Unlike the Little Sisters of the Poor, who filed their suit in September of last year, well before the January 1 deadline for compliance with the contraceptive regulation, and obtained a stay pending appeal—equivalent to a preliminary injunction—before having to comply, see *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 893 (Dec. 31, 2013), Notre Dame filed suit at the last minute. It could have sued in July, when the regulations were amended to include Notre Dame as a religious organization entitled to continue refusing to pay for contraceptive services.

Still, Notre Dame's compliance has not mooted the case. One can imagine an alternative form of relief to turning the clock back; and being able to imagine an alternative form of relief is all that's required to keep a case alive after the primary relief sought is no longer available. *Hoosier Environmental Council v.*

U.S. Army Corps of Engineers, 722 F.3d 1053, 1057-58 (7th Cir. 2013). For example, the university could ask the district court (because the case is before us on an interlocutory appeal, our ruling will not end the litigation) to order the government to notify all of Notre Dame's students and employees of the university's exemption from having to provide contraception and of its opposition to having to notify Aetna and Meritain of their duties under the Affordable Care Act with regard to contraceptive services.

But here we need to remind the reader that the only issue before us is whether Notre Dame is entitled to a preliminary injunction. It faces an uphill struggle for that relief. One reason is that "because of the uncertainty involved in balancing the considerations that bear on the decision whether to grant a preliminary injunction—an uncertainty amplified by the unavoidable haste with which the district judge must strike the balance—we appellate judges review his decision deferentially." *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 795 (7th Cir. 2013). Another obstacle is that a sine qua non for such relief is proof of irreparable harm if the injunction is denied: "A plaintiff seeking a preliminary injunction must establish that he is ... likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Natural Resources Defense Council Inc.*, 555 U.S. 7, 20 (2008). "For if the harm can be fully repaired in the final judgment, there is no reason to hurry the adjudicative process." *Kraft Foods Group Brands LLC v. Cracker Barrel Old Country Store, Inc.*, *supra*, 735 F.3d at 740. As we cannot figure out what Notre Dame wants in the way

of preliminary relief, we cannot make a determination that it will suffer irreparable harm if we affirm the denial of such relief.

Another requirement for preliminary relief is that the plaintiff be likely to win its suit in the district court. The Supreme Court's decision in the *Winter* case states flatly that "a plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits." 555 U.S. at 20. So having explained the other objections to the appeal let's turn to the merits.

Notre Dame's principal claim is that by requiring the university to fill out EBSA Form 700 and give copies to Aetna and Meritain, the government has "substantially burden[ed] a person's exercise of religion" (the university is a nonprofit corporate "person"; cf. 1 U.S.C. § 1; *Korte v. Sebelius*, 735 F.3d 654, 674 (7th Cir. 2013)), and that no "compelling governmental interest" justifies that burdening. Religious Freedom Restoration Act, *supra*. But the university has not yet shown that there is a substantial burden. The form is two pages long—737 words, most of it boring boilerplate; the passages we quoted earlier, the only ones of consequence, consist of only 95 words. Signing the form and mailing it to Meritain and Aetna could have taken no more than five minutes. The university claims that there are other paperwork requirements; there aren't. The only colorable burden it complains about has nothing to do with time or cost; it is that by filling out the form and sending it to the companies it "triggers" their coverage of the contraception costs of the university's female employees and students, and that this makes the university an accomplice in the

provision of contraception, in violation of Catholic doctrine, which in the name of avoiding "scandal" forbids the encouragement (equivalent to aiding and abetting) of sinful acts.

The "trigger" theory was stated clearly, which is not to say convincingly, in a recent district court decision where we read that "the self-certification form requires the [religious] organizations to do much more than simply protest or object. The purpose of the form is to enable the provision of the very contraceptive services to the organization's employees that the organization finds abhorrent." *East Texas Baptist University v. Sebelius*, 2013 WL 6838893, at *20 (S.D. Tex. Dec. 27, 2013). The key word is "enable," and it's inaccurate. Federal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services. By refusing to fill out the form Notre Dame would subject itself to penalties, but Aetna and Meritain would still be required by federal law to provide the services to the university's students and employees unless and until their contractual relation with Notre Dame terminated. (Obviously if they were no longer providing any health benefits to the university's students and staff they would not be providing them with any contraceptive services or coverage.)

Notre Dame says no—that had it not filled out the form, Meritain and Aetna wouldn't have been *authorized* to provide contraceptive services because neither would have been a "plan administrator" under section 3(16) of ERISA, 29 U.S.C. § 1002(16), and thus would not have been plan fiduciaries

entitled to make expenditures (as for costs of contraceptives) on behalf of the plan. As the plan's sponsor, Notre Dame is alone authorized to designate a plan fiduciary, 29 U.S.C. § 1102(a)(2), and it made that designation in the form and thus is complicit in the provision of contraceptives to the university's students and staff.

This argument was made for the first time at oral argument, and so has been forfeited. In any event it's unconvincing. For one thing it fails to distinguish between Meritain and Aetna—the latter is the students' health insurer and so already a plan fiduciary, 29 U.S.C. § 1002(21)(A), and therefore required by the Affordable Care Act to provide (come August) contraceptive coverage to plan members whether or not Notre Dame signs the form. 45 C.F.R. §§ 147. 130(a)(1)(iv), 147.131(f). Even as to Meritain, although "many agreements between third party administrators and plan sponsors prohibit third party administrators from serving as fiduciaries," "Coverage of Certain Preventive Services Under the Affordable Care Act," *supra*, 78 Fed. Reg. at 39879, "many" is not "all" or even "most." Notre Dame has presented no evidence that its contract with Meritain forbids the latter to be a plan fiduciary.

Moreover, the university has not been told to name Meritain as a plan fiduciary. Rather, the signed form "shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered." 29 C.F.R. § 2510.3-16(b) (emphasis added). Treated and designated by whom? By the government. The delivery of a copy of the form to Meritain reminds it of an obligation that the

law, not the university, imposes on it—the obligation to pick up the ball if Notre Dame decides, as is its right, to drop it. Notre Dame's signing the form no more "triggers" Meritain's obligation to provide contraceptive services than a tortfeasor's declaring bankruptcy "triggers" his co-tortfeasors' joint and several liability for damages. Meritain must provide the services no matter what; signing the form simply shifts the financial burden from the university to the government.

The parties have not told us the terms of Notre Dame's contracts with these providers. For all we know, the contracts permit the university at any time to "disable" them from providing medical services, including contraceptive services, simply by ceasing to do business with them. Students and employees would make their own health insurance arrangements—most students already do (76 percent), and so do many staff (12 percent). Notre Dame would be off the hook without having to sign the certification form.

The following example may help make clear the fallacy in Notre Dame's "triggering" metaphor. Suppose the United States, like Canada and many other foreign nations, had a "single payer" health care system. That means the government pays the cost of covered medical services (if the United States had such a system, it would be the equivalent of Medicare for everyone), rather than employers, health insurers, and patients, though patients may in a single-payer system be charged directly for some of the expense of the medical care provided by the system, as distinct from indirectly through taxes. Now suppose our hypothetical single-payer system

paid the full expense of female contraceptives. We don't think Notre Dame would argue that the system placed a "substantial burden" on the university's compliance with Catholic doctrine. Notre Dame does not deny the existence of legitimate secular interests, some noted at the outset of this opinion, that can justify a federal program of paying for medical expenses, including contraceptive expenses. (For a summary of those interests, see "Coverage of Certain Preventive Services Under the Affordable Care Act," *supra*, 78 Fed. Reg. at 39872-73.) In fact we *know* it wouldn't object, at least on religious grounds, because it advised the district court that one method by which the government could "achieve its asserted interests without forcing Notre Dame to violate its religious beliefs" would be for the government to "directly provide contraceptive[s]" to the university's staff and students and another method would be for it to "directly offer insurance coverage for contraceptive services": in either case a single-payer system, at least for contraceptives. The main difference between such a system and the Affordable Care Act is that under the Act the government—instead of providing medical services directly—uses private insurance providers and health plan administrators, such as Aetna and Meritain, as its agents to provide medical services, subsidized by the government.

If the government is entitled to require that female contraceptives be provided to women free of charge, we have trouble understanding how signing the form that declares Notre Dame's authorized refusal to pay for contraceptives for its students or staff, and mailing the authorization document to those companies, which under federal law are obligated to

pick up the tab, could be thought to "trigger" the provision of female contraceptives.

Consider this further example illustrative of our doubts. Suppose it is wartime, there is a draft, and a Quaker is called up. Many Quakers are pacifists, and their pacifism is a tenet of their religion. Suppose the Quaker who's been called up tells the selective service system that he's a conscientious objector. The selective service officer to whom he makes this pitch accepts the sincerity of his refusal to bear arms and excuses him. But as the Quaker leaves the selective service office, he's told: "you know this means we'll have to draft someone in place of you" —and the Quaker replies indignantly that if the government does that, it will be violating his religious beliefs. Because his religion teaches that *no one* should bear arms, drafting another person in his place would make him responsible for the military activities of his replacement, and by doing so would substantially burden his own sincere religious beliefs. Would this mean that by exempting him the government had forced him to "trigger" the drafting of a replacement who was not a conscientious objector, and that the Religious Freedom Restoration Act would require a draft exemption for both the Quaker and his non-Quaker replacement? That seems a fantastic suggestion. Yet confronted with this hypothetical at the oral argument, Notre Dame's counsel acknowledged its applicability and said that drafting a replacement indeed would substantially burden the Quaker's religion.

Another way to see the error of thinking that by signing the certification form Notre Dame was "enabling" Aetna and Meritain to violate its religious

freedom is to ask what would happen if the university refused to sign the form while adhering to its long-standing refusal to pick up any part of the cost of contraceptives. The answer is that the female employees and students would still have a federal right to free contraceptives from Meritain and Aetna unless Notre Dame stopped offering health services to its students entirely. Health groups would lose no time in acquainting those employees and students with their federal rights.

To nail down the fallacy of the "trigger" or "enablement" interpretations of the certification form we need only parse carefully its instructions—the statement that "the organization or its plan must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) *in order for the plan to be accommodated with respect to the contraceptive coverage requirement*" (emphasis added). Remember that "accommodation" in this context means accommodating the Affordable Care Act to religious beliefs. The accommodation in this case consists in the organization's (that is, Notre Dame's) washing its hands of any involvement in contraceptive coverage, and the insurer and the third-party administrator taking up the slack under compulsion of federal law. Notre Dame is telling Aetna and Meritain: "we're excused from the new federal obligation relating to contraception," and in turn, the government tells those insurance companies "but you're not." This is a warning, not a trigger. It enables nothing. The sole "enabler" is the federal statute that Notre Dame has been allowed to opt out of.

The university argues alternatively that if the form isn't a trigger, its health plans are the "conduit" through which the employees and students obtain contraceptive coverage, making Notre Dame complicit in sin. But the university's lawyer told us at oral argument that his client would have no problem if each of its female employees signed and mailed to Meritain (and its students mailed to Aetna) a form saying "I have insurance through Notre Dame, but the university won't cover contraceptive services, so now you must cover them." We can't see how that would make the health plan less of a "conduit."

The university has still another argument: that the contraception regulation imposes a substantial burden on it by forcing the university to "identify[] and contract [] with a third party willing to provide the very services Notre Dame deems objectionable." It's true that Meritain could exit its contract with Notre Dame without liability if it didn't want to provide contraceptive services. See "Coverage of Certain Preventive Services Under the Affordable Care Act." *supra*, 78 Fed. Reg. at 39880. But as Meritain does not object to providing them and is doing so already, the "burden" alleged by Notre Dame is entirely speculative and so not a ground for equitable relief. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 104-05 (1983).

The novelty of Notre Dame's claim—not for the exemption, which it has, but for the right to have it without having to ask for it—deserves emphasis. United States law and public policy have a history of accommodating religious beliefs, as by allowing conscientious objection to the military draft— and now exempting churches and religious institutions

from the Affordable Care Act's requirements of coverage of contraceptive services. What makes this case and others like it involving the contraception exemption paradoxical and virtually unprecedented is that the beneficiaries of the religious exemption are claiming that the exemption process itself imposes a substantial burden on their religious faiths. The closest analogues we have found are cases in which churches seeking rezoning or variances claim that the process for obtaining permission is so cumbersome as to constitute a substantial burden on religious practice. E.g., *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005), and cases cited there. Consider also *United States v. Friday*, 525 F.3d 938, 947-48 (10th Cir. 2008), in which a member of a tribe had been prosecuted for killing, without a permit to do so, a bald eagle, for use in a religious ceremony. The court expressed skepticism that the permitting process itself might have imposed a *substantial* burden on a religious exercise. *Cf. United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001) (per curiam).

The process of claiming one's exemption from the duty to provide contraceptive coverage is the opposite of cumbersome. It amounts to signing one's name and mailing the signed form to two addresses. Notre Dame may consider the process a substantial burden, but substantiality—like compelling governmental interest—is for the court to decide. *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011). Otherwise there would have been no need for Congress in the Religious Freedom Restoration Act to prefix "substantial" to "burden."

Notre Dame can derive no support from our decision in *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), heavily cited in the university's briefs. The question in that case was whether two for-profit companies that had health plans for their employees could refuse, because of the religious beliefs of their Catholic owners, to comply with the contraceptive regulation. We ordered the district court to enter a preliminary injunction against enforcing the mandate against the employers. But Notre Dame is *authorized* to refuse, and it *has* refused. Provided it overcomes the intervenors' "sincerity" attack in the district court when the litigation resumes there (see below), it will be in the same position that we allowed the company owners in the *Korte* case to occupy pending the resolution of their case: fully entitled to thumb its nose at the contraceptive regulation.

We need to say something about the three Notre Dame students whom we have allowed to intervene. They had filed a timely motion in the district court to intervene in that court under Fed. R. Civ. P. 24. Having stayed the litigation pending the resolution of this appeal, the district judge did not rule on it, so the students moved for leave to intervene in this court. Although the Federal Rules of Appellate Procedure do not provide for intervention other than in cases involving review of certain administrative rulings, intervention is permitted in other cases as a matter of federal common law, with Rule 24 supplying the standard for determining whether to permit intervention in a particular case. *Automobile Workers v. Scofield*, 382 U.S. 205, 217 n. 10 (1965); *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517-18 (7th Cir. 2004). The student intervenors in our case

express concern that the university is seeking to obtain a ruling from this court that may thwart their right to contraception under the Affordable Care Act. The concern is natural though perhaps exaggerated, since Notre Dame has complied fully with the Act, but we decided that the concern was sufficient to warrant intervention. And we decided to permit the intervenors to participate under pseudonyms because of the privacy interest involved in contraceptive use and their concern that they might be subjected to harassment were their identities revealed. When the litigation in the district court resumes, they presumably will be allowed to intervene in the district court.

In the brief they've filed in this court they say they intend, when litigation in the district court resumes, to press the issue of "sincerity." To obtain the contraceptive exemption, or other exemptions from secular requirements, the leadership of a religious organization must actually believe, not simply pretend, that its religious teachings require the exemption. See, e.g., *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428-29 (2006); *International Society for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981). Although the government has not questioned Notre Dame's sincerity, the intervenors' brief has. It intimates that a plausible inference from the timing and tactics employed by Notre Dame in this litigation is that in challenging the contraception regulation the university is responding to outside pressures. We express no opinion on whether the intervenors will be able to substantiate their doubts about the sincerity of Notre Dame's

opposition to the use of contraceptives, when, upon the resumption of the litigation in the district court, they have an opportunity to present evidence.

For now the important point is that Notre Dame has failed to demonstrate a substantial burden. We find support for this conclusion in Judge David Tatel's dissent from the grant (made without accompanying explanation) of an injunction pending appeal in *Priests for Life v. U.S. Dep't of Health & Human Services*, No. 13-5368, and *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-5371 (D.C. Cir. Dec. 31, 2013) (per curiam):

> Because Congress has imposed an independent obligation on insurers to provide contraceptive coverage to Appellants' employees, those employees will receive contraceptive coverage from their insurers *even if* Appellants self-certify—but not *because* Appellants self-certify. ... In other words, it was Congress that "authorized" insurers to provide contraceptive coverage to Appellants' employees—services those employees will receive regardless of whether Appellants self-certify.
>
> ... Although we must accept Appellants' assertion that the scheme itself violates their religious beliefs, we need not accept their legal conclusion that their purported involvement in that scheme qualifies as a substantial burden under RFRA. *Cf. Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) ("Accepting 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—we

> conclude that Kaemmerling does not allege facts sufficient to state a substantial burden on his religious exercise."). Appellants' participation is limited to complying with an administrative procedure that establishes that they are, in effect, exempt from the very requirements they find offensive. *See id.* at 678 ("An inconsequential or de minimis burden on religious practice does not rise to [the level of a substantial burden under RFRA], nor does a burden on activity unimportant to the adherent's religious scheme."). At bottom, then, Appellants' religious objections are to the government's independent actions in mandating contraceptive coverage, not to any action that the government has required Appellants themselves to take. But Appellants have no right to "require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 699 (1986). Religious organizations are required to file many forms with the government, such as applications for tax exemptions, even though they may have religious objections to a whole host of government policies and programs.

Id. at 3-4 (emphases in original). See also Judge Jackson's district court decision in the *Roman Catholic Archbishop* case, denying preliminary relief. 2013 WL 6729515 (D.D.C. Dec. 20, 2013).

Notre Dame doesn't place all its eggs in the RFRA "substantial burden" basket, but only two of its other arguments warrant discussion. (The rest add nothing to its RFRA arguments.) The first is that the exemption for religious employers (essentially churches, as distinct from other religious

organizations, such as Catholic universities, see 45 C.F.R. § 147.130(a)(1)(iv)(B)) violates the establishment clause of the First Amendment because it favors certain types of religious organizations (churches or other houses of worship) over others (like Notre Dame). The religious employer doesn't have to sign or mail a certification form in order to claim its exemption; its exemption from the contraceptive guideline appears to be automatic. See, e.g., 45 C.F.R. § 147.130(a)(l)(iv)(A); U.S. Health Resources & Services Administration, "Women's Preventive Services Guidelines," *supra*; U.S. Department of Labor, "Affordable Care Act Regulations and Guidance," www.dol.gov/ebsa/healthreform/regulations/coverageofpreventiveservices.html. But religious employers, defined as in the cited regulation, have long enjoyed advantages (notably tax advantages) over other entities, 26 U.S.C. §§ 6033(a)(3)(A)(i), (iii), without these advantages being thought to violate the establishment clause. See, e.g., *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 666, 672-73 (1970). The establishment clause does not require the government to equalize the burdens (or the benefits) that laws of general applicability impose on religious institutions. A law exempting churches or other religious property from property taxes will benefit religious denominations that own a great deal of property, to the disadvantage of denominations with modest property holdings (such as storefront churches). This unequal effect does not condemn the law.

Notre Dame's second non-RFRA claim, which is more substantial, is that the regulations violate the free-speech clause of the First Amendment by

providing that an exempt organization, such as Notre Dame, "must 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); 26 C.F.R. § 54.9815-2713A(b)(1)(iii). Obviously there are forms of "influence" that are not protected by the speech, press, or petition for redress of grievances clauses of the First Amendment. But most speech or writing intended to influence someone's decision—to persuade someone to do or not do something—*is* protected.

There is a great variety of female contraceptives, see U.S. Food & Drug Administration, "Birth Control; Medicines To Help You," www.fda.gov/forconsumers/byaudience/forwomen/freepublication/ucm313215.htm, including a great variety just of contraceptive pills. Mayo Clinic, "Choosing a Birth Control Pill," www.mayoclinic.org/best-birth-control-pill/art-20044807. Notre Dame's student health service might have views concerning the relative medical risks of different female contraceptives; it would certainly be entitled to communicate those views to its third-party administrator, Meritain. It's true that the regulation requires provision of "all" FDA-approved female contraceptives, but the health service could try to persuade the administrator to recommend to the physicians in its network one FDA-approved drug over another, such as progestin IUDs over copper ones, or even to advise the FDA to alter

its list of approved female contraceptives. The university has a responsibility for the health and safety of its students and staff.

A footnote in the commentary to the regulation states that "nothing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." "Coverage of Certain Preventive Services Under the Affordable Care Act," *supra*, 78 Fed. Reg. at 39880 n. 41. That's not very reassuring. The example we gave was not of a statement of opposition to the use of contraceptives, but of a statement intended to influence the choice of contraceptives that the third-party administrator or the health insurance provider would cover. The footnote is an unsatisfactory afterthought.

Against this it can be argued that the regulation is only about "payments," and not about the provision of contraceptives, as in our example of student health services' being concerned with the safety of particular contraceptives. At the oral argument the government's lawyer said that the regulation, despite its wording, is not limited to wrangling over payments; that it also concerns the provision of contraceptives, as in our example of an attempt at influence that cannot be prohibited without infringing freedom of speech. The regulations specify the contraceptives that health plans must provide for women—namely "all Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," U.S. Health Resources & Services Administration, "Women's Preventive Services Guidelines," *supra*—and the government's lawyer seemed (no stronger word is

possible) to imply that for Notre Dame to urge a plan not to provide a specific such contraceptive, even because of a sincere health concern by the university, would violate the "influence" regulation.

We're troubled by the seeming vagueness of the regulation as drafted and as further muddied by the footnote in the commentary (why isn't it in the regulation itself?), and we fear that it may have pernicious consequences if understood to forbid or inhibit the kind of discussion between the university and the contraceptives providers sketched in the preceding paragraphs. But the parties have failed to place the issue in focus. Notre Dame hasn't told us what it wants to say but fears to say (except that it at least wants to be able to tell Meritain not to provide contraceptive coverage at all — which sounds like urging civil disobedience) and the government hasn't clearly embraced an interpretation of the regulation that would give rise to the concerns we've expressed. The issue must, for now, be left for further exploration in the district court.

Two loose ends remain to be tied up. They relate to motions that Notre Dame filed in this court after filing its appeal but before oral argument. First was a motion it filed on January 20, six days after the students' motion to intervene was granted, asking us to dismiss its appeal or in the alternative to order a limited remand to the district court; the stated purpose of either alternative was to provide Notre Dame with an opportunity to depose the three student intervenors. We took the motion under advisement, the appeal having been scheduled for imminent oral argument with expedited briefing underway and the intervenors having not yet filed

their brief, which made the motion premature. It was apparent that the appeal would be refiled after discovery relating to the intervenors or resumed if we ordered a limited remand in lieu of dismissal. So dismissal or remand would be an interruption rather than a termination—a source of delay harmful to both parties and disruptive of this court's schedule.

We have the authority to dismiss an appeal at the appellant's request. Fed. R. App. P. 42(b); *United States v. Hagerman*, 549 F.3d 536, 538 (7th Cir. 2008). But it is authorization, not command. E.g., *Albers v. Eli Lilly & Co.*, 354 F.3d 644, 646 (7th Cir. 2004) (per curiam). As in the case just cited, here we have thought it "best ... to carry through so that the investment of public resources already devoted to this litigation will have some return." So the motion has remained pending, and is now moot in light of our affirming the denial of preliminary relief to Notre Dame.

On January 28 the university filed a renewed motion for an injunction pending appeal—it had filed such a motion on December 23, but we had denied that motion a week later when we ordered expedited briefing of the appeal. The sole ground for the renewed motion was the Supreme Court's order of January 24 in the *Little Sisters* case, 2014 WL 272207. That ground was an odd one for Notre Dame to assert, because the university disagrees with the Court's order. The Court's order conditioned the injunction pending appeal in that case on the Little Sisters' sending a letter to the government declaring its opposition to paying for contraceptive services—and at the oral argument of our case Notre Dame told us that it would consider sending such a letter an

infringement of its religious freedom. Another distinction between that case and this one is that unlike Meritain, Little Sisters' third-party administrator, Christian Brothers, is a "church plan" administrator and so wouldn't provide contraceptive services anyway, or be required to do so. We now deny the renewed motion for an injunction pending appeal as moot because the appeal has been resolved.

Chief Judge Simon's denial of preliminary relief in the district court is

AFFIRMED.

FLAUM, *Circuit Judge*, dissenting. While Notre Dame's appeal from the district court's denial of a preliminary injunction was pending before this court, we granted the students' motion to intervene. Notre Dame then moved to dismiss the appeal in order to conduct additional discovery in the district court. Dismissal would not prejudice the government or the student-intervenors. Nor would it inhibit this court's review of the ultimate issues at a later stage in the proceedings. Because I see no reason not to "accept plaintiffs' decision to proceed to trial without interim relief," *Creaton v. Heckler*, 781 F.2d 1430, 1431 (9th Cir. 1986), I would grant Notre Dame's motion and dismiss this appeal.

The majority does not agree, however, and so the appeal remains before us. Faced with the merits, I conclude that Notre Dame has made out a credible claim under the Religious Freedom Restoration Act. I therefore would grant the university a preliminary injunction forbidding the government from penalizing Notre Dame for refusing to comply with the self-certification requirement.

I.

Notre Dame filed an emergency motion for an injunction pending appeal on December 23, 2013. At that point, its attention was fixed on the looming January 1, 2014 deadline, the date that the mandate and relevant regulations would go into effect. The court denied the motion on December 30 and ordered expedited briefing. The following day, the university—"forced," in its words, "to choose between potentially ruinous fines and compliance with the Mandate" —opted to submit its self-certification form while it continued to litigate this appeal. *See Notre Dame Issues Statement on Contraceptive Care Injunction Denial*, WNDU.com (Dec. 31, 2013), available at http://tinyurl.com/kyhn6op (last visited Feb. 20, 2014). On January 14, the day after Notre Dame filed its opening brief, the court granted the students' motion to intervene. The students intended to, and in fact later did, advance a number of arguments that the government had not pursued in the district court. Shortly thereafter, Notre Dame moved to dismiss its appeal. The government took no position on the motion for voluntary dismissal, and the students opposed it. The motion was taken under advisement.

Federal Rule of Appellate Procedure 42 permits us to dismiss an already-docketed appeal "on the appellant's motion on terms agreed to by the parties or fixed by the court." Fed. R. App. P. 42(b). Even where the parties do not agree on terms, we apply a "presumption in favor of dismissal," *Albers v. Eli Lilly & Co.*, 354 F.3d 644, 646 (7th Cir. 2004) –as well we should, for normally it makes very little sense to force an appellant into court against his will. This

presumption would appear to be stronger when the appeal is an interlocutory one. Such a dismissal will not prejudice any future determination on the merits and will put the appellee in no worse position than if the appellant had not taken an appeal to begin with. At the same time, however, this presumption may be overcome by other prudential considerations. Appellate review is not a "bargaining chip" to be played and then casually conceded after a bad card is dealt. *Id.* (citing *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994)).

Invoking the *Albers* case, the student-intervenors accuse Notre Dame of "procedural gamesmanship" for moving to dismiss the appeal after its pleas for urgent relief earlier in the litigation. But for Notre Dame, the circumstances of this case changed significantly on January 1, by which point the expedited briefing schedule had already been set. They changed yet again on January 14, when the student-intervenors entered the case. Certainly Notre Dame is not the first party to reassess the wisdom of taking an appeal in light of later developments. *Cf. Tyndale House Publishers, Inc. v. Sebelius*, No. 13-5108, 2013 WL 2395168 (D.C. Cir. May 3, 2013) (granting the government's opposed motion for voluntary dismissal in a contraceptive-mandate case brought by a for-profit religious employer). In my judgment, if the university is willing to return to the district court and forego any chance at a preliminary injunction, we should not hold it to an expedited schedule that it did not request and to an appeal involving parties and arguments that it did not anticipate.

Importantly, Notre Dame has not "sought dismissal for the purpose of evading appellate determination." *United States v. Wash. Dep't of Fisheries*, 573 F.2d 1117, 1118 (9th Cir. 1978). To the contrary, the university tells us that it "fully expects to be back in this Court—either from its appeal or the Government's appeal ... following the district court's ruling on a permanent injunction." This is a far cry from a case like *Albers*, where counsel for the appellant "essentially conced[ed]" that he decided after oral argument to dismiss the appeal for opportunistic reasons, in order to "try again, with a different client, at a different time or in a different court." 354 F.3d at 646.

This case is also very much unlike *United States v. Hagerman*, where we denied an imputed motion for voluntary dismissal because it arose "with the appeal fully briefed and the merits free from doubt." 549 F.3d 536, 538 (7th Cir. 2008). Notre Dame requested dismissal a week before the government's and intervenors' briefs were due; Notre Dame's reply brief (which addressed a number of the intervenors' new arguments) was due a week after that. More to the point, and with respect for my colleagues' views, I do not find the question in this case to be clear cut. There have been nineteen cases challenging the application of the mandate to religious nonprofits to date, and every plaintiff besides Notre Dame has received an injunction.[1] In contrast to *Hagerman*, the

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[1] Most plaintiffs received a preliminary injunction in the district court. *See Ave Maria Found. v. Sebelius*, No. 13-cv-15198, 2014 WL 117425 (E.D. Mich. Jan. 13, 2014); *Catholic Diocese of Beaumont v. Sebelius*, No. l:13-cv-709, 2014 WL 31652 (E.D. Tex. Jan. 2, 2014); *Roman Catholic Diocese of Fort Worth v. Sebelius*,

merits in this case are hardly "free from doubt." *Id.* I suggest that granting the motion to dismiss the appeal is the more prudential approach.

II.

On the merits, I believe that Notre Dame has made out a credible claim that the Patient Protection and

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No. 4:12-cv-314 (N.D. Tex. Dec. 31, 2013) (Doc. 99); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-92, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013); *Diocese of Fort Wayne-S. Bend v. Sebelius*, No. 1:12-cv-159, 2013 WL 6843012 (N.D. Ind. Dec. 27, 2013); *Grace Schs. v. Sebelius*, No. 3:12-cv-459, 2013 WL 6842772 (N.D. Ind. Dec. 27, 2013); *E. Tex. Baptist Univ. v. Sebelius*, No. H-12-3009, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013); *S. Nazarene Univ. v. Sebelius*, No. 13-1015, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); *Geneva Coll. v. Sebelius*, No. 12-0207, 2013 WL 6835094 (W.D. Pa. Dec. 23, 2013); *Reaching Souls Int'l, Inc. v Sebelius*, No. 13-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Zubik v. Sebelius*, No. 2:13-cv-1459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013). A handful lost in the district court but later received an injunction on appeal. *See Little Sisters of the Poor v. Sebelius*, No. 13-cv-2611, 2013 WL 6839900 (D. Colo. Dec. 27, 2013), *injunction pending appeal granted*, No. 13A691 (U.S. Jan. 24, 2014); *Mich. Catholic Conf. v. Sebelius*, No. 1:13-CV-1247, 2013 WL 6838707 (W.D. Mich. Dec. 27, 2013), *injunction pending appeal granted*, No. 13-2723 (6th Cir. Dec. 31, 2013); *Catholic Diocese of Nashville v. Sebelius*, No. 3:13-1303, 2013 WL 6834375 (M.D. Tenn. Dec. 26, 2013), *injunction pending appeal granted*, No. 13-6640 (6th Cir. Dec. 31, 2013); *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441, 2013 WL 6729515 (D.D.C. Dec. 20, 2013), *injunction pending appeal granted*, No. 13-5371 (D.C. Cir. Dec. 31, 2013); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013), *injunction pending appeal granted*, No. 13-5371 (D.C. Cir. Dec. 31, 2013).

Affordable Care Act and accompanying regulations are a substantial burden on its exercise of religion. Accordingly, I would grant the university's request for a preliminary injunction. *See Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011) (setting forth the legal standard for a preliminary injunction); *cf. ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) (noting that the "loss of First Amendment freedoms, for even minimal periods of time," constitutes an irreparable injury for which damages are not an adequate remedy).

The Religious Freedom Restoration Act provides that a federal law may not "substantially burden a person's exercise of religion" unless the government "demonstrates that application of the burden to the person ... is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-l. For purposes of this litigation, the government concedes that the least-restrictive-means exception does not apply, so we need only decide whether the burden that the Affordable Care Act imposes on Notre Dame is substantial.

In *Korte v. Sebelius*, this court said that a substantial burden arises "when the government 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" 735 F.3d 654, 682 (7th Cir. 2013) (quoting *Thomas v. Review Bd. of Ind. Emp't Div.*, 450 U.S. 707, 718 (1981)). Put another way, government action substantially burdens religious exercise if it "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise ... effectively

impracticable." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (interpreting a parallel provision in the Religious Land Use and Institutionalized Persons Act).

It is clear that if Notre Dame were forced to pay for contraceptive coverage against its religious beliefs or else incur significant monetary penalties, this would be a substantial burden. *See Korte*, 735 F.3d at 682-85. Unlike the for-profit plaintiffs in *Korte*, however, the university has an additional choice: a specially crafted accommodation "whereby the objecting employer gives notice to its insurance carrier and the insurer issues a separate policy with the mandated coverage." *Id.* at 662. This accommodation permits a religious organization to discharge its obligations to provide contraceptive coverage by "self-certif[ying], in a form and manner specified by the [government]," that the organization "opposes providing coverage for some or all ... contraceptive services ... on account of religious objections," "is organized and operates as a nonprofit entity," and "holds itself out as a religious organization." 26 C.F.R. § 54.9815-2713A(a). Among other things, the organization must provide a copy of the self-certification form, known as EBSA Form 700, to its insurance issuer or third-party administrator; those entities are then required to offer segregated contraceptive services directly to plan participants and beneficiaries. *Id.* § 54.9815-2713A(b)-(c). However, if the organization does not self-certify—and also does not provide the required, religiously objectionable coverage—it continues to face the same "ruinous fines" that constituted a substantial burden in *Korte*. 735 F.3d at 684.

I do not question that the accommodation is the government's good-faith attempt to meet religious objectors half-way, and it makes this a somewhat closer case than *Korte*. Nevertheless, by putting substantial pressure on Notre Dame to act in ways that (as the university sees it) involve the university in the provision of contraceptives, I believe that the accommodation still runs afoul of RFRA.

The district court reasoned that the self-certification scheme is not a substantial burden because the scheme does not require the university to modify its behavior in any way. According to the court, "Notre Dame need only step aside from contraception coverage, as it has always done and most assuredly would always do." Similarly, the government tells us that by self-certifying, the university "is simply completing a form conveying that the University does not intend to provide contraceptive coverage."

I do not view the required act so mechanistically. The accommodation does not merely require the religious organization to "step aside from contraceptive coverage." It requires the organization to perform a new act that it did not have to perform before: completing and delivering to its insurer or third-party administrator the official EBSA Form 700. In the university's eyes, this form's "purpose and effect"—evident from the face of the regulations—"is to accomplish what the organization finds religiously forbidden and protests." *E. Tex. Baptist Univ. v. Sebelius*, No. H-12-3009, 2013 WL 6838893, at *20 (S.D. Tex. Dec. 27, 2013). As to health plans administered by third-party administrators in particular, the form flatly states that it is "an

instrument under which the plan is operated." Having to submit the EBSA Form 700, Notre Dame maintains, makes it "complicit in a grave moral wrong" by involving it with a system that delivers contraceptive products and services to its employees and students.

The majority has trouble accepting this position, in part due to the university's statement that its signature will "trigger" contraceptive coverage, because the majority understands federal law to require contraceptive coverage regardless of what Notre Dame signs or does not sign. *But see Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441, 2013 WL 6729515, at *17, *22 (D.D.C. Dec. 20, 2013) (distinguishing between group health insurers, which have an independent obligation under the regulations to provide contraceptive coverage, and third-party administrators, which do not). Yet we are judges, not moral philosophers or theologians; this is not a question of legal causation but of religious faith. Notre Dame tells us that Catholic doctrine prohibits the action that the government requires it to take. So long as that belief is sincerely held, I believe we should defer to Notre Dame's understanding.[1]

The district court relied in part on *Bowen v. Roy*, 476 U.S. 693 (1986), and derivatively *Kaemmerling v.*

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[1] The intervenors insinuate that sincerity is at issue, hinting at the possibility of last-minute influence by a group called the Sycamore Trust. While the district court may find a warrant for this suggestion once discovery proceeds, so far as I can determine, there is currently no basis in the record for concluding that Notre Dame has been insincere in advancing this litigation.

Lappin, 553 F.3d 669 (D.C. Cir. 2008), which the court thought foreclosed Notre Dame's objection to a mere "administrative tool, used to relieve Notre Dame of liability for not providing contraceptive payments." I do not read *Roy* as cutting so broadly. In fact, five justices in that case expressed the view that the plaintiffs "*were entitled* to an exemption" from an analogous "administrative" requirement—"that welfare recipients provide a social security number on their application." Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109,1127 (1990) (emphasis added).

Roy involved a Free Exercise Clause challenge to federal regulations governing state-run food-stamp programs. The plaintiff Roy, a member of the Abenaki tribe, had sought benefits for his two-year-old daughter. Roy objected to two distinct aspects of the regulations. First, he objected to a requirement that each applicant furnish a social security number on the application. Second, he challenged a requirement that states utilize social security numbers in administering the program (principally to prevent abuse or waste). *See* 476 U.S. at 699. Roy refused to *furnish* his daughter's number because he feared its use would "rob" her spirit and diminish her spiritual purity. *Id.* at 696. During the litigation, it became clear that the government had somehow obtained a social security number for Roy's daughter independently. *Id.* at 697. The government argued that the case had become moot, but Roy disagreed. *Id.*

As the district court in this case correctly noted, the Court squarely rejected Roy's free exercise challenge to the state's *use* of the social security

number, concluding that the First Amendment does not "require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." 476 U.S. at 699. But a majority of justices indicated that the requirement that applicants furnish a social security number was a different matter. Five justices either concluded or strongly suggested that the government could not require an applicant to provide the number on a benefits application if the applicant had a sincere religious objection to doing so.

Justice O'Connor, joined by Justices Brennan and Marshall, determined that the requirement burdened Roy's exercise of religion, and that the government had "failed to show that granting a religious exemption to those who legitimately object to providing a Social Security number will do any harm to its compelling interest." 476 U.S. at 732 (O'Connor, J., concurring in part and dissenting in part). Justice White agreed; he would have enjoined both the provision and use requirements. *Id.* at 733 (White, J., dissenting). Finally, Justice Blackmun would have remanded the case to determine whether the issue was moot. However, he stated that if the issue were squarely presented, he would have agreed with Justice O'Connor and held that the government could not deny assistance based on a parent's religious refusal to provide a social security number. *Id.* at 714-16 (Blackmun, J., concurring in part).

To be sure, because only four justices actually reached the question, this conclusion does not constitute part of *Roy's* holding. Nevertheless, it

provides a useful framework for analyzing the facts of this case.[1]

Under *Roy's* approach, it is clear that RFRA does not authorize religious organizations to dictate the independent actions of third-parties, even if the organization sincerely disagrees with them. *See* 476 U.S. at 700 (noting that Roy could "no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets"). That is true whether the third-party is the government, an insurer, a student, or some other actor. *Cf Korte*, 735 F.3d at 684 ("[I]t goes without saying that [the plaintiffs] may neither inquire about nor interfere with the private choices of their employees on these subjects."); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12-2542, 2013 WL 6579764, at *13 (E.D.N.Y. Dec. 16, 2013) ("[I]t seems unlikely that placing new legal obligations on the third-parties with whom plaintiffs contract could be a substantial burden on *plaintiffs'* religion."). So long as the government does not require the university itself to take action, RFRA does not give Notre Dame a right to prevent the government from providing contraceptives to its students and employees. Indeed, at oral argument, counsel for Notre Dame acknowledged that the university would have no

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[1] Although *Roy* is a Free Exerdse Clause case, not a RFRA case, "Congress was clear that RFRA codifies pre-*Smith* free-exercise jurisprudence." *Korte*, 735 F.3d at 679 (referring to *Employment Division v. Smith*, 494 U.S. 872 (1990)).

objection if the students or employees had to opt in to receive contraceptive coverage from insurers.

But the self-certification requirement is different. It is one thing for the government to take independent action. It is quite another for the government to "force[]" the university "to cooperate actively with the Government by themselves providing" the EBSA Form 700—a form that, in Notre Dame's view, endorses the provision of contraceptives to its students and employees. *Roy*, 476 U.S. at 714 (Blackmun, J., concurring in part). That type of compulsion takes this case out of the realm of independent action and into the sort of "direct, primary, and fundamental" pressure that renders "religious exercise ... effectively impracticable." *Civil Liberties for Urban Believers*, 342 F.3d at 761.

The Supreme Court's recent decision to grant a temporary injunction in a similar RFRA challenge suggests to me that a majority of justices may continue to hold this view of free exercise rights (although now as a statutory matter, and not a constitutional one). *See Little Sisters of the Poor v. Sebelius*, No. 13-cv-2611, 2013 WL 6839900 (D. Colo. Dec. 27, 2013), *injunction pending appeal granted*, No. 13A691, 2014 WL 272207 (U.S. Jan. 24, 2014). Notably, the burden on the plaintiffs in *Little Sisters* appears less significant than the one on Notre Dame. The government tells us that Little Sisters provides group health insurance through a self-insured "church plan" that, because of a peculiar twist in ERISA, is itself exempt from the requirement to assume responsibility for contraceptive coverage. Under the current regime, the form that Little

Sisters refuses to sign is entirely unconnected to the actual provision of contraceptive services, yet the Supreme Court still granted the requested injunction. Should the mandate be enforced in this case, by contrast, Notre Dame will continue to self-certify as part of a scheme that will actually deliver products and services to which the university has a religious objection. I am well aware that the order in *Little Sisters* "should not be construed as an expression of the Court's views on the merits." 2014 WL 272207, at *1. However, I believe the Court's action strengthens the case for a preliminary injunction here, where the burden is, if anything, more concrete.

Now that Notre Dame has signed the self-certification form, the majority doubts whether we could grant the university any form of meaningful relief. I agree that we cannot enjoin the university's insurers from providing contraceptive coverage or require the government to forbid the insurers from doing so. However, this only underscores the point that Notre Dame does not (and cannot) take issue with the independent actions of third-parties. Meaningful relief follows from what Notre Dame *does* object to: a regulation that requires it either to pay for contraceptive services or self-certify that it has a religious objection in order to avoid substantial fines. I would therefore enjoin the government from enforcing the penalty against Notre Dame for not providing contraceptive coverage—even if Notre Dame revokes or fails to maintain its EBSA Form 700, refuses to make the form available for examination upon request, or takes any action otherwise inconsistent with 26 C.F.R. § 54.9815-2713A.

III.

My conclusion is not intended to disparage the government's efforts at accommodation in this difficult area. Especially after *Employment Division v. Smith*, 494 U.S. 872 (1990), how best to accommodate the twin demands of religious faith and secular policy has become a challenging political problem as much as a legal one. Our interpretation of RFRA can only go so far in solving it. *Cf. Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988) ("[L]egislatures and other institutions," not courts, must "reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours."). Whatever the eventual outcome of this litigation, it would be unfortunate if it dissuaded either the government or religious institutions from taking further steps toward mutually acceptable accommodation.

* * *

Because dismissal of this appeal is no longer an option, I conclude that Notre Dame has shown a likelihood of success on the merits, and that it has met the other requirements for a preliminary injunction. I would therefore reverse the district court's order denying relief. I respectfully dissent.

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

May 7, 2014

Before

RICHARD A. POSNER, *Circuit Judge*
JOEL M. FLAUM, *Circuit Judge*
DAVID F. HAMILTON, *Circuit Judge*

No. 13-3853

UNIVERSITY OF NOTRE DAME,

Plaintiff-Appellant,

v.

KATHLEEN SEBELIUS, Secretary of U.S. Department of Health and Human Services, *et al.*,

Defendants-Appellees,

and

JANE DOE 1, et al.,

Intervening-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

No. 3:13-cv-01276-PPS-CAN

Philip P. Simon, *Chief Judge*.

On April 4, 2014, plaintiff-appellant filed a petition for rehearing *en banc*, and on April 22, 2014, defendants-appellees and intervening-appellees filed separate answers to the petition. All the judges on the original panel have voted to deny rehearing and none of the court's active judges has requested a vote on whether to rehear the case en banc.* The petition is therefore denied.

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* Judge Williams did not participate in consideration of whether to rehear the case en banc.

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13-3853

UNIVERSITY OF NOTRE DAME,

Plaintiff-Appellant,

v.

SYLVIA MATHEWS BURWELL, Secretary of U.S. Department of Health & Human Services, *et al.*,

Defendants-Appellees,

and

JANE DOE 3,

Intervening Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 3:13-cv-01276-PPS-CAN — **Philip P. Simon**, *Chief Judge.*

ARGUED APRIL 22, 2015 — DECIDED MAY 19, 2015

Before POSNER, FLAUM, and HAMILTON, *Circuit Judges*.

POSNER, *Circuit Judge*. The Affordable Care Act requires providers of health insurance (including both health insurance companies and companies that administer self-insured employer health plans on behalf of the employer—such companies are called "third party administrators") to cover certain preventive services without cost to the insured, including, "with respect to women, such additional preventive care … as provided for in comprehensive guidelines sup-ported by the Health Resources and Services Administration" of the Department of Health and Human Services. 42 U.S.C. § 300gg-13(a)(4); see also 45 C.F.R. § 147.130(a)(1)(iv); 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011). Guidelines specifying such care have been promulgated by the Department and include, so far as bears on this case, "all Food and Drug Administration approved contraceptive methods." Health Resources & Services Administration, "Women's Preventive Services Guidelines," www.hrsa.gov/womensguidelines (visited May 14, 2015, as were the other websites cited in this opinion).

About half of all pregnancies in the United States are un-intended, and 40 percent of them end in abortion and many others in premature births or other birth problems. Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 102–03 (2011), www.nap.edu/catalog.php?record_id=13181; Lawrence B. Finer & Mia R. Zolna, "Shifts in Intended and Unintended Pregnancies in the United States, 2001–2008," 104 *Am. J. Pub. Health* S43, S44 (2014). Many of the un-intended pregnancies are teen pregnancies, and contraceptive use has been found to

be positively correlated with de-creased teen pregnancy. John S. Santelli & Andrea J. Melnikas, "Teen Fertility in Transition: Recent and Historical Trends in the United States," 31 *Ann. Rev. Pub. Health* 371, 375–76, 379 (2010). Because out-of-pocket expenditures on female contraceptives can be substantial for many women, see Su-Ying Liang et al., "Women's Out-of-Pocket Expenditures and Dispensing Patterns for Oral Contraceptive Pills Between 1996 and 2006," 83 *Contraception* 528, 531 (2011), the provision of such contraceptives without cost to the user can be expected to increase contraceptive use and so reduce the number both of unintended pregnancies and of abortions. See Jeffrey F. Peipert et al., "Preventing Unintended Pregnancies by Providing No-Cost Contraceptives," 120 *Obstetrics & Gynecology* 1291, 1295–96 (2012). Furthermore, "women who can successfully delay a first birth and plan the sub-sequent timing and spacing of their children are more likely than others to enter or stay in school and to have more opportunities for employment and for full social or political participation in their community." Susan A. Cohen, "The Broad Benefits of Investing in Sexual and Reproductive Health," 7 *Guttmacher Report on Public Policy*, March 2004, pp. 5, 6; see also Martha J. Bailey et al., "The Opt-in Revolution? Contraception and the Gender Gap in Wages," 4 *American Economic Journal: Applied Economics,* July 2012, pp. 251–52. For a compact and convincing summary of the benefits to society in general and women in particular of inexpensive access to contraception, see *Priests for Life v. U.S. Dept. of*

Health & Human Services, 772 F.3d 229, 257–64 (D.C. Cir. 2014).

The University of Notre Dame provides health benefits to both its employees and its students. It self-insures its employees' medical expenses, but has hired Meritain Health, Inc. to administer the employee health plan without providing any insurance coverage; Meritain is therefore the third-party administrator of the university's employee health plan. To take care of its students' medical needs, Notre Dame has a contract with Aetna, Inc., the well-known health care and health insurance company (and Meritain's parent); the contract gives the students the option of obtaining health insurance from Aetna at rates negotiated by Notre Dame. Meritain administers coverage for some 4600 employees of Notre Dame (out of a total of 5200) and 6400 dependents of employees. Aetna insures 2600 students and 100 dependents; Notre Dame has about 11,000 students, most of whom have coverage under either their parents' health insurance policies or under their own policies rather than under the Aetna Notre Dame Health Plan.

Because Catholic doctrine forbids the use of contraceptives to prevent pregnancy (the "rhythm" method of avoid-ing pregnancy, which is permitted, is a form of abstention, not of contraception), Notre Dame has never paid for contraceptives for its employees or permitted Aetna to insure students under the Aetna Notre Dame Health Plan (or any other Aetna plan) for the expense of contraceptives. Cognizant of the religious objections of Catholic and a number of other religious institutions to contraception, and mindful of the dictate of the

Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1(a), (b), that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest," some months after the enactment of the Affordable Care Act the government offered a religious ex-emption from the contraception guidelines. See "Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services," 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011) (codified at 45 C.F.R. § 147.130(a)(1)(iv)); see also 77 Fed. Reg. 8725, 8727–29 (Feb. 15, 2012).

At first the exemption was limited to churches and so excluded religious institutions that are incorporated as non-profit (rather than as religious) institutions, such as Notre Dame. The exclusion precipitated the filing in 2012 of a federal suit by the university against the government, claiming that the contraceptive regulations infringed rights conferred on the university by both the First Amendment and the Religious Freedom Restoration Act. That suit was dismissed on standing and ripeness grounds, the government having promised that Notre Dame wouldn't have to comply with the regulations for one year, during which new regulations would be issued. *University of Notre Dame v. Sebelius*, 2012 WL 6756332, at *3–4 (N.D. Ind. Dec. 31, 2012); see "Certain Preventive Services Under the Affordable Care Act," 77 Fed. Reg. 16501, 16502–03 (Mar. 21,

2012). The new regulations were issued as promised—and as expected they enlarged the exemption. See "Coverage of Certain Preventive Services Under the Affordable Care Act," 78 Fed. Reg. 39870, 39875–90 (July 2, 2013); 29 C.F.R. § 2590.715-2713A(a); 45 C.F.R. § 147.131(b). As a result, Notre Dame now came within its scope.

But to exercise its right conferred by the new regulations to opt out of having to pay for contraceptive coverage either directly (with or without the administrative assistance of a third-party administrator, such as Meritain) or through a health insurer, such as Aetna, the university had to fill out "EBSA Form 700—Certification." See 45 C.F.R. § 147.131(b)(4). The form (www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf) is short, its meat the following sentence: "I certify that, on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered; the organization is organized and operates as a nonprofit entity; and the organization holds itself out as a religious organization." The form states that "the organization or its plan must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement." So Notre Dame, if it decided to sign the exemption form, would have to give copies to both Aetna and Meritain.

As noted at the outset of this opinion, the Affordable Care Act requires providers of health insurance (including third-party administrators of self-insured health plans, even though they are conduits rather than ultimate payors of plan benefits) to provide contraceptive coverage for women. See also 45 C.F.R. §§ 147.131(c)(2)(i)(B), (ii); 29 C.F.R. § 2590.715-2713A(b)(3). The exemption form if signed by Notre Dame and sent to Aetna and Meritain would therefore inform them that since Notre Dame was not going to pay for contraceptive coverage of its students and staff, Aetna and Meritain would have to pay. Aetna (including its Meritain subsidiary) has neither religious nor financial objections to paying for contraception. Regarding the cost to these companies, the government will reimburse at least 110 percent of the third-party administrator's (Meritain's) costs, 45 C.F.R. § 156.50(d)(3), while Aetna can expect to recoup its costs of contraceptive coverage from savings on pregnancy medical care (since there will be fewer pregnancies if contraception is more broadly available, at no cost, to Notre Dame's female employees and students) as well as from other regulatory offsets. See "Coverage of Certain Preventive Services Under the Affordable Care Act," *supra*, 78 Fed. Reg. at 39877–78.

The regulations required Aetna and Meritain, if Notre Dame signed and sent the exemption form—but not Notre Dame—to inform the university's female employees and students that those companies would be covering their contraceptive costs. See 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d). The companies could either "provide payments for contraceptive services" themselves or,

alternatively, "arrange for an insurer or other entity to provide payments for" those services, but they could not "impos[e] any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impos[e] a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries." 29 C.F.R. §§ 2590.715-2713A(b)(2), (c)(2).

The regulations thus sought an accommodation between the secular interests that had motivated the requirement to provide contraceptive services to women free of charge and the interests of religious objectors. Accommodation is consistent with the balancing act required by the Religious Freedom Restoration Act, which as we noted requires consideration of "substantial burden" (on the institution unwilling to provide contraceptive services), a "compelling governmental interest" in that provision, and the "least restrictive means" that is feasible for realizing the government's interest.

When the accommodation was promulgated in July of 2013, Notre Dame did not at first bring a new suit (remember that its previous suit, brought when the university was excluded from opting out of contraceptive coverage, had been dismissed on jurisdictional grounds, and those grounds were irrelevant to a suit challenging the new regulations). Not until December 2013 did the university file the present suit, challenging the accommodation. The delay in suing was awkward, since the regulations were to take effect with respect to the employee health plan—and did take effect—on January 1, 2014. "Coverage of Certain Preventive Services

Under the Affordable Care Act," *supra*, 78 Fed. Reg. at 39889. (The student health plan, provided by Aetna, had until Au-gust 2014 to comply. See *id.*; University of Notre Dame, *2013–2014 Student Injury and Sickness Insurance Plan* 3, 5, http://uhs.nd.edu/assets/108455/nd_brochure_1314.pdf.)

With the January deadline for compliance looming, the university, less than a week after filing its second suit on December 3, 2014, asked the district court to issue a preliminary injunction that would prevent the government from enforcing the regulation against it pending a trial. The district judge denied the motion on December 20, and Notre Dame filed its appeal from that denial the same day. On December 30 we denied the university's emergency motion for an injunction pending appeal. The next day—the last day before it would be penalized for violating the regulations—the university signed EBSA Form 700 and thereby opted out of providing contraceptive coverage for its employees. On January 28 it filed with us a second appeal from the denial of the preliminary injunction that it had sought. Later it signed the same form regarding Aetna.

The lawsuit had been only a few weeks old when Notre Dame appealed, and so the district judge suspended all proceedings in his court pending our resolution of the appeal (which as just noted had become two appeals). The parties had thus had only a slender window in which to present evidence, and very little had been presented. Because of Notre Dame's focus on obtaining relief at the appellate level, there has been no resumption of proceedings in the district court, and as a result there is very little

evidence in the record before us. That is one reason why, in a decision issued on February 21, 2014, we declined (with one member of the panel dissenting) to reverse the district judge's denial of the preliminary injunction sought by Notre Dame. *University of Notre Dame v. Sebelius,* 743 F.3d 547 (7th Cir. 2014). A few months later, in an almost identical case, the Sixth Circuit also ruled in favor of the government, *Michigan Catholic Conference & Catholic Family Services v. Burwell*, 755 F.3d 372 (6th Cir. 2014), vacated and remanded, 2015 WL 1879768 (April 27, 2015), and afterward was joined by the D.C. Circuit in *Priests for Life v. U.S. Dept. of Health & Human Services*, *supra.*

Notre Dame continued filing appellate petitions, the most notable being a petition for certiorari, granted by the Supreme Court on March 9 of this year in an order (*University of Notre Dame v. Burwell*, 135 S. Ct. 1528) that states in its entirety: "On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S.Ct. 2751 (2014)." With the case now back in this court, the parties filed position statements, after which we heard oral argument for an hour and fifty minutes. The discussion of issues that follows in this opinion is based on the position statements and oral argument, on portions of our original opinion, and on the *Hobby Lobby* decision.

Our previous opinion had expressed puzzlement about what exactly the university wanted us to

enjoin. It had by that time signed EBSA Form 700 and sent copies to Aetna and Meritain, thus obtaining the statutory accommodation, and the companies had notified Notre Dame's employees and students that they (the companies, not the university) would be providing contraceptive coverage. We now have (we think) a clearer idea of what the university wants. It wants us to enjoin the government from forbidding Notre Dame to bar Aetna and Meritain from providing contraceptive coverage to any of the university's students or employees. Because of its contractual relations with the two companies, which continue to provide health insurance coverage and administration for medical services apart from contraception as a method of preventing pregnancy, Notre Dame claims to be complicit in the sin of contraception. It wants to dissolve that complicity by forbidding Aetna and Meritain—with both of which, to repeat, it continues to have contractual relations—to provide any contraceptive coverage to Notre Dame students or staff. The result would be that the students and staff currently lacking coverage other than from Aetna or Meritain would have to fend for themselves, seeking contraceptive coverage elsewhere in the health insurance market.

Notre Dame does not forbid its students or staff to use contraception or to obtain reimbursement from health insurance companies for their purchase of contraceptives. Its objection that it asks us to ratify by issuing a preliminary in-junction is to Aetna's and Meritain's being legally obligated to make contraceptive coverage available to Notre Dame students and staff. It regards its contractual

relationship with those companies as making the university a conduit between the suppliers of the coverage and the university's students and employees. In the university's words, the contraception regulation imposes a substantial burden on it by forcing the university to "identify[] and contract[] with a third party willing to provide the very services Notre Dame deems objectionable."

But the scanty record contains no evidence to support the conduit theory. Although Notre Dame is the final arbiter of its religious beliefs, it is for the courts to determine whether the law actually forces Notre Dame to act in a way that would violate those beliefs. As far as we can determine from the very limited record, the only "conduit" is between the companies and Notre Dame students and staff; the university has stepped aside. Thus it tells its students (and we assume its staff as well) that "the University of Notre Dame honors the moral teachings of the Catholic Church. There-fore, for example, University Health Services may prescribe contraceptive medications to treat approved medical conditions, but not to prevent pregnancy. To comply with federal law, Aetna Student Health provides coverage for additional women's health products or procedures that the University objects to based on its religious beliefs. *This coverage is separate from Notre Dame.* Students enrolled in Aetna Student Health may call Aetna customer service at 877-378-9492 for more information. Students not covered by Aetna Student Health should check with their own insurance plans regard-ing federally-mandated women's health coverage." University of Notre Dame Health Services, "FAQ-Aetna Student Health,"

http://uhs.nd.edu/insurance-billing/faq-aetna-student-health-ans/ (emphasis added). There thus is no suggestion that Notre Dame is involved at all in Aetna's and Meritain's contraception coverage.

When the case was last before us, in 2014, the university's lawyer had similarly argued that Notre Dame's health plans were the "conduit" through which the employees and students obtained contraceptive coverage, making Notre Dame complicit in sin. But the lawyer also had said that his client would have no problem if each of its female employees signed and mailed to Meritain (and its students mailed to Aetna) a form saying "I have insurance through Notre Dame, but the university won't cover contraceptive services, so now you must cover them." It's difficult to see how that would make the health plan any less of a "conduit" between Notre Dame and Aetna/Meritain.

It's not even clear that by forcing Aetna/Meritain to provide Notre Dame's students and staff with contraception coverage the government is forcing Notre Dame to do business with an entity that is providing an objectionable service to the Notre Dame community. For the government authorizes a third-party administrator to "arrange for an issuer or other entity" to pay for contraception coverage and bill the expense to the government. 29 C.F.R. § 2590.715-2713A(b)(2)(ii). Notre Dame thus could ask Meritain to out-source contraception coverage for both students and staff to an entity that does no business with Notre Dame. The university would have no contractual relationship with that entity and so would not be involved even indirectly in the pro-

vision of contraceptive coverage to its students and employees.

A further problem with Notre Dame's quest for a preliminary injunction is the absence from the record of its con-tracts with Aetna and Meritain. We are not told what the du-ration of the contracts is, whether or in what circumstances they are terminable by Notre Dame before their expiration date, or what the financial consequences to the companies might be given that the federal government reimburses health insurers' contraception payouts generously. So far as contraception is concerned, health insurers are merely intermediaries between the federal government and the consumers. We are led in turn to wonder whether the government—which rarely provides health services directly to patients but rather uses health care companies to provide those services as the government's agents—might without offending Notre Dame's religious scruples hire Aetna and Meritain to provide that coverage. That would be simpler and more direct than the government's shopping for other health insurance companies to be its agents in dealing with Notre Dame's students and staff.

It is irregular, moreover, for a court to be asked to enjoin nonparties. For all we know, Aetna and its subsidiary value the opportunity to provide contraception coverage with generous reimbursement by the federal government. (The record, consistent with its sparseness, contains almost nothing about Aetna or Meritain.) Their business is providing health care, health care administration, and health insurance, and Notre Dame wants unilaterally to exclude them from a possibly lucrative chunk of that

business. When the university, albeit under protest, signed and mailed the exemption form, Aetna and Meritain reasonably believed that they had an economic opportunity—that for the first time they would be providing contraceptive coverage to the Notre Dame community. (Remember that before the Affordable Care Act was passed they provided no such coverage to the community.) They have had no opportunity to intervene in the district court, where proceedings have been suspended pending Notre Dame's appellate submissions culminating in this case.

Notre Dame takes particular umbrage at the regulation under the Affordable Care Act which states that "if the eligible organization provides a copy of the self-certification [EBSA Form 700] of its objection to administering or funding any contraceptive benefits … to a third party administrator [Meritain], the self-certification shall be an instrument under which the plan is operated, [and] shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds." 29 C.F.R. § 2510.3-16(b). (What a mouthful!) Notre Dame treats this regulation as having made its mailing of the certification form to its third-party administrator (Meritain) the *cause* of the provision of contraceptive services to its employees in violation of its religious beliefs. That's not correct. Since there is now a federal right, unquestioned by Notre Dame, to contraceptive ser-vices, the effect of the university's

exercise of its religious exemption is to throw the entire burden of administration on the entities (Aetna and Meritain) that now provide contraceptive coverage to Notre Dame's students and staff. The university is permitted to opt out of providing federally mandated contraceptive services, and the federal government determines (enlists, drafts, conscripts) substitute providers, and it is not surprising that they are the providers who already are providing health services to university students and staff.

The university argues that by conditioning its right not to provide contraceptive coverage for its students and staff on its signing EBSA Form 700 and giving copies to Aetna and Meritain, the government has, in violation of RFRA, "substantially burden[ed] a person's exercise of religion" (the university is a nonprofit corporate "person"; cf. 1 U.S.C. § 1; *Korte v. Sebelius*, 735 F.3d 654, 674 (7th Cir. 2013)), and that no "compelling governmental interest" justifies that burdening. It notes that the Catholic concept of "scandal" forbids the encouragement (equivalent to aiding and abetting) of sinful acts; a 2013 affidavit by Notre Dame's executive vice-president defines "'scandal' … in the theological context … as encouraging by words or example other persons to engage in wrongdoing." Of course in invoking the exemption the university also throws the entire administrative and financial burden of providing contraception on the health in-surer and third-party administrator, which are secular organizations that unlike the university have no aversion to providing contraceptive coverage. The result is to lift a bur-den from the university's shoulders.

Alternatively Notre Dame charges that the government has "coerce[d] [it] into serving as the crucial link between contraceptive providers and recipients." That's a recursion to the "conduit" theory, and ignores that as a result of the university's signing the exemption form, students and staff now deal directly with Aetna and Meritain, bypassing Notre Dame. It is federal law, rather than the religious organization's signing and mailing the form, that requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services. By re-fusing to fill out the form Notre Dame would subject itself to penalties, but Aetna and Meritain would still be required to provide the services to the university's students and employees.

Notre Dame says no—that had it not filled out the form, Meritain wouldn't have been *authorized* to provide contraceptive services because it would have been a "plan administrator" under section 3(16) of ERISA, 29 U.S.C. § 1002(16), and thus not a plan fiduciary entitled to make expenditures (as for contraception coverage) on behalf of the plan. The university argues that it alone is authorized to designate a plan fiduciary, 29 U.S.C. § 1102(a)(2), and that it made that designation in the form that it mailed to the company and thus is complicit in the provision of contraceptives to the university's staff. This version of Notre Dame's "triggering" argument does not apply to Aetna, which is the students' health insurer and so already a plan fiduciary, 29 U.S.C. § 1002(21)(A), required therefore by the Affordable Care Act to provide contraceptive coverage to plan members whether or not Notre Dame signs the form.

45 C.F.R. §§ 147.130(a)(1)(iv), 147.131(f). Even as to Meritain, although "many agreements between third party administrators and plan sponsors prohibit third party administrators from serving as fiduciaries," "Coverage of Certain Preventive Services Under the Affordable Care Act," *supra*, 78 Fed. Reg. at 39879, "many" is not "all" or even "most." Notre Dame has presented no evidence that its contract with Meritain forbids the latter to be a plan fiduciary (remember that the contract is not in the record).

Nor has the university been ordered to name Meritain as a plan fiduciary. Rather, the signed form "*shall be treated as* a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered." 29 C.F.R. § 2510.3-16(b) (emphasis added). Treated and designated by whom? By the government. The delivery of a copy of the form to Meritain reminds it of an obligation that the *law*, not the university, imposes on it—the obligation to pick up the ball if Notre Dame decides, as is its right, to drop it. Notre Dame's signing the form no more "triggers" Meritain's obligation to provide contraceptive services than a tortfeasor's declaring bankruptcy "triggers" his co-tortfeasors' joint and several liability for damages. Meritain must provide the services no matter what; signing the form simply shifts the financial burden from the university to the government, as desired by the university.

Suppose the United States, like the United Kingdom, Canada, and many other foreign nations, had a "single payer" health care system. In such a system, the government pays the cost of specified medical services (if the United States had such a

system, it would be the equivalent of Medicare for everyone), rather than employers, health insurers, and patients, though patients may be charged directly for some of the expense of the medical care provided by the system, as distinct from indirectly through taxes. If our hypothetical single-payer system paid the full expense of female contraceptives, Notre Dame couldn't argue that the system placed a "substantial burden" on the university's compliance with Catholic doctrine, for Notre Dame does not deny the existence of the legitimate secular interests noted at the outset of this opinion that justify a federal program of paying for contraceptive expenses. (For a summary of those interests, see "Coverage of Certain Preventive Services Under the Affordable Care Act," *supra*, 78 Fed. Reg. at 39872–73.) It even advised the district court that to "achieve its asserted interests without forcing Notre Dame to violate its religious beliefs" the government could "directly provide contraceptive[s]" to the university's staff and students or, alternatively, "directly offer insurance coverage for contraceptive services." The consequence in either case would be a single-payer system for contraceptives. The main difference between such a system and the Affordable Care Act is that under the Act the government, instead of providing medical services directly, uses private insurance providers and health plan administrators as its agents to provide medical services subsidized by the government.

If the government is entitled to require that female contraceptives be provided to women free of charge, it is un-clear how signing the form that declares Notre Dame's authorized refusal to pay for contraceptives

for its students or staff, and its mailing the authorization document to those companies, which under federal law are obligated to pick up the tab, could be thought to "trigger" the provision of contraceptive coverage.

But we must—we have been ordered by the Supreme Court to—consider the bearing on our analysis of *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). The case (anticipated by our decision in *Korte v. Sebelius*, *supra*) involved three closely held for-profit corporations whose owners objected on religious grounds to having (by virtue of the contraception provisions of the Affordable Care Act and the regulations issued under it) to provide insurance coverage for their employees' purchase of contraceptives that can destroy a fertilized ovum, such as "morning after" pills and intrauterine contraceptive devices (IUDs); the owners' objections were thus objections not to contraceptives as such but to what they considered to be abortifacients. The question was whether RFRA should be interpreted to apply to nonreligious institutions owned by persons having sincere religious objections to their institutions' having to comply with the ACA's contraceptive regulations. The Court held that it should be so interpreted, and therefore the institutions would be entitled to the "accommodation," that is, to fill out form FSBA 700 and mail it to their health insurers: "HHS has already established an accommodation for nonprofit organizations with religious objections. Under that accommodation, the organization can self-certify that it opposes providing coverage for particular contraceptive services. If the organization makes

such a certification, the organization's insurance issuer or third-party administrator must '[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan' and '[p]rovide separate payments for any contraceptive services required to be covered' without imposing 'any cost-sharing requirements … on the eligible organization, the group health plan, or plan participants or beneficiaries.'" 134 S. Ct. at 2782 (citations and cross-reference omitted). This of course is what Notre Dame did in our case; the companies in the *Hobby Lobby* case did it without protesting—which shows how different the two cases are. The companies in Hobby Lobby *requested* the accommodation; Justice Kennedy, concurring in *Hobby Lobby*, described the accommodation as an "existing, recognized, workable, and already implemented framework to provide coverage" for employees of "an objecting employer." 134 S. Ct. at 2786. Notre Dame, in contrast, deems the accommodation a violation of its religious rights.

The Supreme Court did leave open in *Hobby Lobby* the possibility that the accommodation sought and obtained there would not prevent religious beliefs or practices from being substantially burdened in some cases. But it gave no examples; perhaps it remanded our case for further consideration of that possibility. We've suggested in this opinion that Notre Dame could as an alternative to the official accommodation direct Meritain to delegate to companies that have no contractual relationship with Notre Dame (as Aetna and Meritain do) the provision of contraception coverage to the university's students and staff. Then Notre Dame would be outside the loop.

Notre Dame does note possible alternatives, such as a single-payer system in which Notre Dame women would apply directly to the government for reimbursement of their costs of buying contraceptives. But at this stage in the litigation, with no trial having been conducted, we have no basis for concluding that any of the university's proposed alternatives would avoid imposing an unreasonable cost either on the government or on Notre Dame's students and employ-ees. The government, as we said, typically provides medical services, including reimbursement of costs incurred by medical providers, indirectly, through health insurance companies such as Aetna. Does Notre Dame expect the government to establish a federal contraception agency to which Notre Dame women should send the bills for the contraceptives they buy? Alternatively, must every woman who wants re-imbursement of contraceptive costs pick a health insurance company, maybe on the basis of a Google search, to contract with? This seem to be what the university has in mind when it says in its position statement that it has no "objection to a system in which its employees or students coordinated with an *independent* insurer to provide coverage that 'would not involve Notre Dame'" (emphasis in original). But because it's a bother for a person to shop for the "best" contraceptive coverage, the proposed solution would reduce the number of women with such coverage, compared to their being entitled to such coverage automatically by virtue of being Notre Dame students or employees. See Brigitte C. Madrian & Dennis F. Shea, "The Power of Suggestion: Inertia in 401(k) Participation and

Savings Behavior," 116 *Quarterly Journal of Economics* 1149 (2001), comparing employee participation in employer-sponsored savings plans under "opt-in" and "opt-out" enrollment and finding that there is much greater participation when one has to opt out in order to forgo it.

The Supreme Court pertinently observed in its *Hobby Lobby* opinion that the official accommodation (the accommodation that Notre Dame wants to escape from) would not impede "women's receipt of benefits by requiring them to take steps to learn about, and to sign up for, a new government funded and administered health benefit." 134 S. Ct. at 2783. So far as we can tell from an undeveloped record, the alternatives suggested by Notre Dame would impede the receipt of such benefits.

Notre Dame says in its position statement that the government has "*many* alternative ways of providing free contraceptive coverage without using the health plans of objecting religious non-profits as the conduit" (emphasis added). Put to one side the question in what sense students and staff dealing directly as they now do with Aetna and Meritain are "using" Notre Dame's health plans—plans that exclude contraception coverage. Our present concern is that Notre Dame has thus far failed to explain the "many alternative ways" (elsewhere it refers to "the myriad ways" or "any number of ways" in which the government can provide free contraceptive coverage to Notre Dame's students and staff)—and it admits that it (that is, Notre Dame) "opposes many of these alternatives on policy grounds."

It lists the following "myriad ways": The government could

(i) directly provide contraceptive services to the few individuals who do not receive it under their health plans;

(ii) offer grants to entities that already provide contraceptive services at free or subsidized rates and/or work with these entities to expand delivery of the services;

(iii) directly offer insurance coverage for contraceptive services;

(iv) grant tax credits or deductions to women who purchase contraceptive services; or

(v) allow Notre Dame and other Catholic non-profit organizations to comply with the Mandate [what we are calling the accommodation or official accommodation] by providing coverage for methods of family planning consistent with Catholic beliefs (i.e., Natural Family Planning training and materials).

Number v is not contraception at all; iv elides all consideration of the costs and complications of the administrative machinery for providing tax incentives to consumers; options i through iii similarly would involve cumbersome administrative machinery and at the same time impose a burden on Notre Dame's female students and employees who want to obtain contraceptives.

Nor does Notre Dame explain how a government pro-gram that directly or indirectly provided contraception coverage to Notre Dame employees—as

Notre Dame suggests—would avoid complicity in sin. Were Notre Dame to hire an unemployed person who, by virtue of becoming employed by Notre Dame, obtained contraception coverage for the first time, would not the university be "triggering" the new employee's access to contraception?

We point out, finally, that a religious institution does not have to sign FSBA 700 in order to exempt itself from the requirement of providing contraceptive coverage to employees and (if the institution is a college or university) students. It can in the alternative notify the Department of Health and Human Services. That was the alternative chosen by another institution of higher learning that was unwilling to provide contraceptive coverage or even sign the FSBA 700. In *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014) (per curiam), the Supreme Court said that "if the applicant informs the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services, the respondents are enjoined from en-forcing against the applicant the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of appellate review. To meet the condition for injunction pending appeal, the applicant need not use the form prescribed by the Government, EBSA Form 700, and need not send copies to health insurance issuers or third-party administrators." We assume that Notre Dame could ask Aetna and Meritain to ignore its submission to them of the signed FSBA 700, and instead could itself inform the Secretary of Health and Human Ser-vices

of its desire to be exempt on religious grounds from providing contraceptive coverage; undoubtedly the Secretary would agree.

Notre Dame tells us that it likewise objects to that alter-native. But based on the sparse record before us, there is a strong argument that given the government's legitimate interest in the provision of contraceptive coverage to women without cost to them, notice to the government would strike the proper balance between legitimate governmental and sincere religious interests. That was the accommodation sought and received by Wheaton College.

We are put in mind of *Bowen v. Roy*, 476 U.S. 693 (1986). Roy objected that any use of his daughter's Social Security number would substantially burden his religious beliefs be-cause he believed that use of that unique identifier would harm her spirit. He wanted an accommodation that would relieve him of the burden of providing the number in his applications for welfare and food stamps and prevent the government from using the number in its internal administration. The Supreme Court refused. It said that "Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets." *Id.* at 700. The very word "accommodation" implies a balance of competing interests; and when we compare the burden on the government or third parties of having to establish some entirely new method of providing contraceptive coverage with the burden on Notre Dame of simply notifying the government that the

ball is now in the government's court, we cannot conclude that Notre Dame has yet established its right to the injunctive relief that it is seeking before trial. The mandate to cover contraceptive care as part of any broad health insurance package provided by employers (or in the case of educational institutions, students as well) was intended to minimize financial, administrative, and logistical obstacles to such coverage. See 78 Fed. Reg. 39888 (July 2, 2013), rejecting alternative proposals and explaining the importance of minimizing costs and logistical and administrative obstacles to contraceptive coverage; see also *Priests for Life v. U.S. Dept. of Health & Human Services*, *supra*, 772 F.3d at 265. All of Notre Dame's suggested alternatives would impose significant financial, administrative, and logistical obstacles by requiring women to sign up for separate coverage either with a government agency or with another private insurer. Such obstacles were considered by the Supreme Court in *Hobby Lobby* in support of the same accommodation that Notre Dame re-fuses to accept.

We emphasize in closing the tentative character of the analysis in this opinion. The record is insufficiently developed to enable us to rule definitively on Notre Dame's claims. The burden of establishing an entitlement to a preliminary injunction was of course on the university, not on the government. The burden has not been carried. Chief Judge Simon's denial of preliminary relief is therefore once again

AFFIRMED.

HAMILTON, *Circuit Judge*, concurring. I join Judge Posner's opinion in full. Notre Dame is not entitled to preliminary injunctive relief at this point. While the ultimate decision on the merits of this case remains uncertain, equitable considerations weigh against a grant of a preliminary injunction now. An injunction would disrupt the status quo and temporarily cut off contraceptive coverage for hundreds or thousands of women.

What this case needs now is a trial on the merits where the relevant factual issues can be explored in depth. The limited factual record before us was made in the district court on an emergency basis in December 2013. That record was also made without the participation of the intervenors, who would be affected most directly by the injunction Notre Dame seeks. Since that time, also, the legal and factual landscapes shaping the issues have shifted a good deal.

Where the law is evolving rapidly and the facts are complex, the better course is usually full exploration of the evidence and thorough findings of fact by the district court, rather than reliance on sweeping legal doctrines and hypothesized or assumed facts. See *Lalonde v. Textron, Inc.*, 369 F.3d 1, 6 (1st Cir. 2004) (vacating in part dismissal of ERISA case challenging actions of employee stock ownership plan and allowing for factual development where law was "neither mature nor uniform"); *Doe v. Walker*, 193 F.3d 42, 46 (1st Cir. 1999) (Boudin, J.) (vacating dismissal on issue with "important social and moral implications" where further factual development might make it unnecessary to decide hard case and in any event would be "likely to contribute to a more

sensitive assessment of what the law 'is' (which, absent decisive precedent, means what it 'should be')"); *Nelson v. IPALCO Enterprises, Inc.*, 2005 WL 1924332, at *3 (S.D. Ind. Aug. 11, 2005) (denying cross-motions for summary judgment to allow further factual development where applicable law was "emerging, controversial, and highly fact-sensitive"). The district court is best suited for those responsibilities even where—and perhaps especially where—the appellate courts are still debating the applicable law.

For now, however, the Supreme Court has ordered us to reconsider our earlier interlocutory decision in light of *Bur-well v. Hobby Lobby Stores, Inc.*, 573 U.S. —, 134 S. Ct. 2751 (2014). The accommodation for religious not-for-profits like Notre Dame played a pivotal role in *Hobby Lobby*, but not in a way that helps Notre Dame in this case. Hobby Lobby Stores is a for-profit corporation that was not eligible for this accommodation. The very existence of the accommodation for religious not-for-profits, however, persuaded the Supreme Court that the government could achieve its purpose of making contraceptives available to employees and their families without infringing on Hobby Lobby's religious beliefs. 134 S. Ct. at 2782.

The Court's conclusion focused on how the accommodation allowed the employer to avoid paying for contraceptives contrary to the owners' religious beliefs while still making them available to employees and their families in a convenient and seamless way. In praising the accommodation, the Court explained that the effect of the accommodation on employees "would be precisely zero. Under that

accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing." 134 S. Ct. at 2760. Justice Kennedy's concurring opinion embraced the accommodation as a fully satisfactory alternative for accomplishing the government's objectives without infringing on Hobby Lobby's religious beliefs. 134 S. Ct. at 2786–87 (Kennedy, J., concurring). He also made clear that neither he nor the other Justices in the majority expected the government to create "a whole new program or burden on the Government" to provide the accommodation needed by the for-profit employer-plaintiffs. *Id.*

The accommodation for religious not-for-profits thus made it fairly easy for the *Hobby Lobby* Court to find that a less restrictive and equally effective alternative was available to accomplish the government's purposes, which the Court assumed were compelling. The Court's solution was to extend the accommodation to religious owners of closely held businesses.

What does *Hobby Lobby* teach us about this case? In deciding *Hobby Lobby*, the Supreme Court was well aware of pending lawsuits like this one, in which religious not-for-profits have challenged the accommodation itself as violating their rights under the Religious Freedom Restoration Act. The majority opinion referred to this category of cases in footnote 9 and wrote later "We do not decide today whether an approach of this type [i.e., the accommodation] complies with RFRA for purposes of all religious claims." 134 S. Ct. at 2782 & n.40.

Despite this inconclusive comment, it is useful to consider in turn the three principal issues under RFRA in light of the Court's remand order after *Hobby Lobby*. Those issues are: (1) "substantial burden" on the exercise of religion; (2) compelling governmental interests; and (3) less restrictive alternatives.

1. *Substantial Burden*: Notre Dame reads *Hobby Lobby* as resolving conclusively in its favor the issue whether the accommodation substantially burdens its exercise of its religion. In *Hobby Lobby*, the Court found that the Affordable Care Act's requirements for contraceptive coverage by for-profit employers substantially burdened the plaintiffs' exercise of religion. The employers were required by law to contract and pay for contraceptive coverage to which the employers' owners objected on sincere religious grounds. The alternatives to compliance would have imposed stiff financial consequences, which the Court deemed a substantial burden. 134 S. Ct. at 2776–77. Notre Dame faces essentially the same financial consequences if it refuses to certify its eligibility for the religious accommodation.

Notre Dame finds most helpful to its position the *Hobby Lobby* rejection of the government's argument that the role of the employer in contracting and paying for contraceptive coverage was too remote from an employee's use of contraceptives to impose a substantial burden on the exercise of religion. Federal courts had no business addressing whether the plaintiffs' religious beliefs about their moral complicity were reasonable. *Id*. at 2778. The Court explained:

> This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.

134 S. Ct. at 2778 (footnote omitted).

The accommodation for religious not-for-profits accepts an employer's religious beliefs and provides a mechanism to provide coverage to employees and their families, while making sure that the employer need not contract, arrange, pay, or refer for the health care it finds objectionable on religious grounds. Notre Dame asserts, however, that the mere act of requesting the exemption substantially burdens its religious exercise because it still has an attenuated role in causing its employees and students to receive the objectionable coverage. Citing *Hobby Lobby*, Notre Dame asserts that its opinion or belief is beyond the reach of a federal court, apart from questions of sincerity.

It is not obvious that the reasoning of *Hobby Lobby* on the substantial burden issue extends to this case. There are important differences between the cases: Notre Dame challenges not the general rule but the accommodation itself, and it attempts to prevent the

government from arranging for a substitute for the employer to pay for contraceptive care. Notre Dame also contends, in effect, that its religious belief can substitute for legal analysis regarding the operation of federal law.

Any student of United States history learns the central roles that religious faith and tolerance have played in the settlement of this land and in the founding of the British colonies and the modern States and the federal Republic. We have a long tradition of governing in ways that accommodate the free exercise of religion. Special treatment of religious faith and practice abounds. From conscientious objector status in the military draft to federal and state tax codes, from compulsory school attendance laws to school lunch menus, from zoning law to employment law and even fish and wildlife rules, our governments at every level have long made room for religious faith by allowing exceptions from generally applicable laws. Through such exceptions and accommodations, we respect diverse faiths, and we govern with reasonable compromises that avoid unnecessary friction between law and faith.

As we pointed out in our first opinion in this case, the most extraordinary feature of this lawsuit is Notre Dame's claim that the process of requesting the accommodation is itself a substantial burden on its religious exercise. *Notre Dame v. Sebelius*, 743 F.3d 547, 557–58 (7th Cir. 2014). True, there are rare cases in which courts have considered the possibility that an accommodation process itself might be too prolonged, intrusive, ineffective, and/or otherwise burden-some. See, e.g., *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*,

396 F.3d 895 (7th Cir. 2005), and cases cited there dealing with land-use decisions, and *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008), and cases cited there, dealing with processes for seeking permits to kill protected wildlife for use in Native American religious practices.

The accommodation in this case, however, poses no such burdens. To take advantage of the accommodation, so that Notre Dame can avoid contracting, paying, arranging, or referring for the objectionable contraceptive care, a university official must only fill out a simple form asserting that Notre Dame is a not-for-profit employer that objects on religious grounds to the law's contraceptive coverage requirements. The official must then send the form to either the Department of Health and Human Services or the insurer or third-party administrator. Notre Dame has already done so, and it need do nothing more.

As Judge Posner's opinion explains, *Bowen v. Roy*, 476 U.S. 693 (1986), weighs against Notre Dame's claim of a substantial burden here. Roy had objected on religious grounds to the government's use of his daughter's Social Security number to administer federal benefits for the family. The Supreme Court rejected the challenge, holding: "The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* at 699.

Notre Dame's position is analogous. At this point, Notre Dame has requested the accommodation and provided the government with contact information for

Aetna and Meritain. The government requires no further action from Notre Dame. The government has informed Aetna and Meritain of their federal obligations to provide contraceptive coverage that Notre Dame has been exempted from providing. The government's steps to have others substitute for Notre Dame are parallel to the internal procedures at issue in *Roy*.

Notre Dame disagrees, arguing that only it can answer what it says is the religious question of whether its religious exercise is substantially burdened by the government's actions. But the Court rejected precisely that argument when it was advanced by Roy. "The Federal Government's use of a Social Security number for Little Bird of the Snow does not itself in any degree impair Roy's 'freedom to believe, ex-press, and exercise' his religion." 476 U.S. at 700–01.

While the Court acknowledged that "Roy's religious views may not accept this distinction between individual and governmental conduct," *id*. at 701 n.6, the Court concluded that this was ultimately a legal question, not a religious one: "It is clear, however, that the Free Exercise Clause, and the Constitution generally, recognize such a distinction; for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference." *Id*. Under *Roy*, whether the government is causing a substantial burden on a person's religious exercise is a question of federal law. Accord, *Geneva College v. Secretary of the United States Dep't of Health and Human Services*, 778 F.3d 422, 436–38 (3rd Cir. 2015) (courts must consider substantial burden issue under

RFRA); *Priests for Life v. Burwell*, 772 F.3d 229, 247–49 (D.C. Cir. 2014); *Michigan Catholic Conference v. Burwell*, 755 F.3d 372, 385–87 (6th Cir. 2014), remanded, 2015 WL 1879768 (April 27, 2015).

Notre Dame argues, however, that the consequence of its certification and exemption imposes the substantial burden. The consequence is that federal law then requires other entities (Meritain and Aetna) to step in as substitutes to provide contraceptive coverage directly to Notre Dame employees and students, respectively, and to their families. Notre Dame objects to this consequence on religious grounds and says it could avoid this consequence only by incurring burdensome financial penalties.

The problem with this argument is that regardless of Notre Dame's choice—to provide contraceptive coverage, to invoke the accommodation for religious not-for-profits, or even not to provide any health insurance coverage at all—those employees and students would receive contraceptive coverage through some form of health insurance. As we and other circuits have pointed out, their coverage results *from federal law*, not from Notre Dame's actions.

This is an issue not of moral philosophy but of federal law. Federal courts are not required to treat Notre Dame's erroneous legal interpretation as beyond their reach—even if that interpretation is also a sincere and religious belief. Notre Dame is not entitled to nullify the law's benefits for others based

on this mistake of law, which is the foundation of its claim of a substantial burden.[1]

As in *Roy*, Notre Dame's "religious views may not accept this distinction." 476 U.S. at 701 n.6. But the courts cannot substitute even the most sincere religious beliefs for legal analysis. To do so would "afford an individual a right to dictate the conduct of the Government's internal procedures," which the Court has expressly rejected. *Id*. at 700.

A comparison to the military draft helps to illustrate the extraordinary nature of Notre Dame's objection to the government's accommodation and finding of substitutes for it. Federal law allows for exemption from military training and service for any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 50 App. U.S.C. § 456(j). (The process for claiming conscientious objector status is far more demanding than the accommodation to which Notre Dame objects, but that's not my focus here.) Suppose a person's religious faith leads him to believe that it is wrong for people to engage in war. He applies for conscientious objector status. The local draft board grants him the exemption.

But suppose a board member then points out that be-cause the objector will not be drafted, someone else will be drafted in his place. He objects again, asserting, much as Notre Dame does here, that if his

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[1] Accord, Geneva College, 778 F.3d at 437 (3rd Cir. 2015); Priests for Life, 772 F.3d at 252; Michigan Catholic Conference, 755 F.3d at 387; 78 Fed. Reg. 39870, 39876 (July 2, 2013) (final rules explaining that obligations of insurers and third-party administrators are imposed by federal law).

exemption means someone else must substitute for him to engage in wrongdoing, he will be morally responsible for it and his religious exercise will be substantially burdened. Citing RFRA, he therefore demands that he be exempted *without a substitute*.

As we said in our prior opinion, that seems a "fantastic suggestion." *Notre Dame*, 743 F.3d at 556. Yet Notre Dame has embraced that reasoning. It argues that national catastrophe could be avoided by treating the substitute draftee as the least restrictive means to achieve a compelling govern-mental purpose. See Notre Dame Rule 54 Statement at 11 n.4. This seems wrong in two fundamental ways.

First, for reasons explained above, the arrangements the government makes to find substitutes for those given the benefit of a religious exemption are imposed as a matter of federal law, not as a result of the exemption itself. The party claiming the exemption is not entitled to raise a religious objection to the arrangements the government makes for a substitute. See *Geneva College*, 778 F.3d at 439 n.14 (making similar point with example of employee who asks for time off to accommodate his religion, but who then objects to employer's substitution for him). And not coincidentally, the government's ability to find substitutes fits well with the Supreme Court's decision, just a few days after it decided *Hobby Lobby*, in a RFRA case much more similar to this one. In *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), the Court issued an interim order allowing another religious college to invoke the exemption by notifying the government rather than its insurer. The Court pointed out: "Nothing in this order precludes the Government from relying on this notice, to the

extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act." *Id*. at 2807. In other words, the Court's order allowed the government to pass the notice on to the insurer so that the insurer could comply with its obligations under federal law. That order left Wheaton College essentially where Notre Dame is now.

Second, if even such mistaken and attenuated objections were sufficient to invoke RFRA's stringent least-restrictive-means test, fair governance where the law imposes burdens on individuals would become nearly impossible. In the draft context, the conscientious objector could argue, much as Notre Dame does here, in favor of an all-volunteer military as a less restrictive means. Should arguments for such radical restructuring of government programs be sufficient under RFRA? And in contexts not involving national security and defense, would government accommodations of religion that require finding substitutes all have to satisfy compel-ling-interest, least-restrictive-means scrutiny?

For these reasons, RFRA should not be understood to recognize such mistaken views about substitutes as "substantial burdens" on religious belief. Accord, *Geneva College*, 778 F.3d at 438; *Priests for Life*, 772 F.3d at 251, 256; *Michigan Catholic Conference*, 755 F.3d at 388; see generally *Bowen v. Roy*, 476 U.S. at 699–700; *Kaemmerling v. Lappin*, 553 F.3d 669, 679–80 (D.C. Cir. 2008) (prisoner's religious exercise not burdened by government's analysis of DNA taken from his tissue sample).

2. *Compelling Governmental Interest*: Even if Notre Dame can ultimately show a substantial burden on its religious belief, the next major issue under RFRA is whether imposing the burden on Notre Dame furthers a "compelling govern-mental interest." 42 U.S.C. § 2000bb–1. In the abbreviated district court proceedings back in December 2013, the federal government did not contest this issue because of our ruling in *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), though the government preserved its right to dispute the issue in the future.

Hobby Lobby now shows that the government has a strong argument on the compelling-interest issue. The *Hobby Lobby* majority assumed that the burden on those plaintiffs would serve a compelling governmental interest. 134 S. Ct. at 2780. Justice Kennedy's concurring opinion made clear that he viewed the governmental interests as compelling. *Id.* at 2786 ("It is important to confirm that a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees."). And all four dissenting Justices viewed the government interests as compelling. *Id.* at 2799–2801 (Ginsburg, J., dissenting). The compelling interests include women's health, the role that access to contraception plays in enabling women to participate fully and equally in society, and significant cost savings. See 78 Fed. Reg. 39870, 39873 & nn. 22, 23, & 24 (July 2, 2013) (final rules). The D.C. Circuit has explained in detail the factual bases for the government's compelling interests. See *Priests for Life*, 772 F.3d at 257–64.

3. *Least Restrictive Means*: If the RFRA analysis proceeds to whether the accommodation for religious not-for-profits like Notre Dame is the least restrictive means of furthering the government's interest, the question demands much more exploration than was possible in the emergency proceedings in the district court back in December 2013.

The general mandate to cover contraceptive care as part of any broad health insurance package provided by employers was intended to minimize financial, administrative, and logistical obstacles to such coverage. 78 Fed. Reg. at 39888 (rejecting alternative proposals and explaining importance of avoiding incremental costs and minimizing logistical and administrative obstacles for contraceptive coverage); *Priests for Life*, 772 F.3d at 265. The accommodation for religious not-for-profits has also been designed to minimize those obstacles.

Notre Dame's suggested alternatives would all impose significant financial, administrative, and logistical obstacles by requiring women to sign up for separate coverage, either with a government agency or another private insurer, and to pay additional costs unless the government paid for the program. Such obstacles were specifically considered in *Hobby Lobby*. In debating whether the accommodation would suffice for the for-profit employers, the majority and dissent paid close attention to cost and to administrative and logistical obstacles. See 134 S. Ct. at 2782–83 (under the accommodation, plaintiffs' employees would continue to receive contraceptive coverage without cost sharing and with "minimal logistical and administrative obstacles"); *id.* at 2802 (Ginsburg, J., dissenting) (new government program

as substitute would impose obstacles to effective coverage). Those concerns about effectiveness of alternatives seem to have substantial merit. They deserve exploration in the district court.

The least-restrictive-means issue also presents a question of law for which the contours are not yet well-defined. The legal question is in essence the scope of imagination permitted in thinking of supposedly less restrictive means.

The heart of the Affordable Care Act was a decision to approach universal health insurance by expanding the employer-based system of private health insurance that had evolved in our country, rather than to substitute a new "single payer" government program to pay for health care, like the systems in place in the United Kingdom and Canada. I do not see support for Notre Dame's view that a least-restrictive-means analysis would need to consider such radically different alternatives.

In fact, Justice Kennedy's *Hobby Lobby* concurrence emphasized that the accommodation for religious not-for-profits was an "existing, recognized, workable, and already-implemented framework to provide coverage" for employees with an objecting employer. 134 S. Ct. at 2786 (Kennedy, J., concurring). In finding that the accommodation was a less restrictive alternative, Justice Kennedy noted that "the Government has not met its burden of showing that it cannot accommodate the plaintiffs' similar religious objections under this *established framework*." *Id.* (emphasis added). He also commented that accommodation was possible

"without imposition of a whole new program or burden on the Government." *Id.*

Consistent with those observations, I doubt that a hypothetical new single-payer program for contraceptives, which would require separate registration or application, would be for RFRA purposes a "less restrictive" means of achieving the government's interests. It also seems likely that such a program would impose the sort of logistical and administrative obstacles of such concern in *Hobby Lobby*.

Further fact-finding in the district court may cast the case in a different light, of course. But for all of these reasons, as well as those explained in Judge Posner's opinion, I continue to agree that Chief Judge Simon properly denied a preliminary injunction in this case.

FLAUM, *Circuit Judge*, dissenting.

By requiring health insurers to provide contraceptive coverage, the Patient Protection and Affordable Care Act ("ACA") forces Notre Dame to act in ways it says violate its religious beliefs. The resultant burden on Notre Dame's rights is substantial: because Notre Dame offers health insurance to its students, and especially because it acts as a self-insurer for its employees, the law turns Notre Dame into a conduit for the provision of cost-free contraception. It also compels Notre Dame to contract with parties—Meritain and Aetna—in a manner in which Notre Dame believes makes it complicit in moral wrong. Notre Dame's only alternative is to endure crippling fines.

In light of the Supreme Court's ruling in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)—the decision the Court cited in asking us to reconsider this case—Notre Dame has articulated a substantial burden for purposes of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*. As a result, strict scrutiny governs our consideration of Notre Dame's challenge here, and the government has the burden of demonstrating that the challenged accommodation is the least restrictive means of serving a compelling interest. In my view, the government has not satisfied that charge. Accordingly, I respectfully dissent, concluding that Notre Dame is entitled to a preliminary injunction pending the district court's decision of this case on the merits.

* * *

The Catholic Church—like all religious employers—is exempt from the ACA's contraceptive mandate. *See Hobby Lobby*, 134 S. Ct. at 2763. The U.S. Department of Health & Human Services excluded churches and religious orders from its edict, permitting them to offer employee health insurance that does not include coverage for contraception. Notre Dame seeks that same treatment, be-cause it has the same religious objections to rendering available contraceptive health coverage for those it em-ploys (and those that attend its school, in Notre Dame's case). At present, Notre Dame—as a nonprofit religious organization that opposes providing contraceptive coverage—may avail itself of what has become commonly referred to as "the accommodation," s*ee e.g.*, 45 C.F.R. § 147.131(b), the

effects of which Notre Dame says also violate its religious beliefs.

Notre Dame has two distinct roles as far as health insurance is concerned. With respect to its employees, Notre Dame acts as a self-insurer (hiring Meritain as the third-party administrator of its insurance plan). For its students, Notre Dame acts as an insurance broker (negotiating on their behalf to offer them an insurance plan through insurer Aetna). When Notre Dame invoked the accommodation, its relationship with both Meritain and Aetna changed because of the ACA. Meritain, its third-party administrator, became both authorized and required to offer contraceptive coverage to Notre Dame's employees. *See Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2814 n.6 (2014) (Sotomayor, J., dissenting) (noting that a religious university's "third-party administrator bears the legal obligation to provide contraceptive coverage *only* upon receipt of a valid self-certification" (emphasis added)). Aetna, as the insurer for the student plans, became obligated to segregate premium payments from Notre Dame's students and to provide them with contraceptive coverage at Aetna's expense, separate and apart from the insurance plan offered by the school. *See Hobby Lobby*, 134 S. Ct. at 2763 ("When a group-health-insurance issuer receives notice that one of its clients has invoked this provision, the issuer must then exclude contraceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employees beneficiaries."(citing 45 C.F.R. § 147.131(c)).

While Notre Dame is no longer obligated to *pay* for contraceptive services for its employees, it's apparent to me that, at a minimum, the ACA thrusts Notre Dame into a facilitator's role that, Notre Dame says, violates its religious beliefs by forcing it to serve as a continuing link between Meritain and the contraceptive services it provides to Notre Dame's employees.

With regard to the student health plan, there seems to be outstanding disagreement over whether Notre Dame's invocation of the accommodation "triggers" Aetna's obligation to cover student contraception. *See Wheaton Coll.*, 134 S. Ct. at 2807 (majority opinion) ("The Government contends that the applicant's health insurance issuer … [is] required by federal law to provide full contraceptive coverage regardless [of] whether the applicant" invokes the accommodation, while Wheaton College "contends, by contrast, that the obligations of its health insurance issuer ... are dependent on their receipt of notice that the applicant objects to the contraceptive coverage requirement."). *But see* 42 U.S.C. § 300gg–13(a) ("A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for— … (4) with respect to women, such additional preventive care and screenings … as provided for in comprehensive guidelines supported by the Health Resources and Services Administration … ."). But that question really is of no moment here, because Notre Dame also believes that being driven into an ongoing contractual relationship with an insurer—especially

one that Notre Dame chose—that provides its students with contraception compels it to act in contravention of its beliefs.

In Notre Dame's view, the ACA alters its relationships with both Meritain and Aetna in a way that renders Notre Dame morally complicit in the provision of contraception. Put simply, Notre Dame is too engaged in a process—the very premise of which offends its religion—that the church itself is exempted from entirely.

The majority appears to minimize the significance of Notre Dame's position by focusing on its continued objection to the mandate in the face of a proffered accommodation. I believe that any inquiry into the rationality of that position is precluded by the Supreme Court's decision in *Hobby Lobby*, which in my view underscores the legitimacy of Notre Dame's religious objection. There, as here, HHS's main argument was "basically that the connection between what the objecting parties must do … and the end that they find to be morally wrong … [was] simply too attenuated." 134 S. Ct. at 2777. However, the Supreme Court made clear that this position, at least in this narrow context, is untenable. That's because it "dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)." *Id.* at 2778 (emphasis in original).

Like the plaintiffs' challenge in *Hobby Lobby*, Notre Dame's deeply held religious beliefs about contraception and the formation and prevention of human life "implicate[] a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Id.* Notre Dame is no doubt differently situated than the *Hobby Lobby* plaintiffs, who had to directly provide contraceptive insurance. Nevertheless, the ACA also places Notre Dame in a position that contravenes its belief sys-tem. Yet the majority here sides with HHS, and "in effect tell[s] the plaintiff[] that [its] beliefs are flawed."[1] *Id.* The *Hobby Lobby* Court, however, rejected that position. *See id.* ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine … the plausibility of

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[1] To the extent the majority views Notre Dame's burden as less substantial than the burden imposed on the plaintiffs in *Hobby Lobby* (and thus not actionable under RFRA) because Notre Dame is further removed from the direct provision of contraception, I suggest that analysis is flawed. *Hobby Lobby* instructs that, once we determine a religious belief is burdened, substantiality is measured by the severity of the penalties for non-compliance. 134 S. Ct. at 2759, 2775–76. Because the contraceptive mandate forced the *Hobby Lobby* plaintiffs "to pay an enormous sum of money ... if they insist[ed] on providing insurance coverage in accordance with their religious beliefs, the mandate clearly impose[d] a substantial burden on those beliefs." *Id.* at 2779. Here, Notre Dame faces the same penalties the *Hobby Lobby* plaintiffs faced: $100 per day for each affected individual. 42 U.S.C. § 300gg-22(b)(2)(C). "These sums are surely substantial." *Hobby Lobby*, 134 S. Ct. at 2776.

a religious claim." (quoting *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 887 (1990))). And so do I.

For that reason, the *Hobby Lobby* Court had "little trouble concluding" that "the HHS contraceptive man-date 'substantially burden[ed]' the exercise of religion" in view of the plaintiffs' asserted beliefs.[2] *Id.* at 2775. The Court thus proceeded to the compelling interest compo-nent of the RFRA test. *See id.* at 2779 ("Since the HHS contraceptive mandate imposes a substantial burden on the exercise of religion, we must move on and decide whether HHS has shown that the mandate both '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.' 42 U.S.C. § 2000bb–1(b)."). In *Hobby Lobby*, "HHS assert[ed] that the contraceptive mandate serves a variety of important interests, but many of these [were] couched in very broad terms, such as promoting 'public health' and 'gender equality.'" *Id.* HHS asserted those same interests to the district court in this case. *See* Defs.' Resp. in Opp'n to Pl.'s Mot. for Pre-lim. Inj. at 15–16, *Notre*

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[2] I would be remiss not to note that just one week after the Supreme Court issued its opinion in *Hobby Lobby*, Wheaton College—which, on the basis of our first (and now vacated) decision in this case was denied a preliminary injunction in its own Seventh Circuit suit challenging the contraceptive mandate's accommodation provision—sought and was granted emergency relief by the Supreme Court. *Wheaton Coll.*, 134 S. Ct. at 2807. In granting the preliminary injunction, the Court necessarily found (at least for preliminary injunctive purposes) that the accommodation substantially burdened Wheaton College. Notre Dame challenges that same (though slightly revised) accommodation.

Dame v. Sebelius, 988 F. Supp. 2d 912 (N.D. Ind. 2013) (No. 3:13-cv-01276) ("[E]ven if the challenged regulations were deemed to impose a substantial burden on plaintiff's religious exercise, the regulations satisfy strict scrutiny because they are narrowly tailored to serve compelling government interests in *public health* and *gender inequality*." (emphases added)). The Supreme Court, however, rejected the simple assertion of such broad interests.

"RFRA … contemplates a 'more focused' inquiry: It 'requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.'" *Hobby Lobby*, 134 S. Ct. at 2779 (quoting *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal,* 546 U.S. 418, 430–31 (2006)). "This requires us to 'loo[k] be-yond broadly formulated interests' and to 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants … .'" *Id.* (quoting *O Centro*, 546 U.S. at 431). Nevertheless, the Court found it unnecessary to delve into the "features of [the] ACA that support [the] view" that the government lacks a compelling interest here (such as the fact that "many employees—those covered by grandfathered plans and those who work for employers with fewer than 50 employees—may have no contraceptive coverage without cost sharing at all"), be-cause—even assuming that the government's interest is a compelling one—HHS failed to demonstrate "that the contraceptive mandate is 'the least restrictive means of furthering'" it. *Id.* at 2780 (citing § 2000bb–1(b)(2)).

As the Court noted, "[t]he least-restrictive-means standard is exceptionally demanding," and it is the government's burden to demonstrate that "it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Id.* Here again, the majority in our case sets aside *Hobby Lobby*, instead assigning Notre Dame this burden because it seeks a preliminary injunction. But Hobby Lobby, too, sought a preliminary injunction. *Hob-by Lobby Stores Inc. v. Sebelius*, 723 F.3d 1114, 1143 (10th Cir. 2013) ("[E]ven at the preliminary injunction stage, RFRA requires *the government* to demonstrate that mandating a plaintiff's compliance with the contraceptive-coverage requirement is 'the least restrictive means of advancing a compelling interest.'" (emphasis in original) (citing *O Centro,* 546 U.S. at 423)), *aff'd*, 134 S. Ct. 2751. And the law in our own circuit is clear on this point. *See Korte v. Sebelius*, 735 F.3d 654, 673 (7th Cir. 2013) (noting, in the preliminary injunction context, that "[o]nce a RFRA claimant makes a prima facie case that the application of a law or regulation substantially burdens his religious practice, the burden shifts to the government to justify the burden under strict scrutiny"). Indeed, the government—in this very case—conceded in its brief to the district court that *Korte* dictates the issuance of a preliminary injunction if the court finds a substantial burden on Notre Dame's religious beliefs. *See* Defs.' Resp. in Opp'n to Pl.'s Mot. for Prelim. Inj., *supra*, at 15–16 ("Defendants recognize that a majority of the Seventh Circuit rejected these arguments [that the regulations satisfy strict scruti-ny because they are narrowly tailored to serve compel-ling governmental

interests in public health and gender equality] in *Korte*, and that this Court is bound by that decision."). In *Korte*, we granted the preliminary injunction because the government had made minimal efforts "to explain how the contraception mandate is the least restrictive means of furthering its stated goals of promoting public health and gender equality." 735 F.3d at 687. *Korte*, of course, was our iteration of *Hobby Lobby*, and it remains the law of this circuit—yet it appears not to instruct the majority.

The majority observes that Notre Dame has presented "possible alternatives" to the accommodation that would not infringe its religious exercise. Yet it concludes that Notre Dame has failed to present an adequate proposal for how the government can efficiently (and conveniently) implement and administer an alternative program. But to reiterate, *Hobby Lobby* expressly informs—consistent with *Korte*—that it is the government's, not Notre Dame's, burden to establish that the accommodation is the least restrictive means of advancing a compel-ling government interest. Moreover, the suggestion by the majority that any alternative method of advancing the government's interests would likely be too costly or cumbersome to the government turns a blind eye to the Supreme Court's latest teachings. What matters under RFRA is whether the means by which the government is attempting to advance its compelling interest is the least burdensome on Notre Dame's religious beliefs. Accordingly, RFRA may require the government to start over and "creat[e] … entirely new programs," and it "may in some circumstances require the

Government to expend additional funds to accommodate citizens' religious beliefs." *Hobby Lobby*, 134 S. Ct. at 2781. For those reasons, the Supreme Court made clear that, in this sphere, "[t]he most straightforward way" of serving the Government's interests would be for it to assume the cost of providing contraception "to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." *Id.* at 2780. Here, as in *Hobby Lobby*, "HHS has not shown … that this is not a vi-able alternative." *Id.* For that reason, I would reverse the decision of the district court denying Notre Dame a preliminary injunction.

APPENDIX G

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 24, 2015
Before
RICHARD A. POSNER, *Circuit Judge*
JOEL M. FLAUM, *Circuit Judge*
DAVID F. HAMILTON, *Circuit Judge*

No. 13-3853

UNIVERSITY OF NOTRE DAME, *Plaintiff-Appellant,* *v.* SYLVIA MATHEWS BURWELL, Secretary of U.S. Department of Health and Human Services, *et al.*, *Defendants-Appellees,* *and*	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division. No. 3:13-cv-01276-PPS-CAN Philip P. Simon, *Chief Judge*.

JANE DOE 3,
Intervening-
Appellee.

O R D E R

On July 2, 2015, plaintiff-appellant filed a petition for rehearing and for rehearing *en banc*. All the judges on the original panel have voted to deny rehearing and none of the court's active judges has requested a vote on whether to rehear the case *en banc*.[*] The petition is therefore DENIED.

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[*] Judge Ann Claire Williams did not participate in the consideration of this petition for rehearing.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNIVERSITY OF NOTRE DAME, ***Plaintiff*,** ***v.*** **KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the U.S. Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF THE TREASURY,** ***Defendants.***	**Civil Action No.: 3:13-cv-1276** **Electronically Filed**

AFFIDAVIT OF JOHN AFFLECK-GRAVES

I, John Affleck-Graves, being duly sworn, declare and state as follows:

1. I am over the age of twenty-one (21) and competent to make this declaration. I submit this affidavit in support of the University of Notre Dame's ("Notre Dame" or "University") Motion for Temporary Restraining Order and Motion for Preliminary Injunction in the above-captioned matter.

2. I am employed as the Executive Vice President at the University of Notre Dame. I have been so employed since April 2004. I hold the Notre Dame Chair in Finance and previously served as Vice President and Associate Provost. My responsibilities include the administration of the annual operating budget and the endowment. I also oversee human resource activities of a workforce of more than 5,000 employees and help direct the activities of the university, as well as implement its mission as directed by the Board, the President, and the administration.

3. The facts set forth herein are based upon my personal knowledge and information available to me in the above-referenced capacity, and if I were called upon to testify to them, I could and would competently do so.

I. University of Notre Dame

4. Notre Dame is a nonprofit Indiana corporation with a principal place of business in Notre Dame, Indiana. It is organized exclusively for charitable, religious, educational, and scientific purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code. It is also an educational organization

under Section 170(b)(1)(A)(ii) of the Internal Revenue Code.

5. Notre Dame is an academic community of higher learning, organized as an independent, national Catholic research university. Founded in 1842 by a priest of the Congregation of Holy Cross, Notre Dame seeks to provide a Catholic educational environment that prepares students spiritually and intellectually for their future vocations and careers.

6. Notre Dame's Catholic educational mission is furthered by its leadership. Each of Notre Dame's seventeen Presidents has been a priest from the Congregation of Holy Cross, United States Province of Priests and Brothers. Current-President Rev. John I. Jenkins has articulated a vision of Notre Dame as a preeminent research university with a distinctive Catholic character and an unsurpassed commitment to undergraduate education.

7. Notre Dame currently serves more than 11,500 undergraduate and graduate students annually and it is consistently rated one of the best universities in the country.

8. In total, Notre Dame employs over 5,000 full- and part-time employees and is the largest employer in St. Joseph County, Indiana.

9. Offering over 60 undergraduate majors and 70 graduate programs, including the nation's oldest Catholic law school, Notre Dame pursues the highest academic achievement in every discipline, integrating faith and reason in pursuit of truth.

10. Notre Dame provides a distinctive voice in higher education that is at once rigorously

intellectual and unapologetically committed to the moral principles and ethics of the Catholic Church.

II. Notre Dame's Religious Beliefs

11. Faith is at the heart of Notre Dame's educational mission. In accordance with the apostolic constitution *Ex Corde Ecclesiae*, which governs and defines the role of Catholic colleges and universities, Notre Dame embraces the richness of the Catholic intellectual tradition, "consecrat[ing] itself without reserve to the cause of truth." It aims to provide a forum where, through free inquiry and open discussion, the various lines of Catholic thought may intersect with the arts, sciences, and every other area of human scholarship.

12. In accordance with the *Ex Corde Ecclesiae*, Notre Dame believes and teaches that "besides the teaching, research and services common to all Universities," it must "bring[] to its task the inspiration and light of the Christian message." "Catholic teaching and discipline are to influence all university activities," and "[a]ny official action or commitment of the University [must] be in accord with its Catholic identity." "In a word, being both a University and Catholic, it must be both a community of scholars representing various branches of human knowledge, and an academic institution in which Catholicism is vitally present and operative."

13. The Catholic Church's well-established religious beliefs are articulated in the Catechism of the Catholic Church. One of the central tenets of the Catholic faith is belief in the sanctity of human life and the dignity of all persons. Thus, the Church believes that the "dignity of the human person is

rooted in his creation in the image and likeness of God." *Catechism of the Catholic Church* ¶ 1700.

14. One outgrowth of belief in human life and dignity is the Church's well-established belief that "[h]uman life must be respected and protected absolutely from the moment of conception." *Id.* ¶ 2270. As a result, the Church believes that abortion is prohibited and that it cannot facilitate, endorse, or appear to endorse the provision of abortion-inducing products. *Id.* ¶¶ 2271-72.

15. Catholic teachings prohibit any action which "render[s] procreation impossible" and, more specifically, regard direct sterilization as "unacceptable." *Id.* ¶¶ 2370, 2399.

16. Catholic teachings also prohibit the use of contraceptives to impede conception. Consequently, artificial contraception and sterilization cannot be used for the purpose of impeding procreation. *Id.* ¶ 2370. The Church, however, does not oppose the use of drugs commonly used as contraceptives when a physician prescribes the medication for non-contraceptive purposes.

17. It is a core tenet of Notre Dame's religion that abortion, contraception, and sterilization are serious moral wrongs.

18. Notre Dame's religious beliefs regarding the sanctity of human life and the dignity of all persons are deeply and sincerely held.

19. Additionally, the Catholic moral tradition forbids "scandal," which in the theological context is defined as encouraging by words or example other persons to engage in wrongdoing. "Scandal is an attitude or behavior which leads another to do evil.

The person who gives scandal becomes his neighbor's tempter." *Id.* ¶ 2284. Scandal is particularly grave when associated with those "who by nature or office are obliged to teach and educate others." *Id.* ¶ 2285. Scandal in this sense can be caused not only when an individual or institution deliberately acts to commit or condone some wrong-doing, but also when it *appears to do so* through its actions. It is Notre Dame's sincerely held religious belief that it cannot become entangled with, or appear to facilitate, endorse, or accept, that which it believes to be contrary to Catholic faith.

20. Notre Dame's Catholic beliefs, therefore, prohibit it from paying for, facilitating access to, and/or becoming entangled in the provision of abortion-inducing products, contraception, sterilization, or related counseling (the "objectionable products and services").

21. The unity of the Catholic Church is also a core tenet of Notre Dame's Catholic beliefs. Notre Dame's beliefs in the unity of the Catholic Church are deeply and sincerely held.

22. Notre Dame's Catholic beliefs in the unity of the Church includes its belief that it is the heart of the Church, performing and living a religious educational mission that is just as religious and just as significant as worship.

23. To carry out that religious mission, Notre Dame both lives and teaches its students how to live Catholic moral teachings both inside and beyond the church doors. This religious mission is the heart of the Church and cannot be severed from it. Indeed, Notre Dame is the ideal fusion of Catholic worship

(with daily and weekly Catholic mass) and living Catholic moral teachings (educating future leaders in a society of scholars that is enriched in every way by Catholic intellectual and cultural traditions). It would violate Notre Dame's religious beliefs, including the beliefs articulated in *Ex Corde Ecclesiae*, to sever Notre Dame from the Catholic Church.

24. Notre Dame's Catholic beliefs, therefore, are violated by severing or attempting to sever it from the Catholic Church.

III. Notre Dame's Health Insurance Plans

25. Notre Dame offers health insurance plans to eligible employees and students.

26. Notre Dame's employee health plans are self-insured. That is, Notre Dame does not contract with a separate insurance company that pays for its employees' medical costs. Instead, Notre Dame functions as the insurance company underwriting its employees' medical expenses. Notre Dame carries no stop loss or catastrophic coverage to supplement its self-insured employee health plan.

27. The Notre Dame employee health plans are administered by a third party administrator, Meritain Health, Inc. ("Meritain"). Meritain handles the administrative aspects of Notre Dame's self-insured employee health plans, but Meritain bears none of the risks for benefits nor is it obligated to pay health care providers. Notre Dame pays Meritain administrative fees based on the number of employees covered by its plans.

28. Approximately 5,000 employees at Notre Dame are eligible for coverage under Notre Dame's self-

insured employee health plans. These health plans cover approximately 4,600 employees and 11,000 total individuals, including dependents.

29. Notre Dame offers its students a fully-insured health plan through Aetna.

30. Over 11,000 students at Notre Dame are eligible for coverage under Notre Dame's student health plan. The Notre Dame student health plan covers approximately 2,600 students and 2,700 total individuals, including dependents.

31. Consistent with Roman Catholic teachings, Notre Dame's employee and student health plans do not cover abortion-inducing products, contraceptives (when used for contraceptive purposes), or sterilization. Notre Dame's employee and student health plans cover drugs commonly used as contraceptives only when prescribed with the intent of treating another medical condition, not with the intent to prevent pregnancy.

32. Notre Dame's employee and student health plans have undergone a number of changes and amendments since March 23, 2010, and, accordingly, do not meet the Affordable Care Act's definition of a "grandfathered" health plan. Additionally, the Notre Dame plans have not included and do not include a statement in any plan materials provided to participants or beneficiaries that Notre Dame believes the plans are grandfathered, as is required to maintain the status of a grandfathered health plan. 26 C.F.R. § 54.9815-1251T(a)(2)(i).

33. I have been informed that Notre Dame does not appear to qualify as an entity described in Section 6033(a)(3)(A)(i) or (iii) of the Internal

Revenue Code. Accordingly, Notre Dame does not qualify as a "religious employer" under the exemption to the U.S. Government Mandate.

34. Notre Dame's employee health plan year starts on January 1st.

35. Notre Dame's student health plan year starts on August 15th.

IV. Notre Dame is Injured by the U.S. Government Mandate, the Narrow "Religious Employer" Definition, and the Illusory Accommodation

36. Notre Dame is injured by the regulations at issue in this lawsuit (the "U.S. Government Mandate" or "Mandate"), including the final rule issued by Defendants on June 28, 2013 (the "Final Rule").

37. I understand that Notre Dame does not appear to qualify as an entity described in Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code and that it therefore does not qualify as a "religious employer" under the Government's definition of that term.

38. The "religious employer" exemption creates an official, Government-favored category of religious groups that meet the Government's official definition and are exempt from the U.S. Government Mandate, while denying this favorable treatment to all other religious groups. The "religious employer" definition discriminates in favor of religious denominations that consist primarily of "houses of worship," "integrated auxiliaries," or "religious orders," and against denominations, like the Catholic faith, that also exercise their religion through schools, health care facilities, charitable organizations, and other

ministries. Religious organizations that have a broader mission—such as Notre Dame—are not, in the Government's view, "religious employers."

39. The "religious employer" exemption also requires the Government to determine whether groups qualify as "religious employers" based on intrusive judgments about their beliefs, practices, and organizational features. The exemption turns on an intrusive fourteen (14)-factor test to determine whether a group meets the requirements of section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. These fourteen (14) factors probe into matters such as whether a religious group has "a distinct religious history" or "a recognized creed and form of worship." But it is not the Government's place to determine whether Notre Dame's religious history is "distinct," or whether Notre Dame's "creed and form of worship" are "recognized." By directing the Government to partake of such inquiries, the "religious employer" exemption excessively entangles the Government with religion.

40. The U.S. Government Mandate also attempts to sever the Catholic Church, dividing it into a "worship" arm whose religious beliefs are respected and an "educational and charitable" arm whose religious beliefs are trampled. Notre Dame's Catholic beliefs are violated by severing or attempting to sever it from the Catholic Church. The U.S. Government Mandate, therefore, imposes a substantial burden on Notre Dame's religious beliefs.

41. The so-called "accommodation" in the Final Rule for non-exempt religiously affiliated "eligible

organizations" like Notre Dame does not resolve Notre Dame's religious objection to the U.S. Government Mandate. To qualify as an "eligible organization" under 26 C.F.R. § 54.9816-2713A(a), Notre Dame must (1) "oppose[] providing coverage for some or all of [the] contraceptive services"; (2) be "organized and operate[] as a non-profit entity"; (3) "hold[] itself out as a religious organization"; and (4) self-certify that it meets the first three criteria, and provide a copy of the self-certification form to third parties such as Meritain Health, Inc. ("Meritain")—the third party administrator for Notre Dame's employee health plans—and Express Scripts. The provision of this self-certification then automatically requires Meritain and Express Scripts to provide or arrange "payments for contraceptive services" for Notre Dame's employees and students without imposing cost-sharing requirements. Pursuant to the Final Rule, Notre Dame is not exempt from compliance with the U.S. Government Mandate and is required to pay for, facilitate access to, and/or become entangled with the provision of the objectionable products and services in a manner contrary to Notre Dame's sincerely held religious beliefs.

42. Thus, the U.S. Government Mandate, even in its revised form, forces Notre Dame to violate its religious beliefs by making Notre Dame the vehicle by which "free" abortion-inducing products, contraception, sterilization, and related counseling would be delivered to Notre Dame's employees and students. The U.S. Government Mandate violates Notre Dame's right of conscience by forcing it to participate in an employer-based scheme to provide

insurance coverage to which it strenuously objects on moral and religious grounds.

43. The issuance of the certification itself is compelled speech, the consequences of which cause Notre Dame to become entangled in the provision of products, services, and practices that violate its religious beliefs. Thus, by imposing the U.S. Government Mandate, Defendants are compelling Notre Dame to become entangled with, publicly subsidize or facilitate the activity and speech of private entities that are contrary to its religious beliefs. Further, the U.S. Government Mandate compels Notre Dame to engage in speech that will result in the provision of objectionable products and services to Notre Dame's employees and students.

44. In the past, Notre Dame has notified its third party administrator (for its employee health plans) and insurer (for its student health plans) that it will not cover the objectionable products and services, but that notification never before triggered the provision of the objectionable products and services. Nor has Notre Dame ever authorized a third party to provide those services to its employees or students. Indeed, Notre Dame has sought to eliminate the objectionable products and services from its health plans and to contract with third parties that will cooperate in those efforts.

45. In addition, Notre Dame is prohibited under 26 C.F.R. § 54.9815–2713 from "directly or indirectly, seek[ing] to influence [its] third party administrator's decision" to provide or procure contraceptive services. Thus, the U.S. Government Mandate violates the First Amendment freedom of speech by imposing a

gag order that prohibits Notre Dame from speaking out in any way that might "influence," "directly or indirectly," the decision of a third party administrator to provide or procure contraceptive products and services to Notre Dame's employees, or the means by which a third party administrator provides or procures these services.

46. Some have argued that the accommodation in the Final Rule does not compel Notre Dame to act against its beliefs because third parties are purportedly "arranging" the "payments." However, what is germane is that in both scenarios, Notre Dame's decision to provide a group health plan, and execution of the self-certification, triggers the provision of "free" objectionable coverage to Notre Dame's employees in a manner contrary to its beliefs. The provision of the objectionable products and services is directly tied to Notre Dame's insurance policies and Notre Dame's self-certification, and the objectionable "payments" are available only so long as an employee or student is on Notre Dame's health plans. Thus, Notre Dame's employee and student health plans are the vehicle by which "free" abortion-inducing products, contraception, sterilization, and related counseling would be delivered to Notre Dame's employees and students.

47. Moreover, the Final Rule compels Notre Dame to pay for, facilitate access to, and/or become entangled in the provision of objectionable drugs and services in ways that will lead many to think Notre Dame condones these services, and hence undermines the role of Notre Dame, a Catholic educational institution, to educate others on a matter of religious and moral significance. It is incumbent

upon Notre Dame to extricate itself from any process that leads others to violate the faith. The accommodation does not extricate Notre Dame from the process. The Mandate and its "accommodation" would thus involve Notre Dame in scandal in a manner that would violate its religious beliefs.

48. For example, for Notre Dame, the self-certification constitutes its "authorization" of its third party administrator as its plan and claims administrator for contraceptive benefits. The act and consequences of submitting the self-certification causes Notre Dame to become associated with the U.S. Government Mandate in a way that causes scandal in violation of its religious beliefs.

49. By its Mandate, the Government requires, through threats of crippling fines and other pressure, Notre Dame to become entangled with and facilitate—through offering health care coverage and then certifying and appointing others to directly offer objectionable products and services—a process that creates an unacceptable burden to Notre Dame in carrying out its religious mission, and one contrary to Catholic beliefs. Should it do so, Notre Dame is then precluded from interfering with communications by its "authorized agent" to participants regarding the access to and availability of morally objectionable products and services. By definition, these communications would occur due to Notre Dame's status as health plan sponsor and its decision to self-certify—a circumstance that would create scandal, according to the Catholic tradition, and lead some to believe that Notre Dame condones the objectionable services. Nor, through coerced participation in this scheme, can Notre Dame ensure disassociation with

targeted communications such as those advertised to Notre Dame's employee participants and students that seek to normalize practices contrary to Notre Dame's mission. *See, e.g.*, Advertisements of Colorado Consumer Health Initiative, including one depicting female youth next to male youth and stating "OMG he's hot! Let's hope he's as easy to get as this birth control. My health insurance covers the pill, which means all I have to worry about is getting him between the covers." (A true and correct copy of that advertisement is attached hereto at Ex. A.) Because such communications would result from Notre Dame's participation as plan sponsor and submission of its self-certification, Notre Dame would become associated with the U.S. Government Mandate in a way that causes scandal, and Notre Dame therefore cannot comply with the Mandate consistent with its religious beliefs.

50. Similarly, to avoid scandal, Notre Dame cannot appear to endorse the litany of concepts that underlie the U.S. Government Mandate and that are contrary to its religious beliefs: *e.g.*, (i) that it is a moral societal goal to encourage a reduction in the overall cost of health care by reducing the number of mothers or children who may require expensive post child birth care, (ii) that pregnancy is a condition for which there should be "preventive services", and (iii) that increased access to contraception, sterilization, and/or abortion-inducing drugs as proposed by the Government necessarily improves public health.

51. It is Notre Dame's sincerely held religious belief that it cannot become entangled with, or appear to facilitate, endorse, or accept, that which it believes to be contrary to the Catholic faith. The U.S.

Government Mandate requires Notre Dame to subsidize the objectionable products and services and directly participate in a way that causes scandal. Thus, Notre Dame believes that its participation in the U.S. Government Mandate would cause scandal and therefore Notre Dame cannot comply with the Mandate consistent with its religious beliefs.

52. Further, the premise underlying the Government's entire theory of cost neutrality—that the cost to insurance companies of providing contraceptive coverage will be offset by reducing the costs those insurance companies would otherwise pay out for "pregnancies and childbirths" (which will allegedly occur at a lower rate due to the use of contraceptives)—is irreconcilable with Catholic doctrine regarding the immorality of artificial interference with procreation. *Catechism of the Catholic Church* ¶¶ 2370, 2399. The manner in which the U.S. Government Mandate achieves the cost-savings necessary for it to operate effectively is predicated on the Government's prediction of a decrease in the number of childbirths due to a predicted increase in the number of individuals utilizing the products and services that Notre Dame find objectionable. The U.S. Government Mandate thus forces Notre Dame to participate and cooperate in a Government scheme designed not only to provide access to objectionable products and services, but also specifically designed to thwart the transmission of human life. Doing so is contrary to Notre Dame's religious beliefs. *Catechism of the Catholic Church* ¶¶ 2370, 2399.

53. Notre Dame is required to pay for prescriptions dispensed each month at the pharmacy

at Notre Dame's Wellness Center on campus. Notre Dame receives a credit for amounts it pays that are later reimbursed by third party insurers. If the U.S. Government Mandate were to be enforced, Notre Dame would have to pay its on-campus pharmacy for contraceptive products and would receive a credit for those payments only when Meritain paid for the products as directed by the Mandate. In other words, Notre Dame would be forced to "float" the cost of contraceptive products until those costs were reimbursed by Meritain. By absorbing the cost of the objectionable products and services until any subsequent reimbursement, Notre Dame would be forced to directly pay for the provision of these objectionable products and services in violation of its religious beliefs.

54. Because of its religious beliefs, Notre Dame believes that it may not pay for, facilitate access to, and/or become entangled with the provision of contraception, sterilization, abortion, or related counseling, including by contracting with a third party that will, as a result, provide or procure the objectionable products and services for Notre Dame's employees and students.

55. It violates Notre Dame's religious beliefs to take the steps required by the Mandate to facilitate or become entangled in the provision of counseling seeking to influence or educate citizens regarding services which are contrary to Catholic doctrine, including abortion-inducing products, sterilization services, and contraceptives.

56. The U.S. Government Mandate, therefore, requires Notre Dame to do precisely what its

sincerely held religious beliefs prohibit—pay for, facilitate access to, and/or become entangled in the provision of objectionable products and services or else incur crippling sanctions.

57. The U.S. Government Mandate, therefore, imposes a substantial burden on Notre Dame's religious beliefs.

58. The so-called "accommodation" also does not alleviate the burden the U.S. Government Mandate imposes on Notre Dame's religious freedom.

59. Notwithstanding the so-called "accommodation," Notre Dame is still financially penalized or required to pay for, facilitate access to, and/or become entangled in the provision of the objectionable products and services in violation of its sincerely held religious beliefs.

60. Notre Dame cannot avoid the U.S. Government Mandate without incurring crippling fines. If it eliminates its employee health plans, it is subject to annual fines of $2,000 per full-time employee. If Notre Dame keeps its health plans but refuses to provide or facilitate the objectionable coverage, it is subject to fines of $100 a day per affected beneficiary. The fines, therefore, coerce Notre Dame into violating its religious beliefs.

61. If Notre Dame offers a student health plan consistent with its Catholic values, it is subject to fines of $100 a day per affected beneficiary. Declining to offer a student health plan would negatively impact Notre Dame's efforts to recruit and retain students.

V. Notre Dame Needs a Temporary Restraining Order and Preliminary Injunction

Now To Prevent Imminent Harm and Irreparable Injury

62. The Government has indicated that it will enforce the essential provisions of the Mandate that impose a substantial burden on Notre Dame's rights starting January 1, 2014. Consequently, absent the relief sought herein, Notre Dame will be required to pay for, facilitate access to, and/or become entangled in the provision of abortion-inducing products, contraception, sterilization, and related education and counseling, in violation of its sincerely held religious beliefs.

63. As outlined above, the Mandate's "accommodation" requires Notre Dame to sign a self-certification that will authorize and trigger the requirement that third parties, such as Meritain and Express Scripts, provide abortion-inducing products, contraception, sterilization, and related education and counseling to Notre Dame's employees and students and their dependents.

64. Meritain (third party administrator) and Express Scripts (insurer that handles prescription drug benefits) have informed Notre Dame that, in order to meet the January 1, 2014 enforcement deadline, they would need to begin implementing the requirements of the Mandate starting Wednesday, December 11 or Thursday, December 12, including sending communications to Notre Dame's female employees and any female dependents covered by its healthcare plans informing them about the availability of FDA-approved contraceptive methods and enclosing a Contraceptive Prescription ID Card. The self-certification is a condition precedent to these

communications, and Notre Dame would thereby be forced to facilitate access to and/or become entangled in the provision of abortion-inducing products, contraception, sterilization, and related education and counseling, in violation of its sincerely held religious beliefs.

65. These communications would be sent to Notre Dame's female employees and any female dependents covered by its healthcare plans due to Notre Dame's status as health plan sponsor and as a direct result of the Government's requirement that Notre Dame sign the self-certification form pursuant to the U.S. Government Mandate's "accommodation." The U.S. Government Mandate would, therefore, through the threat of crippling fines and other Government pressures, force Notre Dame's participation in the Government's scheme to provide products and services that Notre Dame finds objectionable, associating Notre Dame with those products and services, and seeking to normalize practices contrary to Notre Dame's beliefs and mission. If Notre Dame allows these communications to be sent, it would become associated with the U.S. Government Mandate in a way that causes scandal.

66. Notre Dame cannot comply with the U.S. Government Mandate in a manner that is consistent with its religious beliefs. Due to the impending deadline from Meritain and Express Scripts regarding notice to participants, and due to the upcoming enforcement date of January 1, 2014, Notre Dame requires immediate relief from the U.S. Government Mandate so that it will not be coerced to violate its religious beliefs through its forced participation in this Government scheme, including

through its coerced signing of the self-certification form.

67. As a matter of prudent fiscal management, Notre Dame has posted a reserve in the amount of one million dollars ($1,000,000) in preparation for any potential financial ramifications, including the increase in resources currently spent responding to the U.S. Government Mandate and the imminent threat of fines or penalties.

68. Notre Dame needs a Temporary Restraining Order and Preliminary Injunction now to prevent these imminent harms which could cause irreparable injury to the University.

FURTHER AFFIANT SAYETH NOT.

/s/ *John Affleck Graves*
JOHN AFFLECK GRAVES

STATE OF INDIANA)
)
COUNTY OF SOUTH BEND)

Sworn to and subscribed before me
this 9th day of December, 2013

/s/
Notary Public in and for the
State of INDIANA

Commission Expires:
August 3, 2019

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2013, I electronically filed the foregoing with the Clerk of the United States District Court for the Northern District of Indiana using the CM/ECF system and mailed the foregoing by first class mail via the United States Postal Service to the following:

Kathleen Sebelius, Secretary
U.S. Department of Health & Human Services
200 Independence Ave., SW Washington, D.C. 20201

U.S. Department of Labor
200 Constitution Ave., NW
Washington, D.C. 20210

Thomas Perez, Secretary
U.S. Department of Labor
200 Constitution Ave., NW
Washington, D.C. 20210

U.S. Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Jacob J. Lew, Secretary
U.S. Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Eric H. Holder, Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

U.S. Department of Health & Human Services 200 Independence Ave., SW Washington, D.C. 20201	David A. Capp, Esq. c/o Civil Process Server United States Attorney's Office 5400 Federal Plaza, Suite 1500 Hammond, IN 46320

/s/ *Matthew A. Kairis*
One of the Attorneys for Plaintiff

APPENDIX I

42 U.S.C. § 2000bb-1 provides:

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C.A. § 2000bb-2 provides:

§ 2000bb-2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. § 2000cc-5 provides:

§ 2000cc-5 Definitions

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause " means that portion of the First Amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term "government"—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

42 U.S.C. § 300gg-13(a)(4) provides:

§ 300gg-13. Coverage of preventive health services

(a) In general

A group health plan and a health insurances issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

* * *

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

26 U.S.C. § 4980D provides:

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

(a) General rule.—There is hereby imposed a tax on any failure of a group health plan to meet the requirements of chapter 100 (relating to group health plan requirements).

(b) Amount of tax.—

(1) In general.—The amount of the tax imposed by subsection (a) on any failure shall be $100 for each

day in the noncompliance period with respect to each individual to whom such failure relates.

(2) Noncompliance period.—For purposes of this section, the term "noncompliance period" means, with respect to any failure, the period—

(A) beginning on the date such failure first occurs, and

(B) ending on the date such failure is corrected.

(3) Minimum tax for noncompliance period where failure discovered after notice of examination.—Notwithstanding paragraphs (1) and (2) of subsection (c)—

(A) In general.—In the case of 1 or more failures with respect to an individual—

(i) which are not corrected before the date a notice of examination of income tax liability is sent to the employer, and

(ii) which occurred or continued during the period under examination,

the amount of tax imposed by subsection (a) by reason of such failures with respect to such individual shall not be less than the lesser of $2,500 or the amount of tax which would be imposed by subsection (a) without regard to such paragraphs.

(B) Higher minimum tax where violations are more than de minimis.—To the extent violations for which any person is liable under subsection (e) for any year are more than de minimis, subparagraph (A) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(C) Exception for church plans.—This paragraph shall not apply to any failure under a church plan (as defined in section 414(e)).

(c) Limitations on amount of tax.—

(1) Tax not to apply where failure not discovered exercising reasonable diligence.—No tax shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such tax did not know, and exercising reasonable diligence would not have known, that such failure existed.

(2) Tax not to apply to failures corrected within certain periods.—No tax shall be imposed by subsection (a) on any failure if—

(A) such failure was due to reasonable cause and not to willful neglect, and

(B)(i) in the case of a plan other than a church plan (as defined in section 414(e)), such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such tax knew, or exercising reasonable diligence would have known, that such failure existed, and

(ii) in the case of a church plan (as so defined), such failure is corrected before the close of the correction period (determined under the rules of section 414(e)(4)(C)).

(3) Overall limitation for unintentional failures.—In the case of failures which are due to reasonable cause and not to willful neglect—

(A) Single employer plans.—

(i) In general.—In the case of failures with respect to plans other than specified multiple employer health plans, the tax imposed by subsection (a) for failures during the taxable year of the employer shall not exceed the amount equal to the lesser of—

(I) 10 percent of the aggregate amount paid or incurred by the employer (or predecessor employer) during the preceding taxable year for group health plans, or

(II) $500,000.

(ii) Taxable years in the case of certain controlled groups.—For purposes of this subparagraph, if not all persons who are treated as a single employer for purposes of this section have the same taxable year, the taxable years taken into account shall be determined under principles similar to the principles of section 1561.

(B) Specified multiple employer health plans.—

(i) In general.—In the case of failures with respect to a specified multiple employer health plan, the tax imposed by subsection (a) for failures during the taxable year of the trust forming part of such plan shall not exceed the amount equal to the lesser of—

(I) 10 percent of the amount paid or incurred by such trust during such taxable year to provide medical care (as defined in section 9832(d)(3)) directly or through insurance, reimbursement, or otherwise, or

(II) $500,000.

For purposes of the preceding sentence, all plans of which the same trust forms a part shall be treated as one plan.

(ii) Special rule for employers required to pay tax.—If an employer is assessed a tax imposed by subsection (a) by reason of a failure with respect to a specified multiple employer health plan, the limit shall be determined under subparagraph (A) (and not under this subparagraph) and as if such plan were not a specified multiple employer health plan.

(4) Waiver by Secretary.—In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the tax imposed by subsection (a) to the extent that the payment of such tax would be excessive relative to the failure involved.

(d) Tax not to apply to certain insured small employer plans.—

(1) In general.— In the case of a group health plan of a small employer which provides health insurance coverage solely through a contract with a health insurance issuer, no tax shall be imposed by this section on the employer on any failure (other than a failure attributable to section 9811) which is solely because of the health insurance coverage offered by such issuer.

(2) Small employer.—

(A) In general.—For purposes of paragraph (1), the term "small employer" means, with respect to a calendar year and a plan year, an employer who employed an average of at least 2 but not more than 50 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year. For purposes of the preceding sentence, all persons treated as a single

employer under subsection (b), (c), (m), or (o) of section 414 shall be treated as one employer.

(B) Employers not in existence in preceding year.—In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is a small employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(C) Predecessors.—Any reference in this paragraph to an employer shall include a reference to any predecessor of such employer.

(3) Health insurance coverage; health insurance issuer.—For purposes of paragraph (1), the terms "health insurance coverage" and "health insurance issuer" have the respective meanings given such terms by section 9832.

(e) Liability for tax.—The following shall be liable for the tax imposed by subsection (a) on a failure:

(1) Except as otherwise provided in this subsection, the employer.

(2) In the case of a multiemployer plan, the plan.

(3) In the case of a failure under section 9803 (relating to guaranteed renewability) with respect to a plan described in subsection (f)(2)(B), the plan.

(f) Definitions.—For purposes of this section—

(1) Group health plan.—The term "group health plan" has the meaning given such term by section 9832(a).

(2) Specified multiple employer health plan.—The term "specified multiple employer health plan" means a group health plan which is—

(A) any multiemployer plan, or

(B) any multiple employer welfare arrangement (as defined in section 3(40) of the Employee Retirement Income Security Act of 1974, as in effect on the date of the enactment of this section).

(3) Correction.—A failure of a group health plan shall be treated as corrected if—

(A) such failure is retroactively undone to the extent possible, and

(B) the person to whom the failure relates is placed in a financial position which is as good as such person would have been in had such failure not occurred.

26 U.S.C. § 4980H provides:

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

(a) Large employers not offering health coverage.—If—

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-

sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

(b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.—

(1) In general. —If—

(A) an applicable large employer offers to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to 1/12 of $3,000.

(2) Overall limitation.—The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any

month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

[(3) Repealed. Pub.L. 112-10, Div. B, Title VIII, § 1858(b)(4), Apr. 15, 2011, 125 Stat. 169]

(c) Definitions and special rules.—For purposes of this section—

(1) Applicable payment amount.—The term "applicable payment amount" means, with respect to any month, 1/12 of $2,000.

(2) Applicable large employer.—

(A) In general.— The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.

(B) Exemption for certain employers.—

(i) In general.—An employer shall not be considered to employ more than 50 full-time employees if—

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) Definition of seasonal workers.—

(C) Rules for determining employer size.—For purposes of this paragraph—

(i) Application of aggregation rule for employers.— All persons treated as a single employer under

subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

(ii) Employers not in existence in preceding year.—In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(iii) Predecessors.—Any reference in this subsection to an employer shall include a reference to any predecessor of such employer.

(D) Application of employer size to assessable penalties—

(i) In general.—The number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating—

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).

(ii) Aggregation—In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be allowed with respect to such persons and such reduction shall be allocated among such persons ratably on the basis of the number of full-time employees employed by each such person.

(E) Full-time equivalents treated as full-time employees.—Solely for purposes of determining whether an employer is an applicable large employer

under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

(3) Applicable premium tax credit and cost-sharing reduction.—The term "applicable premium tax credit and cost-sharing reduction" means—

(A) any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

(4) Full-time employee—

(A) In general.—The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

(B) Hours of service.—The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) Inflation adjustment.—

(A) In general.—In the case of any calendar year after 2014, each of the dollar amounts in subsection

(b) and paragraph (1) shall be increased by an amount equal to the product of

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

(B) Rounding.—If the amount of any increase under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the next lowest multiple of $10.

(6) Other definitions.—Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act.

(7) Tax nondeductible.—For denial of deduction for the tax imposed by this section, see section 275(a)(6).

(d) Administration and procedure.—

(1) In general.—Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Time for payment.—The Secretary may provide for the payment of any assessable payment provided by this section on an annual, monthly, or other periodic basis as the Secretary may prescribe.

(3) Coordination with credits, etc.— The Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or cost-sharing reduction with respect to an employee, such

allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

26 C.F.R. § 54.9815–2713 provides:

§ 54.9815–2713 Coverage of preventive health services

(a) Services—

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

(i) [Reserved]

(ii) [Reserved]

(iii) [Reserved]

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

(2) Office visits. [Reserved]

(3) Out-of-network providers. [Reserved]

(4) Reasonable medical management. [Reserved]

(5) Services not described. [Reserved]

(b) Timing. [Reserved]

(c) Recommendations not current. [Reserved]

(d) Effective/applicability date. April 16, 2012.

26 C.F.R. § 54.9815–2713A provides:

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

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 54.9815–2713(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 Secretaries of Health and Human Services and Labor, that it satisfies the criteria in paragraphs (a)(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 (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) Contraceptive coverage—self-insured group health plans—(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph

(b)(1) of this section are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides each third party administrator that will process claims for any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section, which shall include notice that—

(A) 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; and

(B) Obligations of the third party administrator are set forth in 29 CFR 2510.3–16 and 26 CFR 54.9815–2713A.

(iii) The eligible organization must 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.

(2) If a third party administrator receives a copy of the self-certification described in paragraph (a)(4) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods—

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than the copy of the self-

certification from the eligible organization regarding its status as such.

(c) Contraceptive coverage--insured group health plans—(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (a)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) Payments for contraceptive services—(i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (a)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 54.9815–2713(a)(1)(iv) must—

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 9815. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services—self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of

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

(e) Reliance—insured group health plans—

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to

its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

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

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

26 C.F.R. § 54.9815-2713AT provides:

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

(a)[Reserved]. For further guidance, see § 54.9815-2713A(a).

(b)Contraceptive coverage--self-insured group health plans. (1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self-certification must include notice that obligations of the third party administrator are set forth in 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Labor (working with the Department of Health and Human Services), will send a separate notification to each of the plan's third party administrators informing the third party administrator that the

Secretary of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or a notification from the Department of Labor, as described in paragraph (b)(1)(ii) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of

this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than a copy of the self-certification from the eligible organization or notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

(c) Contraceptive coverage--insured group health plans-- (1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 54.9815-2713. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection

based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section and under § 54.9815-2713A.

(2) Payments for contraceptive services.

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (b)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 54.9815-2713(a)(1)(iv) must--

(ii)[Reserved]. For further guidance, see § 54.9815-2713A(c)(2)(ii).

(d) [Reserved]. For further guidance, see § 54.9815-2713A(d).

(e) [Reserved]. For further guidance, see § 54.9815-2713A(e).

(f) Expiration date. This section expires on August 22, 2017 or on such earlier date as may be provided in final regulations or other action published in the Federal Register.

29 C.F.R. §§ 2510.3-16 provides:

§ 2510.3-16 Definition of "plan administrator."

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

(b) In the case of a self-insured group health plan established or maintained by an eligible organization, as defined in § 2590.715-2713A(a) of this chapter, if the eligible organization provides a copy of the self-certification of its objection to administering or funding any contraceptive benefits in accordance with § 2590.715-2713A(b)(1)(ii) of this chapter to a third party administrator, the self-certification shall be an instrument under which the plan is operated, shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds, and shall supersede any earlier designation. If, instead, the eligible organization notifies the Secretary of Health and Human Services of its objection to administering or funding any contraceptive benefits in accordance

with § 2590.715-2713A(b)(1)(ii) of this chapter, the Department of Labor, working with the Department of Health and Human Services, shall separately provide notification to each third party administrator that such third party administrator shall be the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds, with respect to benefits for contraceptive services that the third party administrator would otherwise manage. Such notification from the Department of Labor shall be an instrument under which the plan is operated and shall supersede any earlier designation.

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

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

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

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

29 C.F.R. § 2590.715–2713 provides:

§ 2590.715–2713 Coverage of preventive health services

(a) Services—

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

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices

of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

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

(2) Office visits—

(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) Conclusion. In this Example 1, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2.

(i) Facts. Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) Conclusion. In this Example 2, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 3, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4.

(i) Facts. A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 4, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement with respect to the office visit.

(3) Out-of-network providers. Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) Reasonable medical management. Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) Services not described. Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration,

or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) Timing—

(1) In general. A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years that begin on or after September 23, 2010, or, if later, for plan years that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) Changes in recommendations or guidelines. A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) Recommendations not current. For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography,

and prevention issued in or around November 2009 are not considered to be current.

(d) Applicability date. The provisions of this section apply for plan years beginning on or after September 23, 2010. See § 2590.715–1251 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

29 C.F.R. § 2590.715-2713A

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

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 2590.715-2713(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 (a)(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 (b) or (c) of this section applies. The self-certification must be executed by a person authorized

to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) Contraceptive coverage--self-insured group health plans—

(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self-certification must include notice that obligations of the third party administrator are set forth in § 2510.3-16 of this chapter and this section.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if

applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Labor (working with the Department of Health and Human Services), shall send a separate notification to each of the plan's third party administrators informing the third party administrator that the Secretary of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under § 2510.3-16 of this chapter and this section.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or a notification from the Department of Labor, as described in paragraph (b)(1)(ii) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or

indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than a copy of the self-certification from the eligible organization or notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

(c) Contraceptive coverage--insured group health plans –

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to

the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 2590.715-2713. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1)

of this section and describing the obligations of the issuer under this section.

(2) Payments for contraceptive services --(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (c)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 2590.715-2713(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 715 of ERISA. If the group health plan of the eligible

organization provides coverage for some but not all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that

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

(e) Reliance--insured group health plans –

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

45 C.F.R. § 147.130 provides:

§ 147.130 Coverage of preventive health services. (a) Services—

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

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

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

(A) In developing the binding health plan coverage guidelines specified in this paragraph (a)(1)(iv), the Health Resources and Services Administration shall be informed by evidence and may establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines.

(B) For purposes of this subsection, a "religious employer" is an organization that meets all of the following criteria:

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

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

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

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

(2) Office visits—

(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1. (i) Facts. An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual.

The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) Conclusion. In this Example 1, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2.

(i) Facts. Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) Conclusion. In this Example 2, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 3, the blood pressure screening is provided as part of an office

visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4.

(i) Facts. A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 4, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement for the office visit charge.

(3) Out-of-network providers. Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described

in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) Reasonable medical management. Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) Services not described. Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) Timing—

(1) In general. A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years (in the individual market, policy years) that begin on or after September 23, 2010, or, if later, for plan years (in the individual market, policy years) that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) Changes in recommendations or guidelines. A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) Recommendations not current. For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) Applicability date. The provisions of this section apply for plan years (in the individual market, for policy years) beginning on or after September 23, 2010. See § 147.140 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

45 C.F.R. § 147.131 provides:

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

(a) Religious employers. In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(b) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

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

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-

certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

(c) Contraceptive coverage—insured group health plans—

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 147.130. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as

applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of § 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section.

(2) Payments for contraceptive services—

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (c)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 147.130(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 147.130(a)(1)(iv) for plan participants and

beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 147.130(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--insured group health plans and student health insurance coverage. For each plan year to which the accommodation in paragraph (c) of this section is to apply, an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent

possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your [employer/institution of higher education] has certified that your [group health plan/student health insurance coverage] qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your [employer/institution of higher education] will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of health insurance issuer] will provide separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your [group health plan/student health insurance coverage]. Your [employer/institution of higher education] will not administer or fund these payments. If you have any questions about this notice, contact [contact information for health insurance issuer]."

(e) Reliance –

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to

its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(f) Application to student health insurance coverage. The provisions of this section apply to student health insurance coverage arranged by an eligible organization that is an institution of higher education in a manner comparable to that in which they apply to group health insurance coverage provided in connection with a group health plan established or maintained by an eligible organization that is an employer. In applying this section in the case of student health insurance coverage, a reference to "plan participants and beneficiaries" is a reference to student enrollees and their covered dependents.